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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications

Türk Hukukunda Ticari Uyuşmazlıklarda Zorunlu Arabuluculuğun İlkeleri ile Uygulamalarına İlişkin Tespitler ve Değerlendirmeler

Dilek Cengiz*

Abstract

Mediation is based on voluntariness, having developed in due course to eventually become widespread. Mandatory mediation has become an exception to voluntary mediation with the elimination of the principle of voluntariness. Mandatory mediation has been applied in Turkish law in the field of labour law since its acceptance with Article 3 of Law No. 7036 on Labour Courts. After the initial obtaining of successful results, it was accepted by the Turkish Commercial Code as well. In this study, various comments and evaluations are made regarding the principles and applications of the mandatory mediation model prescribed by the Turkish Commercial Code. Within the framework of these comments and evaluations, some explanations of relevant opinions are provided. We also consider whether mandatory mediation is in compliance with the general principles of commercial law.

Keywords

Mandatory mediation, Turkish commercial law, Turkish Commercial Code Art. 5/A, principles of mandatory mediation, applications of mandatory mediation in Turkish commercial law

Öz

Arabuluculuk, niteliği gereği gönüllülük ilkesini içeren ihtiyari arabuluculuk modeli ile ortaya çıkmış, gelişmiş ve yaygınlaşmıştır. Zorunlu arabuluculuk ise, ihtiyari arabuluculuğun aksine gönüllülük ilkesini bertaraf eden istisnai bir arabuluculuk modeli olarak, genel arabuluculuk modeli olan ihtiyari arabuluculuğun karşısında yer almıştır. Zorunlu arabuluculuk Türk hukukunda önce İş hukuku alanında 7036 sayılı İş Mahkemeleri Kanunu (İMK) m 3 düzenlemesi ile kabul edilerek uygulanmıştır. Elde edilen başarılı sonuçlar üzerine Türk ticaret hukukunda da kabul edilmiştir. Bu çalışmada Türk ticaret hukukunda ortalama olarak 1,5 yıldır uygulanmakta olan zorunlu arabuluculuk modelinin kuramsal içeriğine, ilke ve uygulamalarına ilişkin tespitler ve değerlendirmeler yapılmıştır. Bu tespit ve değerlendirmeler çerçevesinde konunun içerdiği başlıca hukuki sorunlara ve çözümlerine yönelik kendi görüşümüzle beraber çeşitli görüşlere ilişkin açıklamalara yer verilmiştir. Bu tespitler, değerlendirmeler ve açıklamalara dayanılarak zorunlu arabuluculuğun Türk ticaret hukukundaki ilkelerinin yerindeliğine ve uygulamaların etkinliğine ilişkin çıkarsamalar yapılmıştır.

Anahtar Kelimeler

Zorunlu Arabuluculuk, 6102 sayılı Türk Ticaret Kanunu m 5/A, Türk Ticaret Hukukunda Zorunlu Arabuluculuğun İlkeleri ve Uygulamalar

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Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications

Mediation in legal disputes was introduced into Turkish law with the acceptance of the Code of Mediation in Legal Disputes (CMLD)[1] in 2012 and came into force a year later. Mediation is a worldwide practice and the mediation procedure of the CMLD (Art. 3/1) is similarly based on the referral of parties in an ongoing dispute arbitrarily. In other words, the starting point and the acceptance of mediation in Turkish law is built on the foundation of voluntary mediation.[2]

While the development and the prevalence of the voluntary model of mediation continue to grow worldwide, mandatory mediation has become an exceptional model of arbitration, eliminating the basis of voluntariness upon which voluntary mediation is based to constitute a solution to the new and different requirements arising as a result of the increased workloads of courts and the problem of delayed justice.[3] Mandatory mediation was accepted first in European countries and in US and Australian law and then continued to spread in prevalence.[4]

In parallel to these developments, in Turkey, a first step was made in cases filed with claims for reinstatement as well as employee or employer receivables based on individual or collective bargaining contracts in the field of labour law through the regulation of the Law on Labour Courts[5] in Turkish law, with acceptance of referral to a mediator in advance of applying to a court in order to take legal action as a cause of action.[6] Mandatory mediation took its place in the Turkish legal system as a cause of action in the Turkish Commercial Code (TCC) with the addition of the provision of Art. 5/A of the TCC[7] No. 6102 within the framework of Art. 20 of the Law on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts.[8] It was the result of both success in labour disputes and doctrinal discussions on the issue. It is emphasized in theory that the inclination towards expanding on this step, which is presently limited to only labour law and commercial law, started to progress in a gradual manner to encompass the fields of consumer law and family law.[9]

1 No. 6325, Date: 22.06.2012 (OJ, 07.06.2012/28331).

2 Seda Özmumcu, "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış", *İÜHFD*, Vol. 74, Iss. 2, 2016, pp. 807-808; Süha Tanrıver, "Dava Şartı Arabuluculuk Üzerine Bazı Düşünceler," *TBBD*, Vol. 14, Iss. 1, 2020, pp. 111-113.

3 Özmumcu (n2), 807-808.

4 Özmumcu (n2), 818-825.

5 No. 7036, Date: 12.10.2017 (OJ, 15.10.2017/302).

6 Tanrıver (n2), 114.

7 No. 6102, Date: 13.01.2011 (OJ, 14.02.2011/27846).

8 No. 7155, Date 06.12.2018 (OJ, 19.12.2018/30630).

9 Tanrıver (n2), 115, 119. Tanrıver concludes as follows: "By this means, extension of the scope of mediation as a cause of action and trying to bring it into a general cause of action will spread over a very wide scope in practice upon addition of especially consumer and family disputes to commercial and labour disputes; thus, the mediation that is in the position of a special cause of action will have been converted into a general cause of action and this will lead to the addition of a new condition to the general causes of action in Art. 114 of the [Legal Procedural Law]; as a consequence, in consideration of the foregoing grounds, it will not constitute a sound approach". Tanrıver (n2), 119.

The speed, trust, and economical usage of financial resources are indispensable conditions for the existence and functionality of commercial activities regulated by commercial law. The rules to regulate commercial law reflect these aspects. Otherwise, important disruptions in the functioning and existence of commercial activities would be inevitable.[10] In this context, the problem of delayed justice has special importance in the field of commercial law. It is obligatory and inevitable that mandatory arbitration makes contributions to both these principles of commercial law and the solution of delayed justice to some extent.

The objective of this study is to determine the principles and evaluate the practice of mandatory mediation over the course of one and a half years. Furthermore, we will consider whether mandatory mediation in commercial disputes satisfies expectations or not.

This subject is addressed within five primary sections apart from this introduction and the conclusion. In the first four sections, relevant legal theoretical explanations are made regarding the relevant principles. In the fifth section, we analyse the effectiveness of mandatory mediation and comment on its application.

I. Legislation History of Mandatory Mediation in the Turkish Commercial Code

A. History of Mandatory Mediation in the Turkish Commercial Code

Mandatory mediation in Turkish law came into being and developed considerably late in comparison with other countries.[11]

10 It is possible to clarify such disruptions from the point of view of a businessperson or trader as follows: "It is important for a businessman [to consider] what to do for the sustainable future of his workplace. It is important from the point of view of a businessman to think optimistically when he initiates a new business activity…for the determination of things to be done for the economic use of resources in hand in terms of sustainable business development and the increasing of such resources. In this context, there is positive motivation for the future. When a (legal or economic) problem comes forth and the solution process is extended, this circumstance becomes fully reversed… When mediation is preferred, or, that is to say, when it is ensured that the businessman (or trader) is included in the mode of mediation without referral to the court, the cost that will be incurred as a result of such dispute may fall and it may generate profit. Furthermore, the projections conducted with relation to the future of business relationships may contain mistakes. The scenario may be better or worse (in comparison with realities). It is possible in mediation to intervene in the scenario and repair the results of erroneous scenarios even if only partially. When a problem has arisen, the businessman or trader at issue concentrating on the subject matter thereof will lose time and will also be affected by this problem psychologically. In mediation, however, the problem will be dealt with in a short period of time and, as a consequence, he will focus on his other works". Constantin Gavrılla, "Ticari Uyuşmazlıkların Çözümünde Arabuluculuk", in T.C. Adalet Bakanlığı Arabuluculuk Daire Başkanlığı, *Ticari Uyuşmazlıkların Çözümünde Arabuluculuk ve Arabuluculukta Avukatın Rolü Sempozyumu*, Mine Demirezen (Ed.), Deniz Ofset Press, 2017, pp. 17-18. Also see Muammer Erol, *Türk Hukukunda Arabuluculuk ve Teşkilatlanması*, Adalet Press, 2018, pp. 84-91.

11 Notwithstanding that mediation in the modern sense in Turkish law was enacted considerably late, there were some legal arrangements that included mediation and other available alternative methods of settlement in previous periods. For example: I) settlement was included in Arts. 5 and 53 of the Village Law (No. 44, Date: 03.18.1924 (OJ, 07 04, 1924/668); II) mediation was included in Art. 213/I of the Legal Procedural Law (No. 1086, Date: 18.06.1927 (OJ, 18, 1927/624); III) reconciliation and negotiation were included in Articles 26 and 27 of the Turkish Petrol Law (No. 6326, Date: 07.1954 (OJ, 16, 03, 1954/8659); IV) settlement was included in Art. 32 of the Property Ownership Law (No. 634, Date: 23.06.1965 (OJ, 02, 07,1965/12038); and V) reconciliation was included in Art. 7'I of Law No. 5521 on the Code of Labour Courts dated 30.01.1954/7424). For explanations of the contents of these legal arrangements, see Erol (n10), 84-91.

Mediation in the modern sense entered Turkish law for the first time through the Mediation Code of Civil Disputes (MCoCD).[12] Upon the entry into force of the MCoCD, an institutional substructure was developed based on it (Art. 37/1-a, b),[13] and the law acquired a wide range of application fields, developing rapidly in the first 6 years following the enforcement of the MCoCD. The method of voluntary mediation was accepted and arranged on the basis of the voluntariness principle of Art. 2/I, b.[14]

Mandatory mediation subsequently entered Turkish law because commercial activities require a certain speed and the workload of the courts made it necessary. However, voluntary mediation has been effective and successful in labour disputes[15] (Art. 3-5).

In the general preamble of that law, the requirement for the mandatory mediation method regarding labour law disputes was based on the "requirement for alternative reconciliation methods, change, experience in the execution of the work, caseload rising in the labour courts, extraordinary development being experienced in technology, expansion of the field of social security law, and diversification of employee-employer relationships…"

After this development, along with special provisions pertaining to both the mandatory mediation model to be applied to labour disputes regulated by the lawmaker according to this law and the mandatory mediation model that might possibly be regulated in other fields of private law in the future, it was deemed necessary to prepare a detailed legal regulation that would constitute general provisions with relation to the mandatory mediation model in Turkish law. To this end, the aforementioned basic principles were prepared in detail and added to Mediation Law No. 6325 on Legal Disputes by the nature of the related general law with additional Article 18/A, dated 06.12.2018.[16] Furthermore, a detailed regulation in parallel to Article 18/A

12 No. 6325, Date: 22.06.2012 (OJ, 02.06.2012, 28331).

13 Muhammed Özekes, Murat Atalı, Ömer Ekmekçi, and Vural Seven, *Hukuk Uyuşmazlıklarında Arabuluculuk*, Vol. XII Levha Press, 2019, p. 42.

14 Erol (n10), 81.

15 No. 7036, Date: 12.10.2017 (OJ, 15.10.2017/30206).

16 The requirement of this arrangement is explained in the preamble of Article 23 of the Law on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts as follows: "The institution of mediation has entered our legal system as a cause of action for the first time through Law No. 7036 of the Code on Labour Courts. Following the entry into force of the provisions of Law No. 7036 pertaining to mediation and in consideration of the success that mediation has achieved in the settlement of labour disputes, it has been proclaimed in application and doctrine that the practice of this method in other disputes would be useful and beneficial. Within this scope, in the event of the acceptance of mediation as a cause of action in the laws pertaining thereto, it is deemed convenient to arrange the basic provisions to be applied to the mediation process in Law No. 6325. As a natural consequence of such an arrangement related thereto, an arrangement in the related law pertaining to the fact that only the dispute will be subject to the mediation as a cause of action will be sufficient. In the event that the law brings forth special arrangements with relation to mediation as a cause of action, the application of these special arrangements is unquestionable as well".
"While Article 18/A, added to Law No. 6325, is regulated, the arrangement contained by Article 3 of Law No. 7036, applied successfully for an approximate period of one year, is taken as the basis. However, in consideration of the fact that the scope will be extended, a circumstance wherein an interim injunction and cautionary attachment, and state of availability of necessity to resort to arbitration in private laws or another alternative way of settlement before the action at issue is filed, is arranged in a special manner…"

was included with relation to the mandatory mediation method in Articles 22-28 of the Regulation on the Mediation Code of Civil Disputes (MCoCD Reg.).[17] and Art. 18/A of the MCoCD, enacted by the Ministry of Justice and entering into force as of 02.06.2018.

Thus, after a relatively short period of 1.5 years, the extension of the scope of mandatory mediation began to be discussed pursuant to the successful results of mandatory mediation obtained in the field of labour disputes. The necessity of passing the mediation method into cause of action accordingly entered the agenda in the field of commercial law, which was exposed to roughly similar problems.[18] In this context, for commercial cases, referral to a mediator in advance of filing a case in disputes on compensation and pecuniary claims of which the subject matter is the payment of a certain amount of money was made a cause of action through Art. 5/A, added to Turkish Commercial Code No. 6102, and Law No. 7155 on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts,[19] dated 06.12.2018, and entered into force on 01.01.2019. Thus, Art. 5/A of the TCC was the first special and fundamental provision by which mandatory mediation was regulated in the TCC.

B. Applicable Legal Provisions with Relation to Mandatory Mediation in the Turkish Commercial Code

As was previously explained,[20] within the scope of the historical development process, the main legal regulations within the framework of both private and general norms with relation to mandatory mediation in the field of the TCC consist of Law No. 7155 on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts",[21] dated 06.12.2012; Article 5/A added to TCC No. 6102; the MCoCD, bearing the number of 6325 and date of 07.06.2012; MCoCD Additional Article No. 18/A dated 02.06.2018; Additional Article No. 18/A of the MCoCD containing general provisions with relation to mandatory mediation; Article 18/A of the MCoCD dated 02.06.2018; and Articles 22-28 of the MCoCD Reg.

17 OJ (02.06.2018/30439).

18 See Kırca for explanations regarding the suitability of commercial disputes to mediation as a cause of action and the requirement of mediation as a cause of action. İsmail Kırca, "Ticari Uyuşmazlıkların Çözümünde Arabuluculuk", in T.C. Adalet Bakanlığı Arabuluculuk Daire Başkanlığı, *Ticari Uyuşmazlıkların Çözümünde Arabuluculuk ve Arabuluculukta Avukatın Rolü Sempozyumu*, Mine Demirezen (Ed.), Deniz Ofset Press, 2017, p. 21.

19 OJ (19.12.2019/30630). This law has been criticized from the point of view of its form on the grounds that it contains contradictions with law-making techniques. See Çiğdem Yazıcı-Tıktık, "Assessment of the Mediation Application as a Cause of Action in Commercial Cases in Respect of Basic Principles", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 113-114.

20 See Section I, A.

21 OJ (19.12.2019/30630). This law has been criticized from the point of view of its form on the grounds that it contains contradictions with law-making techniques. See Çiğdem Yazıcı-Tıktık, "Assessment of the Mediation Application as a Cause of Action in Commercial Cases in Respect of Basic Principles", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 113-114.

Within the framework of these regulations, the provisions found in private laws such as the TCC and Law on Labour Courts pertaining to mandatory mediation are special provisions and, in such cases, the first principle to be applied for the determination of the order of the provisions to be applicable thereunder will be the principle of the priority of the special norm. The general provisions to be applied thereto for filling the gaps in the provisions in the context of the special norm, however, are the provisions found in Art. 18/A of Mediation Law No. 6325. If there is no provision in Art. 18/A, then the other provisions of MCoCD No. 6325 will be applied as general provisions at a degree of inconvenience to the nature of the mandatory mediation. Within this framework, it may be possible to refer to Art. 22-28 of the MCoCD for the gaps pertaining to the application of Art. 18/A. These principles with relation to the order of the application of all these legal regulations pertaining to the mandatory mediation model in Turkish law are clearly indicated in Art. 18/A as follows:

> "In the event that the mediator applied thereto in related laws is regarded as a cause of action, then the following provisions will be applicable to the mediation process" (Art. 18/A-1).
>
> "The special provisions accepted with relation to the cause of action of mediation in the related laws are reserved" (Art. 18/A-19).
>
> "Under circumstances where no applicable provision exists, the other provisions of this law will be applied at a degree to be convenient for the nature of it" (Art. 18/A-20).

II. Legal Nature, Objectives, and Functions of Mandatory Mediation in Turkish Law

A. Legal Nature

As indicated in the doctrine, the mandatory mediation method has three different models.

In the first model, certain legislation prescribes mediation as a mandatory and automatic procedure. In this case, mediation is qualified as a cause of action.[22] This approach to mandatory mediation is described as categorical by Sander in the US doctrine.[23]

22 Özmumcu (n2), 808. Key examples of this type of mediation include the settlement of disputes with relation to agricultural debts in New South Wales, Australia, through the application of the mediation method; in 2013, the mandatory arbitration applications that began being applied in Italy for certain disputes; and the mandatory arbitration applications pertaining to pilot projects in the United Kingdom. Özmumcu (n2), 808-809; Melissa Hanks, "Perspectives and Mandatory Mediation", *UNSW Law Journal*, Vol. 35, Iss. 1, 2012, pp. 829, 931. For mandatory mediation applications in Italian law, see Özmumcu (n2), Mandatory Mediation, 812-815; Kürşad Karacabey, "Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığına ve Uygulanabilirliğine Dair Sorunlar", *ABD*, Vol. 61, Iss. 1, 2016, pp. 456, 461.

23 Frank Sander, "Another View of Mandatory Mediation", *Dispute Resolution Magazine*, Vol. 13, Iss. 2, 2007, pp. 15-16.

In the second model, the court refers the relevant parties to mediation.[24] This model is known as "mediation, referred by the court".[25] In this model,[26] the judge is authorized to refer the parties to mediation based on the merits of the case either with or without the consent of the parties.[27]

The third model is known as a "quasi-compulsory mediation". In this model, it is not obligatory to proceed with alternative dispute resolution methods and the court expenses shall be borne as a sanction by the party that has acted unreasonably in attempts to resolve the dispute.[28] In this context, if this method is not attempted before the action is filed, then the negative effects of the court expenses constitute an effective compulsion mechanism.[29]

Mandatory mediation in Turkish law constitutes an explicit example of the first model explained above because it is stipulated as a cause of action (Art. 5/A-I of the TCC).

In civil procedure law, the courts have the authority to check certain conditions to be able to proceed with a case. Such conditions are referred to as "causes of action".[30] In this sense, the conditions necessary for the court to be able to proceed with a case are "positive causes of action" and those conditions not existing are "negative causes of action". A cause of action is not a condition that must be present for the court to be able to proceed with the case but not for the lawsuit to be filed. These are also referred to as conditions for hearing a case[31] (Art. 114 of the Civil Procedure Law (CPL)).

The cause of action matter is clearly prescribed by Art. 114 of the CPL. There are also other causes of action stipulated in other laws. Causes of action are divided into three categories as causes of action pertaining to the "court", to "parties", and to the "subject of the case". The CPL (CCP) reflects this difference[32] (Art. 114).

24 Sander (n23), 15-16.

25 Sander (n23), 15-16.

26 Although this model has been prevalently applied in Australia, it has found a considerably limited field of applications; for instance, a party that fails to act reasonably must honour the expenses of the (court) proceedings for the settlement of the dispute in the British Civil Procedure Rules and in Australia by the Civil Dispute Resolution Act, dated 2011. Hanks (n21), 931-932; Özmumcu (n2), 809.

27 Sander emphasizes that this model is applied by the court mostly on a discretionary basis subject to the request of the parties thereunder. Sander (n22), 16; see also Özmumcu (n2), 809.

28 For instance, the expenses of the proceeding are to be honoured by the party that fails to act reasonably according to both the British Civil Procedure Rules and the Australian Civil Dispute Resolution Act, dated 2011. Hanks (n22), 931-932; Özmumcu (n2), 809.

29 Hanks (n22), 931.

30 Saim Üstündağ, *Medeni Yargılama Hukuku*, C. I-II, Sulhi Garan Press, 2000, pp. 279-281; Yavuz Alangoya, Kamil Yıldırım, and Nevhis Deren-Yıldırım, *Medeni Usul Hukuku Esasları*, Beta Press, 2011, p. 190; Timuçin Muşul, *Medeni Usul Hukuku*, Yetkin Press, 2012, 100; Abdürrahim Karslı, *Medeni Muhakeme Hukuku*, Alternatif Press, 2014, pp. 393-394; Baki Kuru, *Medeni Usul Hukuku*, Legal Press, 2015, pp. 41-43; Hakan Pekcanıtez, *Medeni Usul Hukuku*, C. II, Vedat Press, 2017, p. 926; Süha Tanrıver, *Medeni Usul Hukuku*, C. I, II, Yetkin Press, 2018, p. 636.

31 Kuru (n30), 41-44.

32 Özekes, Ekmekçi, Atalı, and Seven (n13), 153.

The court must decide whether it can proceed with a case regarding cause of action on an ex officio basis or not. If it determines that there is a lack of cause of action, then the court may not proceed with the merits of the case. In such an event, the court is obliged to dismiss the case on its merits[33] (Art. 115/2 of CPL).

The regulations regarding the cause of action for mediation in the MCoCD are parallel to these general principles of the CPL (Art. 18/A-II of the MCoCD; Art. 22/I of the MCoCD Reg.; Art. 114-115 of the MCoCD).[34]

B. Legislation on Mandatory Mediation in the Turkish Commercial Code and Its Practice

The conditions for and the need to have mandatory mediation are explained in the preamble of the MCoCD in Art. 3. It is indicated in the general preamble of the Law on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts containing the additional provision of Art. 5/A to the TCC that: "It is necessary to make arrangements in the direction of extension of this application to commercial disputes in consideration of the benefit and success that the institution of mediation has achieved in practice, having been applied from the date of 1 January 2018 onward and with respect to labour disputes through Law No. 7036 on Labour Courts".

The cause and the objective of this requirement are indicated in the preamble of Art. 20, which contains the provision for the addition of the specified regulation as follows: "An obligation was brought forth to refer to a mediator before filing any action with regard to any pecuniary and compensation claims among the commercial actions indicated in Article 4 of the TCC and the subject matter of which consists of the payment of a certain amount of money, and, by doing so, it is aimed to settle these disputes thoroughly in a manner conforming to the willpowers of the parties and with less expense and in a shorter period of time, as well".

The sustainability and continuity of commercial activities depend on their speed and security. Mandatory mediation serves these purposes. At the same time, commercial law is one of the first areas affected by technological developments and innovation. Thus, the number of commercial disputes and the burden on commercial courts increase steadily. Mandatory mediation would help to decrease the number of cases and thus ease the workload of commercial courts.[35] In brief, one of the

33 See Section IV, E for explanations regarding the legal consequences of filing an action before referral to mandatory mediation.

34 See Section IV, E for explanations regarding the parallelism between the provisions of Art. 22/I of the MCoCD and Art. 18/A-II of the MCoCD.

35 See Section V, A, B for statistical data on the effects of mandatory mediation applications in Turkish commercial law in decreasing the caseloads of the courts.

major goals of mandatory mediation in commercial law is to ease the workload of commercial courts.[36]

C. Positive and Negative Effects of Mandatory Mediation

The principles and the practice of mandatory mediation in comparison with voluntary mediation have been the subjects of some analyses. The present analysis considers not only mandatory commercial mediation but general mandatory mediation as well. We shall comment on mandatory mediation in general and indicate the specific results of mandatory mediation in commercial law.

1. Positive Effects

It is often believed that a party applying for voluntary mediation is perceived as weak in his or her case. This perception is one of the biggest handicaps of voluntary mediation, and mandatory mediation successfully avoids it. In mandatory mediation, parties have no reason to think that other parties are weak in their cases because participation is obligatory.[37] At the same time, mandatory mediation is relatively cheaper than litigation and can contribute to the faster and more trusted resolution of disputes.

It is clear that these positive aspects of mandatory mediation can also meet the requirements of commercial law.

2. Negative Effects

The only point considered as a negative effect of mandatory mediation is the idea that the mandatory aspect of this mediation is in contradiction with the principle of voluntariness. To force people into something considered to be voluntary by nature is considered illogical.

The principle of voluntariness is considered as one of the pillars and justifications of mediation.[38] It is the result of seeking a peaceful solution.[39]

In this respect, mediation has been subject to laws as a voluntary process both globally and in Turkey.[40] The principle of voluntariness accordingly became the

36 It is emphasized in the doctrine that the definition of the cause of action of mediation as an objective contributing to the decrease of the caseloads of the courts constitutes a logical inconsistency and contradiction within itself as a result of the grounds that compulsion for the referral of a dispute to mediation in the period before the case is filed would be contrary to the nature of mediation if there is a general reluctance of the parties to resolve the dispute by reconciliation. See Tanrıver (n2), 119, 121-122.

37 Campbell Hutchinson, "The Case for Mandatory Mediation", *Loyola Law Review*, Vol. 42, Iss. 4, 1996, pp. 85-90; Özmumcu (n2), 825-826.

38 Karacabey (n22), 488-499; Özmumcu (n2), 837-838.

39 Özmumcu (n2), 837; Karacabey (n22), 499; Tanrıver (n2), 121.

40 Tanrıver (n2), 121.

characteristic aspect of mediation.[41] Over time, the exception of mandatory mediation arose to challenge that principle.[42]

Thus, in light of the aforementioned contradiction, it is discussed whether mandatory mediation is in conformity with law de lege ferenda or not.[43]

Some authors indicate that there are justified reasons for having mandatory mediation to protect legal interests in spite of the noted contradiction.[44] In contrast, some other authors argue that it is necessary to reject it due to that contradiction.[45] These authors state that this contradiction is a breach of judicial rights and judicial ethics.[46]

Mandatory mediation must also be taken into consideration regarding constitutional rights and freedoms.[47] Namely, according to an opinion, the principle of voluntariness

41 A definition is provided in Art. 2 of Law No. 6325 on Mediation in Legal Disputes. According to this arrangement, mediation is "a dispute solution method that is conducted voluntarily and [with the] participation of an impartial and independent person, who has a [relevant] education and brings the parties together through the application of systematic techniques in order to meet and conduct negotiations, and who realizes the establishment of the communication process by and between them in order to ensure that they produce their own solutions in this way, and brings forth relevant solution(s) in the event that it is understood that the parties thereunder have failed to produce any solution".
A parallel definition is provided in Art. 4/1-c of the MCoCD Reg. as follows: "Mediation: 'a voluntary dispute solution method that is conducted as a public service and by the participation of an impartial and independent person, who has a [relevant] education and brings the parties together through the application of systematic techniques in order to meet and conduct negotiations, and realizes the establishment of the communication process by and between them in order to ensure that they produce their own solutions in this way'". Official Gazette, Date: 02.06.2018, Issue No. 30439.

42 For instance, it is accepted within the framework of Law No. 7036 on Labour Courts, dated 12.10.2017, in order to meet the requirements of "the need for alternative reconciliation methods, variation that is experienced in caseloads and the mode of execution of the work, population increase, extraordinary development being experienced in technology, expansion of the field of the social security law, and diversification of labour relationships…" See the General Preamble of Law No. 7036 on Labour Courts.

43 See Özmumcu (n2), 827-930; for detailed explanations related to this discussion, see also Karacabey (n22), 457.

44 Sander ((n23), 16) is one of the authors defending the conformance and acceptability of mandatory mediation in relation to the applicable law. Other authors assessing the legal problem in question pragmatically include: Dorcas Quek Anderson, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program", *Cardozo Journal of Conflict Resolution*, Vol. 10, Iss. 1, 2010, pp. 479-485; Frank Sander, William Allen, and Deborah Hensler, "Judicial (Mis)use of ADR? A Debate", *University of Toledo Law Review*, Vol. 27, Iss. 4, 1996, p. 886; Stephan Bullock, Noel Gallagher, and Linda Rose, "Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation", *Louisiana Law Review*, Vol. 67, Iss. 3, Spring 1997, pp. 885, 940.
According to this opinion, there is a clear and explicit difference between compulsion to mediation and compulsion within the mediation process. The latter, namely compulsion within the mediation process, will not be accepted as mediation. The former, however, is acceptable. However, even this is in the nature of a temporary measure, designed for solutions of problems arising in circumstances where mandatory mediation is required. Sander (n22), 16; Quek Anderson, (n44), 485-486; Sander, Allen, and Hensler (n44), 886.

45 Tanrıver (n2), 121.

46 Rosella Wissler, "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts", *Willamette Law Review*, Vol. 33, Iss. 1, 1997, p. 565; Queck Anderson (n44), 484; Victoria J. Hanemann, "The Inappropriate Imposition of Court-Ordered Mediation in Will Contents", *Cleveland Law Review*, Vol. 60, Iss. 4, 2012, pp. 755-756; Özmumcu (n2), 755, 837; Karacabey (n21), 489; Özmumcu (n2), 807, 826. These authors allege that the mediation process's division into three stages represents a formal and artificial differentiation; it is neither possible nor realistic to separate those stages from each other with definite boundaries within the scope of realities and, therefore, the fundamental ground of those defending the opinion explained heretofore cannot be accepted. As a consequence, mandatory mediation contradicts the principles of legal ethics and legal rights. Within this framework, it has been emphasized that there would be no difference of content by and between the compulsion to mediation and compulsion within the mediation process, with the compulsion to mediation then converted into compulsion within the mediation process. Wissler (n46), 566; Hanemann (n46), 552; Quek Anderson (n44), 485. In this context, the compulsion to mediation is emphasized as a factor for the parties to be directed to negotiation under the least possible pressure created by that compulsion. Wissler (n46), 566; Quek Anderson (n44), 485.

47 Özmumcu (n2), 837-839; Demir (n43), 1-2; Karacabey (n22), 464.

is the key element of mediation, and in the event that one or both of the parties are reluctant to participate in the process, the chance of successful mediation will be diminished. Mandatory mediation, it is suggested, will bring a temporary solution to the requirements pertaining thereto, and the opinion concludes a summarized assessment[48] of the subject matter with the well-known Turkish proverb of "No good can be achieved by force".[49]

Some other authors, however,[50] have assessed this subject matter from the point of view of its conformance to the Constitution, alleging that compulsion exists only at the application stage, which is the first of three stages of mediation, and that since the principle of voluntariness again forms the basis of the subsequent stages for the parties to continue and finalize the process, mandatory mediation does not constitute a contradiction from the point of view of the principle.

Another author assesses mandatory mediation with a critical approach from three different points of view. From the first point of view, in the assessment made by this author regarding mandatory mediation's contradiction with the principle of voluntariness, the natural aspect of the institution was observed in terms of the possibility of solving legal disputes by negotiation and for reconciliation methods that can only and solely be materialized on the basis of the voluntary acts and free wills of the parties. Thus, it is stated, it is impossible to describe an agreement approved with the compulsion of one or multiple parties as a real settlement and, in this context, the success of mediation is subject to the process being performed voluntarily. Compulsion is contrary to the essence of mediation; otherwise, it would not be possible for mediation applications to be efficient. Based on these points, the author concludes that mandatory mediation does not contain any contradiction.[51]

From the second point of view, this author makes an assessment regarding a person's rights to directly apply to an independent and impartial judiciary and asserts that compelling persons to refer to mediation on a mandatory basis and in advance of the initiation of an action constitutes a barrier and an obstacle, which must be overcome on an absolute basis, in light of the right to access to an independent judiciary, which is one of the fundamental functions of the state.[52]

On the other hand, the author emphasizes the assessments of some jurists related to the fact that parties in mandatory mediation are compelled only at the application

48 Özmumcu (n2), 837.

49 Özmumcu (n2), 838. The same opinion is summarized in British law with emphasis on a British proverb that may be assessed as synonymous with the aforementioned Turkish proverb: "You can lead a horse to water but you can't make it drink". Wissler (n46), 565-566.

50 Demir (n42), 1.1; Karacabey (n22), 466.

51 Karacabey (n22), 456-466.

52 İbid 467.

stage and are not obliged with respect to the completion of the process, and that they may initiate legal action after the completion of a certain procedure and, as a consequence, the elimination of access to the judiciary would not be in question.[53] The author argues against these assessments, stating that access to the court is not totally eliminated but direct access is eliminated, and that access to an independent and impartial judiciary is delayed and made subject to various costs. Thus, he concludes: "Justice delayed is justice denied".[54]

Third, he assesses mandatory mediation with respect to its conformance to the Constitution.[55] More specifically, he assesses mandatory mediation within the framework of the provisions of Articles 6, 9, 11, 14/2, 36, and 37 of the Constitution of the Republic of Turkey.[56] In this assessment, it is emphasized that any application that would compel persons to refer to mediation would be in contradiction with Article 36 of the Constitution "where the right to a fair trial is regulated" and with Article 37[57] containing provisions indicating that individuals cannot be brought before any other judicial authority/jurisdiction apart from the court present within their legal jurisdictions and that no authorities that may have extraordinary judicial power resulting in such a consequence may be established thereunder. By Article 3, he states, the foregoing is a sufficiently clear contradiction in a clear and basic manner beyond any question and he further concludes that "it is not possible to change the arrangements of Articles 36 and 37 in a manner to provide an opportunity for mandatory mediation as long as the provisions of Article 6, 'where the right of independence is regulated', exist".[58] The author emphasizes in parallel to his conclusion that "mandatory mediation would constitute a contradiction to the indicated provisions of the Constitution and also the spirit in general, and that no practical contemplation based on a concern for solving the problems rapidly and in an easy manner would be an excuse for disregarding the Constitutional principles or making concessions".[59]

The problem pertaining to the conformance of mandatory mediation to the Constitution in Turkish law has been assessed by the Constitutional Court in various decisions. For instance, the Constitutional Court determined a criterion in Decision No. 2013/89[60] about the effect of proceeding with alternative dispute resolutions on the freedom to seek legal remedies. According to the Court: "The obligation for

53 İbid 468.

54 İbid 456, 468.

55 İbid 474.

56 İbid 471-474.

57 İbid 471-474.

58 İbid 473.

59 İbid 472-373.

60 The Constitutional Court's Decision of 10.07.2013, Basis No. 201/94, Decision No. 2013/89, published in the Official Gazette bearing the date of 25.01.2014 and No. 288893.

applying to alternative ways of dispute resolution will not be regarded as contrary to the right to legal remedies as long as these ways are not ineffective and inconclusive methods that have been presented in order to make it impossible for the individuals/persons to obtain their rights to legal remedies". The Court took this criterion into consideration and decided on the dismissal of the action of nullity.

In another of its decisions,[61] however, the Constitutional Court determined a criterion with relation to the limits of access to jurisdiction that has again been one of the rights subject to assessment with respect to the obligation to apply to alternative ways of dispute resolution in advance of the action. According to the Court: "The restrictions that hinder individuals from applying to courts or make decisions of the courts lack meaning, or, to put it another way, that disable the decisions of the courts to a substantial degree may violate the right of access to the courts". The Constitutional Court took this criterion into consideration and adjudged in its decision that mandatory mediation is not contrary to the Constitution.

In Decision No. 2018/82,[62] however, the Constitutional Court assessed the problem in a case filed with a request for the cancellation of mandatory mediation, as regulated in the Law on Labour Courts, with respect to equality, justice, public interest, and principles contrary to the rule in the direction of the fact that judicial authority would be exercised by independent and impartial courts. The Court indicated the following in this assessment:

> "[At the cause of action of mediation,] the mediator, who has a reliable and objective identity, might ensure the conclusion of the process through the observation of equality between the parties in all stages of the dispute resolution process, and when the employee and employer are enabled to resolve the disputes reciprocally in a manner where they can express themselves comfortably at equal levels in circumstances where equality is prioritized, it would not be claimed that the employee would be in a weaker position in the face of the employer and put under pressure… And the resolution of the dispute in a shorter period and at lesser cost while ensuring the satisfaction of both parties and without referring [the dispute] to a judicial authority might prevent the exhaustion of the parties in judgment processes that might take a long period of time, and might decrease the caseloads of the courts and help the judiciary work more effectively and efficiently… However, the institution of mediation has not been regulated in the [MCoCD] as a way of dispute resolution to replace the courts, and it was different from the dispute resolution power held by the courts, and it was not possible to describe mediation, an amicable way of dispute resolution, as a method referring to a judicial activity or competing with the judiciary, and mediation was regulated as a specific dispute resolution method taking place alongside the judicial channels and becoming functional without intervening in the judicial authority…"

61 The Constitutional Court's Decision of 21.01.2014, Basis No. 2014/46, Decision No. 2014/83, published in the Official Gazette bearing the date of 03.06.2015 and No. 29375.

62 The Constitutional Court's Decision of 11.07.2018, Basis No. 2018/178, Decision No. 2018/82, published in the Official Gazette bearing the date of 11.12.2018 and No. 30622.

The court then decided on the dismissal of the request on grounds of the following fact: "The cause of action of mediation was designed to ensure the public interest and there was not any aspect of it contrary to justice, equity criteria, and rule indicating that the judicial authority would be exercised by independent and impartial courts".

III. Basic Substantial Principles of Mandatory Mediation in Turkish Commercial Law

In this study, the basic principles of mandatory mediation in Turkish law shall be analysed within the two categories of "substantial principles" and "procedural principles".

Substantial principles are set out in Article 5/A of the TCC in the nature of special norms:

> "(1) For those commercial disputes whose objective is the payment of a certain amount of money or compensation that are indicated in Article 4 of this Code or in other laws, application to a mediator before proceeding is a cause of action.
>
> (2) The mediator shall finalize the application within six months of his or her assignment date. This period may be extended by a maximum of two weeks by the mediator under unavoidable circumstances".

According to this article, there are two fundamental principles related to the substantial part of mandatory mediation in the field of commercial law. The first of these principles is the principle of "the existence of a commercial case, regulated in Art. 4 of the TCC and other laws", pertaining to the determination of the scope of the cases for which mandatory mediation will be applied. The second one is the principle that limits the actions with respect to the subject of the request included in the scope of mandatory mediation. This second principle is based on the fact that the "legal actions involving compensation and pecuniary claims of which the subject matter is the payment of a certain amount of money, only in commercial cases regulated in Article 4 of the TCC and other laws, will be subject to mandatory mediation".

The principle of "the existence of a commercial case, regulated in Art. 4 of the TCC and other laws" with relation to the determination of the scope of the actions where mandatory mediation will be applied will be explained in the course of this paper. Subsequently, the other principle that limits the commercial cases included within this scope with respect to the subject of the request will be explained.

On the other hand, there is no lex specialis in the TCC specifying principles in relation to the procedure of mandatory mediation. As a consequence, the principles pertaining to the procedure in Article 18/A of the MCoCD and Articles 22-25 of the MCoCD Reg. are characterized as general provisions. The principles pertaining to

the procedure will be explained in forthcoming sections of this study in consideration of Article 18/A of the MCoCD and Articles 22-25 of the MCoCD Reg. bearing the general provisions[63] that are also applicable for mandatory mediation in the field of commercial law.[64]

A. The Principle of the Existence of a Commercial Case Regulated in Art. 4 of the TCC and Other Laws

The provision of the cause of action of mediation in Art. 5/A of the TCC obliges application to mediation in advance of an action in the technical sense. In this context, there is no requirement to apply to mediation obligatorily in advance of this procedure if there is not an action. In other words, there are no requirements to apply to mediation as a cause of action in advance of procedures such as precautionary attachment, interim injunction, or execution for debt because those are not legal actions in the technical sense. Furthermore, non-contentious processes such as these are not among the processes that parties will freely reject at will.[65] For these reasons, the cause of action is not subject to mediation.

In Art. 5/A of the TCC, two separate groups of commercial actions were identified by making a differentiation between commercial actions indicated in Art. 5/A of the TCC arrangement and other laws on the scope of the actions where the mandatory mediation method will be applied as a cause of action in the field of commercial law.

There is legal certainty in Turkish law regarding the kinds of commercial actions taking place within the scope of these groups and there are no important related problems or discussions thereunder. However, there are some controversial matters in relation to the nature of actions subject to mandatory mediation with respect to the quiddity of the subject of the request.[66] In this context, the commercial actions regulated in Art. 4 of the TCC and other laws will primarily be explained in the following text.[67] Subsequently, some explanations will be made regarding actions and discussions related to controversial matters.[68]

63 See Section IV for detailed explanations with regard to the fundamental principles of the procedure.

64 See Section IV.

65 Mehmet Ertan Yardım, "Usul Hukuku Bakımından Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 89, 96.

66 Ali Paslı, "Ticari İşletme ve Ticaret Şirketleri Bakımından Zorunlu Arabuluculuğun Değerlendirilmesi", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, p. 24.

67 Paslı (n66), 24.

68 See Section III, C.

1. Art. 4 of the TCC and Commercial Cases Within the Framework of This Article

The system wherein commercial cases are regulated according to Articles 4 and 5 of the TCC does not encompass cases filed in relation to all disputes that are deemed to be commercial in nature. Rather, it is based on the principle of the descriptions of cases requiring the special expertise of only the judge based on the character and subject of the case and the hearing of that same case in a commercial court. This principle was explained under the heading of "Commercial Cases" in Preamble No. III.1.1 of the previous Turkish Commercial Code (PTCC) with the following wording: "Not the matters included in the concept of 'commercial works' from the point of view of the application of the material law but rather only the matters requiring the special expertise of the judge due to their nature and structure have been described as commercial cases…" This preamble sustained its validity with respect to the currently effective TCC.[69]

In consideration of this principle, the cases indicated in Art. 4 of the TCC and other lex specialis cases are absolutely regarded as commercial cases as a requirement of the applicable law irrespective of the identities of the parties and the nature of the work with Art. 4/a-f of the TCC, Art. 154/3 of the Enforcement and Bankruptcy Law (EBL), and Art. 22 of the Law on Commercial Enterprise Pledge (LCEP). Besides this, in order to describe certain disputes as commercial cases, the condition of pertaining to at least one commercial enterprise should be fulfilled (Art. 4/1-c.2 of the TCC). Additionally, in order for a dispute to be considered as a commercial case, there are some circumstances wherein both parties are required to be traders and the dispute to be related to the commercial operations of both parties (Art. 4/1 of the TCC).

It is necessary to indicate within the framework of these explanations where it appears that the concepts of traders and commercial enterprises play a role thereunder rather than the basic concept of commercial work in the description of commercial cases accepted in this regulation of the TCC.[70]

As a requirement of Art. 5 on "courts where commercial cases and ex parte proceedings are heard" and the cases deemed to be commercial cases within the framework of Art. 4 of the TCC, the cases that necessitate being heard in commercial courts are the civil actions to be heard according to the contested judicial (adversarial) provisions. However, ex parte proceedings that are commercial in nature pursuant to the new regulation of the TCC will be heard in commercial courts from then on. It is specifically the civil courts of peace that are competent in ex parte proceedings by Art. 383 of the Legal Procedural Law (LPL). However, since Art. 4 of the TCC

69 Hüseyin Ülgen, Mehmet Helvacı, Abuzer Kendigelen, Arslan Kaya, and Füsun Nomer-Ertan, *Ticari İşletme Hukuku XII*, Levha Press, 2015, p. 116.

70 İbid 116-117.

contains the provision envisaging that ex parte proceedings of a commercial nature will be handled by commercial courts, it will be the Commercial Courts of First Instance that are, from then on, authorized in the event of ex parte proceedings bearing a commercial nature.[71]

The commercial cases regulated in Art. 4 of the TCC are divided into two groups as absolute commercial cases and relative commercial cases according to their basic characteristics. In this context, the commercial cases regulated in Art. 5/A-1 will be systematically divided in the following subsections into the three groups of absolute commercial cases, relative commercial cases, and cases that are regarded as commercial cases providing a relation to any commercial enterprise.

a) Absolute Commercial Cases

The absolute commercial cases in Art. 4 of the TCC are regulated in a numerus clausus manner, being listed one by one in Art. 4/1-a-f. The absolute nature of these cases arises from the fact that they are deemed commercial disputes irrespective of whether or not they are related to a commercial enterprise, whether the parties are merchants or not, and the subject of the dispute. Correspondingly, they are accepted as a requirement of the law. According to the general legal reasoning of the PTCC, absolute commercial cases "are specific to the essence of commercial life and indicate a separate expertise status…" Apart from the acceptance of disputes regulated in the TCC as absolute commercial cases from a legal point of view, as a result of the relation of the selected examples with the economic order and credit system as well as their close connection with competition law and relevant systems, entrepreneurship being an indispensable factor of commerce, it is understood more or less that they have probably been selected due to their connections with the essence of commerce.[72]

There are a total of seven types of absolute commercial cases regulated in Art. 4/1-a-f of the TCC as described below.

i) Civil Cases Arising from the Matters Stipulated in the TCC

All civil cases regulated in the TCC have been regarded as absolute commercial cases. From the point of view of these cases, it is not taken into consideration whether the parties are traders, the dispute is related to a commercial enterprise, or the source of the receivable or debt has arisen from a contract, a tortious act, or unjust enrichment. In other words, these cases are accepted as commercial cases as a requirement of the applicable law in terms of their characteristics without taking any other criterion into consideration. For instance, a dispute pertaining to a promissory note issued by

71 İbid 117.

72 İbid 118.

an officer will constitute the subject of a commercial case. Again, since the subject matter referring to the responsibility of the board of directors, managers, and directors of a joint stock company is regulated in Art. 553 of the TCC, cases pertaining to such matters will directly constitute commercial cases without requiring any other criterion or assessment such as the relationship to and between the partnership and managers with reference to a service or a proxy agreement.[73]

ii) Civil Cases Arising from the Matters Regulated in Articles 962-969 of the Civil Code on Those Who Engage in Lending on Pawn

Civil actions arising from the matters regulated in Articles 962-969 of the Civil Code in relation to lending on pawn are regarded as commercial cases without the requirement of taking into consideration other criteria such as the status of the parties (whether they are traders or not) in the event that the dispute is related to a commercial company. The acceptance of these types of disputes as absolute commercial cases is based on consideration of the fact that the activity can only be conducted by a commercial company and resolution of the disputes arising from lending relationships requires expertise.[74]

iii) Lawsuits Indicated in Art. 4/1-c of the TCC in Relation to Certain Matters Regulated in the Code of Obligations

Certain circumstances indicated in Art. 4/1-c of the TCC and the Code of Obligations are regarded as absolute commercial cases without seeking any conditions of the status of the parties (whether they are traders or not) or their connections with a commercial company. There are six of these circumstances regulated in the Code of Obligations:

1) Civil Cases Arising from the Matters Regulated in Articles 202-203 of the Code of Obligations on the Takeover of an Asset or an Enterprise and Mergers and Conversions of Enterprises:

> Principles in relation to the takeover of an asset or an enterprise and mergers and conversions of commercial enterprises are regulated in Articles 202-203 of the Code of Obligations. The principles pertaining to mergers and conversions of commercial companies, however, are regulated in Article 136 of the TCC and in the subsequent section. In light of this, disputes pertaining to mergers, takeovers, and conversions within the scope of Articles 202-203 of the Code of Obligations are regarded as absolute commercial cases as a requirement of the provision of Art. 4/1-c of the TCC. Disputes pertaining to merger and takeover procedures taking place within the scope of Art 136 of the TCC and the subsequent section, however, are requirements of the provision of Art 4/1-a of the TCC.

73 Supreme Court Assembly of Civil Chambers, 1004/774, 07.11.2001, http://www.lexpera.com.tr (01.04.2020).

74 Hayri Domaniç and Erol Ulusoy, *Ticaret Hukukunun Genel Esasları*, Yetkin Press, 2007, p. 22.

2) Civil Cases Arising from the Matters Regulated in Articles 444 and 447 of the Code of Obligations Pertaining to Non-Competition:

The principles pertaining to non-competition in the period after the expiration of a service contract are regulated in Articles 444 and 447 of the Code of Obligations. With these regulations, the lawmaker regards disputes pertaining to post-contract non-competition agreements as absolute commercial cases in an accurate manner in accordance with the main theme of the regulation pertaining to commercial cases, having deemed it subject matter specific to the essence of commercial life, the economic freedom of the individual, and his or her involvement in the trade system.[75] The Court of Cassation regarded disputes pertaining to the non-competition in the period following the expiration of a service or employment contract pertaining thereto as absolute commercial cases and resolved that the commercial courts were the legal competent bodies for them.[76] This decision is related to non-competition after the expiration of a service contract. Disputes arising from the violation of the right of monopoly and non-competition pertaining to the post-contract period are heard in labour courts.[77] On the other hand, it is necessary to emphasize that Articles 444 and 447 pertaining to service contracts will be applied for the sub-types of service contracts.[78] For instance, non-competition after the expiration of a marketer's contract is subject to these regulations based on the references of Art. 469 of the Code of Obligations.[79] .

3) Civil Actions Arising from the Matters Regulated in Articles 487-501 of the Code of Obligations Pertaining to Publishing Contracts:

A publishing contract, in the most general sense, refers to the introduction of a work by way of reproduction and putting the same on the market. The opinion that publishing is a commercial enterprise activity constitutes the basis for the acceptance of cases regarding disputes pertaining to publishing contracts as absolute commercial cases.[80]

According to Art. 4/1-c of the TCC, cases arising from rights regarding literary and artistic works can only be accepted as absolute commercial cases provided that they are related to a commercial enterprise. For instance, a full or a simple license for the exercise of the right of reproduction and/or dissemination by the author can only be the subject of an absolute commercial case provided that it is related to a commercial enterprise. On the other hand, the case of a publishing contract by and between the author and publisher will be regarded as an absolute commercial case even if it does not have any connection with a commercial enterprise. To clarify this matter with an example, the case or action arising from a contract regarding only the reproduction of a work and executed by and between a trader that operates for the relevant printing

75 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 119-120.

76 The 11th Civil Chamber of the Supreme Court of Appeals: 12067/3392, 07.03.2013, *BATİDER*, Vol. 28, Iss. 2, 2013, pp. 326-327; Erdoğan Moroğlu and Abuzer Kendigelen, *İçtihatlı Notlu Türk Ticaret Kanunu ve İlgili Mevzuat*, Vedat Press, 2014, p. 20.

77 Yarg. HGK, 9-517/566, 22.09.2008, *Journal of Supreme Court's [Yargıtay] Decisions*, *YKD*, Vol. 35, Iss. 8, 2009, pp. 1481-1482.

78 Yarg. HGK, 9-854/202, 27.02.2013; Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120.

79 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120.

80 Sabih Arkan, *Ticari İşletme Hukuku AÜBTİHE*, İş Bankası Vakfı Press, 2020, p. 99.

house and the author will be regarded as a commercial case. However, since actions for the prevention of (ref davası), for actio negatoria, or for damages are not related to any commercial enterprise, they will not be accepted as commercial cases.[81]

4) Civil Actions Arising from the Matters Regulated in Articles 515-519 of the Code of Obligations Regulating Letters of Credit and Orders of Credit:

Letters of credit and orders of credit entail the granting of a certain amount of money or an order for the provision of the same as a loan (or credit), being, in a broad sense, however, a remittance. A letter of credit is a document that contains the letter of authorization of its sender on granting/lending money or any other similar items and it makes a request of a certain person (i.e. the holder of the letter) who will benefit from the letter of credit with or without determining an upper limit for the addressee upon issuance of such a letter. A letter of credit is subject to the provisions of the proxy agreement and the transfer of money. In an order of credit, however, there is a person giving the credit order (superior), a person who is given the order (officer), and a third party to whom the payment will be made. In this case, while the officer grants the loan for the third party and on account of him, the superior becomes responsible for this credit, like a guarantor.[82] Cases involving disputes in relation to these procedures are regarded as commercial cases due to the fact that said procedures are specific to commercial activities and related to the essence of commercial life.[83]

5) Civil Actions Arising from the Matters Regulated in Articles 532-545 of the Code of Obligations in Relation to Commission Agreements:

Cases regarding movable assets and negotiable instruments (securities) within the framework of Articles 532-545 of the Code of Obligations and arising from the brokerage of commercial activities have been regarded as commercial cases on the grounds that they are related to commercial life. On the other hand, disputes within the scope of Art. 546 wherein principles pertaining to other commission works are regulated were not deemed as commercial actions.

On the contrary, another activity accepted within the scope of other commission works apart from brokerage in commercial occupations or activities is transportation brokerage. Transportation brokerage is regulated in Article 917 and the subsequent articles of the TCC and it is regarded as a commercial case as a requirement of the provision of Art. 4/1-a. Furthermore, a referral has already been made to this article as follows: "The special provisions on transportation brokerage in Art. 546/3 of the Code of Obligations are reserved".[84]

6) Civil Actions Arising from the Matters Regulated in Articles 547-554 of the Code of Obligations Envisaged for Commercial Representatives, Commercial Proxies, and Other Assistant Traders:

81 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120-121.

82 İbid 121.

83 İbid 121.

84 İbid 121

> Civil actions arising from the matters regulated in Articles 547-554 of the Code of Obligations involving commercial representatives and other commercial agents are also regarded as absolute commercial cases. However, notwithstanding that the principles pertaining to marketing contracts are regulated in Articles 460-466, cases pertaining to marketing contracts are not regarded as absolute commercial case.[85]

iv) Civil Actions Arising from the Matters Legislated in the Regulation Related to the Law on Intellectual and Industrial Property Rights

It was stated in Art. 4/d of the TCC that actions pertaining to disputes arising from the regulation regarding intellectual property are commercial cases. However, the acceptance of cases arising from disputes pertaining to artistic and intellectual works within the framework of this regulation as absolute commercial cases is stipulated on the condition that they must be related to at least one commercial enterprise (Art. 4/1, Sentence 2 of the TCC). There are two main laws in Turkish law within the scope of the regulation wherein intellectual and industrial property rights are legislated.

The first of these two laws is the Law on Intellectual and Artistic Works (LIAW).[86] Within the scope of this law, the following is indicated in the Annex, 21.02.2001 - 4630/2, Art. 1/A: "The tangible and intangible rights to the products of authors who produce intellectual and artistic works and artists who perform or read these works, the phonogram producers making the first fixation of a voice activity, and producers who make the first fixations of films as well as the radio and television organizations and the principles and procedures of disposition pertaining to such rights, judicial remedies, and measures are under the authorization and responsibility of the Ministry of Culture".

The second of these laws, dated 22.12.2016, is the Industrial Property Law (IPL). It pertains to the following: "Applications for traditional product names, trademarks, geographical indications, industrial designs, patents, utility models, registrations and post-registration procedures, and legal and penal measures for the violation of rights" (Art. 1/2 of the IPL[87]).

Cases pertaining to disputes included in the scope of the LIAW can only be regarded as commercial cases provided that they are related to a commercial enterprise (Art. 4/1, c-2 of the TCC). Cases related to disputes included in the scope of the IPL, however, are directly regarded as commercial cases without the need of any condition as a requirement of the provision of Art. 4/1, c-1 of the TCC.

It is necessary to indicate that the courts having competency with respect to disputes included in the scope of these laws are the penal courts or civil courts for

85 İbid 122.

86 5846, 05.12.1951 (OJ, 13.12.1951/7981).

87 6769, 22.12.2016 (OJ, 10.01.2017/29944).

intellectual and industrial rights established as specialized courts within the scope of these fields. In the event that no Court on Intellectual and Industrial Property Rights is established, the cases that fall under the competence of these courts will be handled by the Civil Courts of First Instance on duty at that place (Art. 156/1 of the IPL; Art. 76/1 of the LIAW).

In the face of this circumstance, parallelism is required between Art. 4 of the TCC and Art. 156/1 of the IPL and also Art. 76/1 of the LIAW with respect to the courts having competency to handle the disputes included in the scope of Art. 4 of the TCC. However, notwithstanding that the existing regulations are regarded to be worthy of criticism, an assessment is made in the doctrine indicating that the handling of disputes related to intellectual and property rights in Courts of Intellectual and Industrial Rights will not eliminate the nature of these cases as commercial cases.[88]

v) Civil Actions Arising from the Matters Stipulated in Lex Specialis Pertaining to Stock Exchanges, Exhibitions, Fairs, and Markets As Well As Warehouses and Other Places Specific to Trade

Civil actions arising from lex specialis in relation to stock exchanges, exhibitions, fairs, and markets as well as warehouses and other places specific to trade are regarded as absolute commercial cases in Art. 4/1-e of the TCC. For instance, liability cases that may be filed in disfavour of general store operators that may involve places specific to trade and authorized to issue warehouse receipts and warehouse warrants against goods granted upon them are also in the nature of absolute commercial cases. Likewise, cases arising from the provisions regulating the stock exchange are commercial cases and commercial courts have competency in the resolution of the disputes therein.[89]

vi) Civil Actions Stipulated in the Regulations Pertaining to Banks, Other Credit Institutions, Financial Institutions, and Lending Procedures

The scope of Art. 4/1-f of the TCC containing the provision indicating that civil actions envisaged in the regulations pertaining to banks, other credit institutions, financial institutions, and lending procedures were absolute commercial cases was extended in comparison with the regulation with the corresponding provision in the previous commercial code. It is indicated in the preamble of the article regarding the reasoning for this extension that under the current circumstances, institutions in the finance sector did not consist only of banks and establishments that engaged in lending money. Therefore, the phrase "…to other loan organizations, financial institutions…"

88 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 122.

89 İbid 123.

was added to the regulation in accordance with the realities and developments of the finance sector. Various financial institutions, mainly including financial leasing, factoring and finance institutions, forfaiting companies, and so on, were thus included in the scope of the regulation. In Turkish law, financial leasing, factoring, and finance institutions are regulated within the scope of Law No. 6361 on Financial Leasing, Factoring, and Finance Companies, bearing the date of 21.12.2012. In this context, cases involving disputes pertaining to establishments regulated within the scope of this law are subject thereto in the nature of commercial cases.[90]

The following provision is indicated in Art. 142/1 of Banking Law No. 5411 in parallel to Law No. 6361: "Any civil action that may be instituted by a fund, fund banks, and the bankruptcy and liquidation offices of the banks whose operating permission has been revoked shall be heard by the Commercial Courts of First Instance" (Art. 142/1 of the Banking Law). In the event that there is more than one Commercial Court of First Instance in a locality where these actions are heard, these actions shall be heard by the No. 1 or 2 Commercial Courts of First Instance. Again, the civil actions to be filed by banks, savings deposits insurance funds, and bankruptcy divisions of the banks in disfavour of the persons and bankruptcy cases in disfavour of the debtors shall be heard by the No. 1 or 2 Commercial Courts of First Instance (Art. 142/2 of the Banking Law).[91]

It is particularly necessary to indicate here that disputes in relation to the withdrawal of deposit moneys deposited in banks pursuant to this regulation will also be heard by Commercial Courts of First Instance as absolute commercial cases irrespective of whether the depositor related thereto bears the status of a trader or not.[92]

It has been adjudged by the Supreme Court of Appeals that cases related to disputes regarding consumer credits will be handled by Commercial Courts of First Instance.[93] It is asserted in the doctrine[94] that it is also possible to accept the precedent judgment belonging to the period of the previous Law on the Protection of Consumers from the point of view of the Law on the Protection of Consumers currently in force.

vii) Actions Regarded As Absolute Commercial Cases Due To Requirements of Lex Specialis in Other Laws Apart from the LLC

Absolute commercial cases (actions) are not limited only by the cases listed and indicated in Art. 4/I, a-f of the TCC. All or some of the disputes arising from

90 İbid 123.

91 Yarg. 13.HD, 04.07.2013,8530/10378; Moroğlu and Kendigelen (n76), 19; *YKD*, Vol. 1, Iss. 1, 2009, pp. 167, 148, 149.

92 Yarg. 13.HD, 04.07.2013, S. 18042/18586. For more on this decision, see Moroğlu and Kendigelen (n76), 17.

93 Yarg. 11.HD, 02.04.2002, S. 10784/3037, *BATİDER*, Vol. 22, Iss. 3, 2004, pp. 235-237; Moroğlu and Kendigelen (n76), 17.

94 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 123.

laws with special provisions not included in the scope of the TCC are regarded as commercial disputes.[95] In these regulations, a description was made in some, stating that commercial disputes are subject to commercial cases. At other points, however, it was indicated that along with the aforementioned point the commercial courts have jurisdiction for the resolution of these disputes. Explicit provisions are indicated without any descriptions regarding the dispute being the subject of a commercial case in relation to the fact that the commercial courts have absolute jurisdiction for the resolution of the dispute.[96] For instance, the commercial courts serving the location at which the procedure centre of the debtor is located have jurisdiction for bankruptcy cases (Art. 154/3 of the EBL). Likewise, it is explicitly indicated in Art. 22 of the LCEP that commercial courts serving the location at which the trade registry exists shall have the jurisdiction to handle disputes arising from the enforcement or upholding of this law. On the other hand, in some other laws, it is directly stated without additionally indicating that commercial courts have jurisdiction for the case in question that it is a commercial case. For instance, the provision indicated in Art. 99 of the Cooperatives Law states that civil actions arising from the matters regulated in that law would be deemed commercial cases without consideration of whether the parties are traders or not. It is clear in all of these examples that the mentioned disputes are regarded as commercial disputes. In this context, the Commercial Courts of First Instance are authorized and have jurisdiction for handling all commercial cases pursuant to the provision of Art. 5/1 of the TCC irrespective of consideration of the value and number of case subjects unless there is any provision otherwise.[97]

In the face of these explanations, it is clear that the nature of commercial cases as absolute commercial cases regulated by laws apart from the TCC remain within the scope of these examples and theoretical explanations pertaining to such examples are arising.

b) Actions Regarded as Commercial Cases Provided a Connection with a Commercial Enterprise

The acceptance of disputes arising from remittance in Art. 4/f-c2 of the TCC remittance procedure regulated in Articles 555-560 of the Law of Obligations and also from safekeeping contracts as regulated in Articles 561-580 of the Law of Obligations has been stipulated as dependent on their relations to commercial enterprises, as well as disputes arising from rights pertaining to intellectual and artistic works (LIAW) as commercial cases.[98]

95 İbid 124.

96 İbid 124.

97 İbid 124.

98 İbid 125.

In Turkish law, the rights regarding intellectual and artistic works are regulated in the LIAW, No. 5846. For the acceptance of disputes arising from this law as commercial disputes, it is necessary for the dispute to be related to a commercial enterprise. At this point, it is necessary to recall Art. 4/1-c of the TCC in relation to publishing contracts. Namely, disputes arising from publishing contracts will be regarded as absolute commercial cases as a requirement of Art. 4/1-c irrespective of the statuses of the parties and whether they are related to a commercial enterprise or not. The cases in which disputes pertaining to rights in relation to publishing contracts may be subject thereto, however, will directly be deemed absolute commercial cases as a requirement of Art. 4/1-c irrespective of the statuses of the parties and whether they are related to a commercial enterprise.[99]

c) Relative Commercial Cases

For the acceptance of the commercial cases indicated above, with an explicit indication, absolute commercial cases and cases remaining outside the scope of cases for which disputes included in the LIAW and remittance and contract of mandate (actio depositi) are subject thereto and included in the LIAW, provided that they are related to a commercial enterprise as commercial cases, it is necessary for both sides of the dispute in question to be traders and for the dispute to be related to the commercial enterprises of both parties. Cases within this scope are referred to as relative commercial cases.[100]

This matter had been regulated with the following wording in the preamble of the TCC: "Civil actions arising from the matters deemed as commercial for both sides" will be regarded as commercial cases as a requirement of the first paragraph of Article 21 in a manner that shall create confusion in the provision of Art. 4/I of the PTCC".[101] The attribution that was made in Art. 21 of the PTCC and subsequently criticized in the doctrine in unanimity is not included in Art. 4 of the TCC. By this means, a more explicit regulation was included. Thus, the criteria used in determining relative commercial cases are terms of the fact that "the parties will have trader statuses" and "disputes will be related to their commercial enterprises". In this context, following the entry of the TCC into force, it is explicitly clear that any disputes arising from various contracts such as sales, borrowing, services, exceptions, and so on being related to the commercial enterprise of only one of the parties will not be regarded as commercial cases even if both sides are traders. Thus, in determining relative commercial cases, the point that has to be taken into consideration as a criterion is not the commercial affairs but rather the status of the trader(s) and its connection with the commercial enterprises of the parties.[102]

99 İbid 125.

100 İbid 125.

101 Preamble of Art. 4 of the TCC, No. 6102.

102 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

However, it is necessary to indicate that this case is specific to real person traders. This is because it is essential that the debts of the trader are commercial in nature. To prove the contrary of this presumption is only possible from the point of view of real person traders.[103] That is to say, while the real person trader makes a legal transaction, if the opposite party indicates that the transaction has nothing to do with the trader's commercial enterprise or the subject matter is not relevant for the transaction to be regarded as commercial, then the opposite of the aforementioned presumption will be proved and the legal transaction will not be commercial in nature. However, this opportunity, namely the opportunity to prove the contrary of the presumption, is not available with respect to legal person traders. In this context, all debts made by legal person traders are regarded as commercial in nature. Therefore, if any of the parties of the transaction are legal person traders, then it will be sufficient to make an assessment only for the other party of the transaction.[104]

This principle for acceptance in relation to the stipulation of the fact that both parties are traders and the dispute subject to the case is related to the commercial enterprises of both parties as a commercial case is not specific to disputes arising only from contractual relationships. In disputes arising from any tortious act, relevant cases are regarded as commercial cases, provided that both parties are traders and the dispute is related to the commercial enterprises of both parties. For instance, the action for damages filed as a result of the crashing of a vehicle allocated to the commercial enterprise of A and belonging to A into a property where glassware products are sold and belonging to B, a trader, is a commercial case.[105]

On the other hand, for unfair competition based on a tortious act, according to the TCC, disputes arising from some circumstances such as collusion are commercial cases by nature as a requirement of the applicable law. Under these circumstances, for the assessment of whether the action is a commercial case or not, it is furthermore necessary to seek relative criteria pertaining to relative commercial cases.[106]

Reference is made not only to the commercial cases regulated by the TCC but additionally to other commercial cases regulated by other laws beyond the TCC for the requirement of the method of mediation as a cause of action in Art. 5/A-1 of the TCC. In this context, it is necessary to apply to the method of mediation as a cause of action with respect to commercial cases as regulated in both the TCC and other laws apart from the TCC.

103 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

104 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126; Bahtiyar (n102), 53-54.

105 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

106 Yarg. 11. H.D., 12834/5560 06.04.2012; Moroğlu and Kendigelen (n76), 20.

d) As a Requirement of Special Provisions in Commercial Cases by the TCC Considering the Problem of Whether Cases For Which Courts Other Than Commercial Courts of First Instance Have Jurisdiction Are Subject to Mandatory Mediation, and Evaluations Made with Relation to This Problem

In Turkish law, one of the main legal problems pertaining to the determination of cases subject to mandatory mediation within the framework of Art. 5/A of the TCC is as follows: at the basis of the principle containing the provision in Art. 5/I of the TCC stating that "unless there is any provision on the contrary, the Commercial Court of First Instance has the jurisdiction to handle all commercial cases and any non-contentious procedures of commercial nature without consideration of the value or amount of the matter subject to the legal action thereunder", the courts having jurisdiction in all cases determined as commercial cases by Art. 4 of the TCC or other laws are not only the Commercial Courts of First Instance. Some of these cases may be heard in specially designated courts such as consumer courts, courts for intellectual and industrial rights, and so on, within the framework of special provisions as contained in Art. 5/I of the TCC.

For instance, according to Art. 83 of Law No. 6502 on the Protection of the Consumer, the existence of regulations in other laws pertaining to transactions where one of the parties is a consumer will not preclude this transaction from being regarded as a consumer transaction or the application of the provisions of the law pertaining to the duty and authorization therein. Actions where disputes are subject to credit card contracts falling within the framework of this regulation are heard in consumer courts although they are regarded as absolute commercial cases within the framework of Art. 4 of the TCC. More explicitly, it must be asked whether the cases heard in courts with special authority or jurisdiction under such circumstances will lose or not lose their nature as commercial cases on the grounds that they were not heard by a Commercial Court of First Instance.[107] In this context, will these cases that are heard in courts with special authority be subject to mandatory mediation or not as a cause of action within the framework of Art. 5/A?

Some authors asserted within the doctrine of Turkish law that the mentioned cases handled in these courts with special authority do not lose their nature as commercial cases, and in this context, there is a condition to apply to mandatory mediation in advance of filing the case within the framework of Art. 5/A.[108] The main reasons constituting the basis of this opinion are as follows.[109] First, the essential condition for the application of Art. 5/A of the TCC is the existence of a commercial case. In this context, all absolute and relative commercial cases indicated in Art. 5/A of the

107 Yarg. 11. HD, 12871/735 13.02.2017; Yarg. 11. HD, 4399/2911.15.05.2017; Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

108 Paslı (n66), 15-17; İlker Koçyiğit and Alper Bulur, *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk*, ARCS Press, 2019, p. 126.

109 Koçyiğit and Bulur (n109), 126.

TCC are included in this scope. For this, there is no absolute condition thereunder for handling cases in a Commercial Court of First Instance. The handling of the same case in a different court with special authority will not change the commercial nature of the case. One of the results of said case being a commercial case is that the Commercial Court of First Instance has jurisdiction over it. However, this result is not absolute. As indicated above, it is also possible for such a case to be tried in courts with special authority such as consumer courts or civil courts of intellectual and industrial rights. Under these circumstances, the application to mandatory mediation as a cause of action, which is another possible result of a case being a commercial case, will not disappear. Thus, when the results of regarding the case as a commercial case in advance of mandatory mediation are that the Commercial Court of First Instance has jurisdiction over it and that the conditions of special courts are applied, an additional result is application to mandatory mediation. For these reasons, it is sufficient in Turkish law for a case to bear the nature of a commercial case for application to mandatory mediation; the condition for the Commercial Court of First Instance having jurisdiction over the foregoing will not additionally be sought. In the same context, the TCC will continue to be applied as general provisions in the settlement of disputes under these circumstances. For instance, commercial books will be used as evidence if relevant conditions exist (Art. 222 of the LPL). In conclusion, mandatory mediation will be applied as a cause of action as well (Art. 5/A of the TCC; Art. 18/A of the Law on Mediation in Legal Disputes).[110]

On the other hand, as a requirement of special provisions, it is asserted in the doctrine as a contrary opinion that in circumstances where a court other than Commercial Courts of First Instance, such as a consumer court or civil court on intellectual and industrial rights, has jurisdiction in commercial disputes, the nature of actions as commercial cases would disappear and, in this context, the regulation on mediation as a cause of action in Art. 5/A of the TCC could not be applied.[111]

The opposite view is explained by taking the result of a case qualifying as a commercial case into consideration before all else. Namely, the basic conclusion of a case qualifying as a commercial case is that the case be included in the field of the authorization of the Commercial Court of First Instance. It is clearly regulated in Art. 5/I of the TCC that Civil Courts of First Instance have authorization for commercial cases. The provisions pertaining to the field of authorization of consumer courts and intellectual and industrial civil courts bear the nature of special provisions according to Art. 5/I of the TCC.[112]

110 Koçyiğit and Bulur (n109), 126.

111 Mehmet Ertan Yardım, "Ticari Uyuşmazlıklarda Zorunlu Arabuluculuğa Başvuru", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press, 2019, p. 98; Tanrıver (n2), 119.

112 Yardım (n112), 98; Mehmet Bahtiyar and Levent Biçer, "Adi İş/Ticari İş/Tüketici İşlemi Ayrımı ve Bu Ayrımın Önemi", in *Prof. Dr. Cevdet Yavuz'a Armağan*, Legal Press, 2012, p. 424.

In light of these explanations, it is concluded that the basic consequence of a case being deemed a commercial case is that the said case is heard by a commercial court, and on the grounds that this result has not occurred in cases handled in consumer courts or courts with special authority, it is not possible to describe the cases handled in courts with special authority as commercial cases.[113] With respect to these cases, it is concluded that the stipulation to apply to mediation as a cause of action is not available within the framework of Art. 5/A.

In practice, however, it was mentioned in a decision of a regional court of justice in parallel to this opinion that it is not correct to describe a case heard by a consumer court as a commercial case with relation to the dispute arising from the failure to make a credit card payment. Furthermore, it is not necessary to apply to mediation as a cause of action.[114]

In our opinion, to put it explicitly, under circumstances where the court of duty for commercial cases may be a court other than the Commercial Court of First Instance, such as a consumer court or court of intellectual and industrial rights, as a requirement of special provisions, it will be more accurate with relation to the mentioned legal problem to commence a search for the objective that the lawmaker wants to protect with an arrangement according to the commercial case concept, not from the point of view of legal consequences related to the commercial case concept within the TCC for the resolution of the problem of whether the condition for mandatory mediation is present as a requirement of the provision of Art. 5/A in this

113 Yarg. 11 HD, 12871/735 13.02.2017; Yarg. 11 HD, 4399/2911.15.05.2017; Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

114 "It is erroneous for the Court to assess Articles 4 and 5 of the TCC and define the fact that it was necessary to apply Art. 18/A-2 of MCoCD No. 6325 on the grounds that the case was a commercial case. This is because after it has been determined in Art. 4 of TCC No. 6102 which works will be defined as commercial cases in Art. 4 of TCC No. 6102, it is indicated that the relationship between the Commercial Court of First Instance and the Civil Court of First Instance and other civil courts is a relationship of duty after having determined which courts would handle such matters in the capacity of a commercial court and also the establishment of commercial courts in Article 5 of said law. It is possible to gather commercial cases within three groups of absolute commercial cases, relative commercial cases, and cases of a commercial nature although related to only one commercial enterprise… Unless these conditions are all present together, the subject matter of the dispute being of the nature of a commercial work or regarded as a commercial work for the other party as a result of a commercial work presumption would not be sufficient to consider the case as a commercial case. Pursuant to the provision of Art. 19/2 of TCC No. 6102, considering a work that is regarded as a commercial work for one of the parties as a commercial work for the other party will not make the nature of the case commercial. This is because the TCC has determined commercial cases according to the commercial enterprise basis, not according to a commercial basis apart from cases regarded as commercial cases as a requirement of the applicable law. Under these circumstances, the commercial nature of the case does not bring the case the nature of a commercial case… In the concrete event it has been understood from the entire scope of the file that the case filed by the plaintiff bank in disfavour of the defendant's side for the collection of its unpaid receivable having arisen from a loan contract pertaining thereto was a consumer procedure and not a commercial case. To put it another way, the assessment of the case between the parties by the court as a commercial case pursuant to the provision of Art. 4/f of the TCC is erroneous… While it was necessary to make a decision of dismissal on a procedural basis as a result of the absence of the cause of action as a requirement of the provision of Art. 18/A-2 of the MCoCD only in action for damages and commercial disputes and since it has been understood that a party of the pending case is a consumer and that the law to be applicable in consumer disputes is Law No. 6502 and it will not be accurate to define this dispute as a commercial dispute, and while it was necessary for the court to examine the basis of the work and then resolve upon its conclusion, the decision made in the direction of the dismissal of the case on a procedural basis as a result of the unavailability of the cause of action in adverse opinions has been found contrary to the procedure and the applicable law". Istanbul BAM; 19 HD, 11.04.2019, Basis No. 2019/1062, Decision No. 2020/937. For the decision text, see http:/https:///www.lexpera.com.tr (08.01. 2020).

context and whether the commercial case nature of these cases will disappear. This is because the opinion within the framework of the logic presented with respect to the possibility of not being a criterion with regard to the determination of the commercial case concept of the principle containing the provision of Art. 5/I with regard to the fact that the Commercial Courts of First Instance have authorization will lead to an erroneous conclusion with the elimination of the criteria determining the concept. It is possible to clarify our opinion, which depends on the resolution of the problem, by taking the commencement of the point of the objective of the regulation regarding the Commercial Courts of First Instance having authorization as a basis in Art. 5/I and determining the criteria of the commercial case concept as follows: It has been specified in Articles 4-5 of the TCC according to the principle not for the cases filed in relation to all disputes arising from the matters regarded as commercial affairs but rather cases requiring the expertise of the judge due to their nature and subject matter and the handling of the these cases in commercial courts. This principle is explicitly indicated in the preamble of the PTCC with the following expression: "…under the title of 'Commercial Cases' … not all subject matters included in the concept of 'commercial affairs' from the point of view of the application of substantive law but rather only the subject matters that require the personal expertise of the judge due to their nature and structure have been classified as commercial cases…" This preamble maintains its validity with respect to the TCC that is in force.[115]

Again starting from this principle, the cases stated in Art. 4 of the TCC and indicated in some private laws are regarded as commercial cases on an absolute basis as a requirement of the applicable law irrespective of the identities of the parties and the nature of the matter. This includes Art. 4/I, a-f of the TCC, Art. 154/3 of the EBL, and Art. 2 of the LCEP. Apart from this, to qualify the cases pertaining to certain disputes as commercial cases, the condition to entail a commercial enterprise has been sought with the final sentence of Art 4/I-f of the TCC. There are also circumstances therein whereby the conditions for the dispute to be related to the commercial enterprise of each party for the handling of a dispute within the scope of a commercial case are sought.[116]

In Art. 5/A of the TCC, however, the application to mediation as a cause of action is stipulated only in terms of being a commercial case; for this, no stipulation for the Commercial Court of First Instance to have jurisdiction is sought on an additional basis.

Within the framework of all of these points, it is possible to make two main inferences, one negative and the other positive in nature, by taking the explanation regarding the objective in the preamble and in Articles 4-5 of the TCC in relation

115 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 116.

116 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 116.

to the determining criterion or criteria of the concept of commercial cases within the TCC. With respect to the negative inference, from the aforementioned points, it is understood on an explicit basis that the concepts of traders and commercial enterprises play a role rather than "commercial affairs" in the "commercial case" description (Art. 4/I, f, final sentence). However, this inference does not offer a clear determining criterion with respect to the description of a commercial case. More explicitly, the wording of Art. 4 of the TCC does not have any clarification regarding the relationship present for this matter with a commercial enterprise in any manner or for the description of commercial cases according to the trader status of the parties. On the other hand, the statement in the LREC's preamble regarding "not all matters being included in 'commercial affairs' with respect to the application of the substantive law" offers clear data regarding the fact that the concept of commercial affairs does not constitute a determining criterion in the description of commercial cases. In this context, the circumstances wherein the affair constituting the subject matter of the dispute is not a commercial affair but rather a consumer affair will not constitute an obstacle for the determination of the case as a commercial case.

Turning to the positive inference, the statement in the preamble that "the subject matters requiring the special expertise of the judge only as of their nature and structure are categorized as commercial cases" offers a very clear and explicit fundamental criterion regarding the willpower of the lawmaker in the description of commercial cases. Pursuant to this, the question of how to determine the issues that require the special expertise of the judge arise. In this context, it may be asserted that the said criterion is not explicit or clear. For this determination, the expression in Art. 5/I of the TCC that "unless there is a provision otherwise" will make a helpful contribution in this respect. Circumstances such as consumer procedures or intellectual and industrial rights requiring more special expertise of the judge in comparison to general commercial cases will be indicated as a matter of fact in the legal regulations pertaining thereto. In other words, it is necessary for the lawmaker to give an answer to the aforementioned question in such a legal regulation as a contrary provision.

The regulation of the fact that commercial cases may be handled in the Commercial Court of First Instance, however, comes forth as a natural result of being connected to the concept of commercial cases in the direction of the objective again in the preamble (Art. 5/I of the TCC). More explicitly, the court in which the judge having expertise to handle commercial cases is present is stated in Art. 5/I. However, the wording of "unless there is any provision otherwise" found in the introductory part of the same regulation means that this result is not absolute and the authorization of the Commercial Court of First Instance in the description of commercial cases is not a determining criterion. There may be some circumstances wherein judges who

have more expertise in comparison to the Commercial Court of First Instance may be required in parallel to the same main objective. Consequently, the lawmaker here has envisaged disputes pertaining to more special fields in comparison to the expertise that the judge of the Commercial Court of First Instance may have according to the following principle: "…the description of the subject matters that require the special expertise of the judge due to their nature and structure as commercial cases…unless there is any provision otherwise…"

In the face of this circumstance, the designation of the courts other than the Commercial Court of First Instance where judges who have special expertise thereon are available in the said field as a requirement of special provisions for some commercial cases with respect to the resolution of the legal matter in question will not eliminate the commercial case nature of the cases. On the contrary, it will consolidate it further. As a consequence, it will not constitute any contradiction with the will put forth by the lawmaker within the context of the TCC. On the contrary, it is in conformity with that will.

In response to criticism indicating that not all legal results related to commercial cases put forth by the authors[117] defending the opposite opinion were valid in cases where special courts have authorization and that, for this reason, the said cases would not be described as commercial cases, it is necessary to emphasize that the lawmaker has never taken a principle in the description of commercial cases indicating that the Commercial Court of First Instance has authorization under any circumstances whatsoever related to commercial cases, or the legal result as a criterion, and it is not possible to make any inferences from the wording or from the objective of the TCC. For the application of the mediation method as a cause of action in Art. 5/A-1 of the TCC, relevant reference is made not only to the commercial cases regulated in the TCC but also to other commercial cases regulated in other laws. In this context, it is necessary to apply to the method of mediation as a cause of action with respect to the commercial cases regulated in both the TCC and in other laws.

On the other hand, in the event that the legal question is assessed with respect to the objective of the regulation of mandatory mediation in Turkish law, the caseloads of courts for intellectual and industrial rights are as intensive as those of Commercial Courts of First Instance and the elimination of uncertainties while not neglecting the principles of speed and trust as well as legal circumstances in doubt are important requirements. Therefore, the objective toward which the mandatory mediation regulation is oriented in Turkish law necessitates the application of mandatory mediation with respect to cases handled by specialized courts with regard to related disputes corresponding to special fields.

117 Yardım (n112), 97.

In conclusion, an action described as a commercial case in the TCC will not lose its nature as a commercial case in the event that it is handled in a specialized court where the judge has more expertise, rather than the Commercial Court of First Instance, and the cause of action will be subject to the cause (condition) of mediation as a requirement of the provision of Art. 5/A. Hence, the condition sought for this in Art. 5/A of the TCC is that the case be a commercial case.

2. Commercial Cases Regulated in Laws Other Than the TCC

It is indicated in Art. 5/A of the TCC that two groups of commercial cases, namely commercial cases regulated in the TCC and commercial cases regulated in laws other than the TCC, are subject to mandatory mediation. The commercial cases regulated in the TCC are specified in Art. 4. The commercial cases included in the scope of that regulation have been explained above in detail. The group of commercial cases regulated in laws other than the TCC, with cases[118] regarded as absolute commercial cases as a requirement of special provisions in laws other than the TCC[119] and examined within the scope of our explanations with relation to Article 4 and cases within the scope of the cases regarded as commercial cases provided a relation to a commercial enterprise,[120] constitute the commercial cases in laws other than the TCC. Main examples of these cases are the absolute commercial cases specified in Art. 99 of the Cooperatives Law, Art. 22 of the LCEP, and Art. 154/3 of the EBL regulations and the cases deemed commercial cases provided that they relate to any commercial enterprise and filed against the violation of relevant intellectual and industrial rights within the scope of the LIAW. These examples are not limited and it is possible to add new ones by legal regulations that are either currently in force or possibly enacted in the future.

B. The Principle Containing Claims for Damages and Receivables Where the Subject of the Claim of the Plaintiff Is the Payment of a Certain Amount of Money

For application to mediation as a cause of action within the framework of Art. 5/A of the TCC, the existence of a commercial case regulated in other laws and within the framework of Art. 4 is not sufficient per se. Furthermore, there is a stipulation for such a commercial case to include claims for damages and receivables, the subject of which involves the payment of a certain amount of money.

This matter is explained in Art. 5/A as follows: "It is a stipulation of the legal action to have applied to the mediator in advance of the initiation of a legal action

118 Section III E, 1, a, xiii.

119 Section III E, 1, 2.

120 Section III E, 1, b.

with regard to the claims for damages and receivables, the subject matter of which refers to the payment of a certain amount of money, among the commercial cases indicated in Art. 4 of the TCC and other laws". This expression is criticized in the doctrine on grounds of the fact that it is written out inconveniently and has thus brought forth various legal questions and problems. The most important problem is related to whether some cases are included in the scope of Art. 5/A of the TCC with respect to the aforementioned principle or not.[121]

3. Assessments Pertaining to Commercial Cases That Are Controversial Regarding Whether the Plaintiff's Claim Is Included in the Scope of Art. 5/A of the TCC with Respect to the Principle of Containing Claims for Damages and Receivables, the Subject Matter of Which Is the Payment of a Certain Amount of Money

It is controversial in Turkish law whether some commercial cases are included in Art. 5 of the TCC and consequently subject to mandatory mediation with respect to the principle of covering claims for damages and receivables, the subject matter of which is the payment of a certain amount of money.[122] Here only the legal actions among these cases[123] such as negative declaratory actions, intellectual and industrial property law actions, and actions involving cumulative claims (objective mergers of cases) will be handled and assessments will address whether these legal actions are within the scope of Art. 5/A.

A. Negative Declaratory Actions

Two different opinions have been put forth in Turkish law regarding the solution of the problem of whether negative declaratory actions occupying an important place in the applications of Turkish commercial law with respect to the "principle of containing claims for damages and receivables, the subject matter of which is the payment of a certain amount of money", are included in the scope of Art. 5/A of the TCC.

In one of these opinions, an interpretation is made only according to the wording of Art. 5/A and it is indicated that negative declaratory actions are not within the scope of Art. 5/A.[124] As a consequence, it is concluded that there is no stipulation in these cases to apply to mediation as a cause of action.[125] The main grounds of

121 See Section III, 3 for assessments and explanations regarding cases that appear to be controversial with respect to this principle.

122 For other cases and assessments subject to the matter in question, see Yardım (n112), 99-100; Koçyiğit and Bulur (n109), 139-144; Nesibe Kurt Konca, "Ticari Uyuşmazlıklarda Dava Şartı (Zorunlu) Arabuluculuk", *SETA Perspektif*, Vol. 2, Iss. 2, 2016, pp. 221, 225, 5; Paslı (n66), 18-25.

123 See Özekes, Ekmekçi, Atalı, and Vural (n12), 185-194 for explanations regarding other cases in question from the point of view of a legal question and also pertaining to such legal questions within the framework of these cases. Yardım (n112), 99-100.

124 Yardım (n112), 99-100.

125 See Yardım (n112), 99-100; see Paslı (n66), 18-20 for explanations of this opinion and its preambles in the doctrine.

the authors[126] defending this opinions are as follows: One of the authors defending this opinion makes a point based on two fundamental principles. One of them is the principle that the literal interpretation has to be taken as a basis in the interpretation on the grounds that there is a procedural provision mentioning Art. 5/A of the TCC with actions for damages and receivables.[127] The other is the principle that the objective of mandatory mediation to reduce disputes to a minimum degree is taken into consideration and its application cannot be extended.[128] Taking these principles into consideration, the author reaches the conclusion that negative declaratory actions are not included in the scope of Art. 5/A on the grounds that the subject matter of the claim in negative declaratory actions is not the payment of a certain amount of money and, therefore, they are not included in the scope of mandatory mediation.[129]

Another author defending the same point of view, however, accepts, in principle, the interpretation that no conclusion could be reached contrary to the wording of the law. More explicitly, the wording of the law could not be eliminated by way of interpretation; however, it is possible to reach different results that the wording of the law has not regulated. On the basis of this principle, the author reaches the conclusion that particularly actions for performance are indicated with the provision of entailing claims for damages and receivables whereby the subject matter is the payment of a certain amount of money, as in Art. 5/A of the TCC. It is stated that it is not conditional in relation to these actions for performance to be related to only the payment of a certain amount of money, and in a wider sense, it is necessary to cover other lending debts as well. On these grounds, both positive and negative declaratory actions are not included in the scope of Art. 5/A and, as a consequence, are not included in the scope of mandatory mediation.[130] On these grounds, the author

126 Paslı (n66), 18-20; Yardım (n112), 99-100.

127 Paslı (n66), 18.

128 Paslı (n66), 19.

129 The author explains this opinion as follows: "In the event that a bill (bond) is not paid and a negative declaratory action is filed according to Art. 72 of the EBL, and in the event that the holder who keeps the bill in hand filed a direct action of debt, then the condition to resort to mediation as a cause of action will be valid and acceptable. This is because there is a demand in this circumstance both for a commercial action and payment of a certain amount of money. However, since the demand in a negative declaratory action where the dispute to be discussed actually refers to the payment of money and the regulation at issue is an arrangement pertaining to the procedure, this, as a declaratory action, will not be subject to mediation as a cause of action". Paslı (n66), 19-20.

130 The assertion of the author in revealing this opinion is as follows: "The claim for the payment of a certain amount of money in Art. 5/A of the TCC refers to an action for performance where the defendant is required to perform his/her payment obligation. In this arrangement, not all types of actions for performance [are considered] but only the actions for performance pertaining to the payment of a certain amount of money without comprising the obligations of performance apart from money and execution or non-execution. Again, the expression of 'receivables and compensation' mentioned in the letter of the arrangement is exactly in the same direction as the wording of 'about the payment of an amount of money'. In this way, the lawmaker has given place to the same wordings, one after the other. The wording at the beginning saying 'subject of commercial cases' refers to the relief sought, as well… The wording 'subject of the case' in procedural law does not correspond to the subject or event in the sense of the word, but rather to the relief sought. As is seen, the wording of 'payment of a certain amount of money' is included in the letter of the article and, at the same time, the arrangement regarding the case has also been emphasized with the wording of 'actions of debt and actions for damages' in the same direction". Yardım (n63), 99-100.

concludes that an application condition is available only for mediation as a cause of action in cases where a claim is brought forth in relation to the payment of a sum of money and, in this context, it is necessary for both positive and negative declaratory actions to not be included in the scope of Art. 5/A of the TCC.[131]

The opposite view of this opinion is also defended in the doctrine, stating that it is necessary for negative declaratory actions to not be included in the scope of Art. 5/A of the TCC and, as a consequence, to be subject to mandatory mediation.[132] The grounds for this opinion are explained as follows: It is accepted in relation to the said legal question that it is necessary to comprehend and take into consideration which interests the lawmaker wants to protect through this regulation and what is targeted again with the same as a basis in the interpretation of Art. 5/A of the TCC. However, along with this, it would not be correct to make an interpretation by the elimination of the wording of the regulation, and the wording is a factor to be taken into consideration thereunder. In other words, it is further accepted that it would be necessary to take the wording and the equity, or namely the spirit of the law, in the activity of interpretation (Art. 2 of the CL);[133] and on the basis of this principle, it is emphasized that Art. 5/A of the TCC is a regulation pertaining to procedural law, and, in this context, the literal interpretation was essential in the interpretation of the procedural provisions. However, in the event that it is not possible to infer an express and clear meaning only from the wording of the law for the resolution of the legal question requiring interpretation, it might be possible to reach a resolution by taking the objective into consideration. In light of this circumstance, there was no clarification from the point of view of the lawmaker regarding the general preamble of Law No. 7155 or the preamble of Art. 5/A to include actions for performance, the subject of which was the payment of a certain amount of money, in the scope of mediation as cause of action, and all other types of cases are considered to be outside of the scope; however, it is indicated that the lawmaker aimed to regulate mediation as cause of action through a similar regulation in all commercial cases by taking the success in cause of action mediation applications into consideration in any labour disputes based on individual and collective bargaining contracts commenced to be applied on the date of 01.01.2018.[134]

131 The author consolidates this opinion by making a comparison and assessment according to the provision of Art. 3 of the LLC. According to this assessment, for "application to the mediator in the actions filed for the employee and employer and compensation and also for reinstatement claims, similar wordings from a partial point of view are regulated as a cause of action. This clause, which entered into force as of 01.01.2018, has not been subject to fundamental discussions with respect to declaratory actions. The most important cause of this is probably that negative declaratory actions are hardly seen in the labour courts. As it is asserted that the arrangement covers not only the action for performance in this period but, at the same time, the negative declaratory action, as well", on the contrary, it is defended that this arrangement is specific only to claims for monetary receivables along with reinstatement action(s) or, in other words, to actions for performance regarding the payment of an amount of money. Çil Şahin, *İş Uyuşmazlıklarında Arabuluculuk*, Yetkin Press, 2018, p. 20.

132 Koçyiğit and Bulur (n109), 140-142.

133 Koçyiğit and Bulur (n109), 140; Kurt (n124), 5.

134 Koçyiğit and Bulur (n109), 145.

It can be concluded that, for the inclusion of both the action for performance and the declaratory action in the scope of the cause of action of mediation without any questions in the doctrine or relevant applications,[135] the following is stated: "It is the condition of the action to refer to the mediator in the cases filed with the claim of reinstatement and any claims for damages as well as employee or employer receivables based on individual or collective bargaining contracts" in Art. 3/1 of the LLC where the cause of action of mediation is regulated and the application continues in this way. Additionally, on the grounds that the declaratory judgment takes place within the context of the provision made at the end of the action for performance, and that the declaratory action was the processor of the declaratory action, as a consequence, negative declaratory actions were included in the scope of the Art. 5/A regulation of the TCC and, therefore, subject to the cause of action of mediation.[136]

Taking the explained preambles into consideration, it is concluded that declaratory actions along with cases on claims for damages and receivables, the subject matter of which is the payment of a certain amount of money pursuant to Art. 5/A of the TCC, are subject to mandatory mediation or namely to the mediation cause of action condition.[137] Furthermore, in addition to the foregoing, it is emphasized that in the event of the acceptance of the matter otherwise, a conclusion contrary to the objective of the lawmaker would be reached, and, in the meantime, substantial confusion would be experienced in practice.[138]

In practice, however, the 14th Civil Chamber of the Regional Courts of Justice of Istanbul did not share the same opinion. The 7th Commercial Court of First Instance of Istanbul accepted a request in an appeal decision in relation to the decision wherein it evaluated a negative declaratory action within the scope of the cause of action of mediation, and, as a consequence, concluded that negative declaratory actions are not included in the scope of Art. 5/A of the TCC and not subject to mandatory mediation.[139]

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135 In our opinion, the inference obtained by taking the LLC wherein mandatory mediation is regulated in the field of labour is related to the scope of Art. 5/A of the TCC and not convenient with respect to the rules of commenting. This is because the TCC is not a legal field that bears a striking resemblance to labour law. On the other hand, such regulations of the LLC are not general provisions that may be taken into consideration in the interpretation of Art. 5/A of the TCC. Therefore, it is necessary to take the particulars and objectives of the commercial code into consideration in the interpretation of Art. 5/A of the TCC.

136 Koçyiğit and Bulur (n109), 142; for example, also see Koçyiğit and Bulur (n109), 142-145; Kurt (n124), 5.

137 Yarg. 11, HD. 13.02.2017, Basis No. 2017/1287, Decision No. 2018/135; Yarg. 11, HD 15.05.2017, Basis No. 2017/4399, Decision No. 2018/2911, Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

138 See Section III.

139 In its preambles and conclusion the court used the following wording: "…returning to the concrete event, the claim of the plaintiff in this case is related to the negative declaratory claim. According to Art. 5/A of the TCC, application to the mediator before filing an action on claims for debts and damages, the subject of which consists of the payment of a certain amount of money according to Art. 5/A of the TCC, is a cause of action. The subject of the action will be determined by taking the petition for relief at the bill of petition, or the relief sought, as a basis. The application to a mediator is a cause of action under circumstances where the relief sought involves the collection of a pecuniary claim or a claim for damages. Negative declaratory actions cannot be evaluated within this scope. This is because there is no claim for the collection of a certain amount of receivable(s) in negative declaratory actions. That is to say, there is no obligation to apply to the mediator

In our opinion, a limitation arose within the scope of the commercial cases in Turkish commercial law in the text of Art. 5/A of the TCC on the basis of the principle that interpretation pertaining to the literal interpretation of regulations pertaining to procedural law forms a basis thereunder, with boundaries of commercial cases requiring application to the cause of action of mediation. In this regulation, it is stated that "the application to a mediator in advance of the initiation of a case regarding the claims for damages and receivables, the subject matter of which has been the payment of a certain amount of money, is a cause of action". As is clearly understood here, it is stated that mediation would be referred thereto in advance of the initiation of cases containing only claims for damages and receivables, the subject matter of which is the payment of a certain amount of money, in commercial cases. This clarification and the certainty in the expression of the regulation are obstacles to making a comprehensive interpretation. It is clearly understood from this wording that only the actions for performances covering claims for damages and receivables, the subject matter of which is the payment of a certain amount of money, are pointed out. With this wording, the lawmaker has put explicit and particular emphasis on the point that it is necessary to not leave disputes in doubt pertaining to any monetary payments where the requirement of trust has been the most certain in the field of commercial cases from the point of view of the application of mandatory mediation.

Another principle constituting an obstacle to a comprehensive interpretation in the face of the fact that voluntary mediation is the exception of mandatory mediation is related to the fact that the scope of the exception cannot be broadened by way of interpretation.

It is also necessary to emphasize that, taking the literal interpretation of the legal regulation as a basis, it is necessary not to violate the essence or objective of the law upon the entire elimination of it. In the assessment of whether or not Art. 5/A of the TCC is violated by the literal interpretation in this manner, it cannot be said that the interpretation pertaining to the wording would not create a contradiction to its objective. This is because the lawmaker brought a restriction like this to the scope of the commercial cases included in the scope of the boundaries of the regulation from the point of view having indicated that the objective would be achieved with expected sufficiency with respect to commercial cases included in the scope of the boundaries. Otherwise, either a restriction of that kind would not be brought in or it would be

for filing any negative declaratory actions with the nature of commercial cases. The justification (preamble) of the first degree court is, therefore, contrary to the procedure and the applicable law. On the other hand, it has been understood in the concrete event that the plaintiff applied to the mediator arbitrarily before filing this action and the report pertaining to the fact that an agreement having been issued with the participation of the mediator could not be reached has been added to the case petition, and the decision subject to appeal has been contrary to the procedure and applicable laws from this point of view, as well. Upon understanding that the first degree court made a decision contrary to the causes of action under the preambles thus revealed, it has been decided to dismiss the decision of the first degree court subject to appeal hereunder pursuant to the provision of Art. 353/1.a.4 of the LPL and to return the same to the said first degree court that made the decision for rehearing…" Istanbul BAM 14 HD, 21.03.2019, Basis No. 2018/52, Decision No. 2019/493 (see http://www.lexpera.com.tr for the full text of the decision (08.03.2020).

preferred to refer clearly to the commercial cases containing relevant requests for expressions or determinations that would enable an extensive interpretation without determining the boundaries of the scope clearly to this extent.

On these grounds, we are in favour of the opinion that negative declaratory actions are not included in the scope of the provision of Art. 5/A of the TCC and, consequently, it is not necessary to apply to the cause of action of mediation for negative declaratory actions.

B. Civil Actions of the Law on Intellectual and Industrial Property

In the doctrine, civil actions of the law on intellectual and industrial property, occupying a significant place among commercial cases with respect to the scope of Art. 5/A of the TCC, have been a topic of discussion.[140]

It is necessary to make an assessment according to whether the subject matter of the case contains any claim for damages and receivables with relation to the payment of a certain amount of money. In this context, if the subject of the legal action contains the claim at issue, then the action or case will be included in the scope of Art. 5/A and be subject to the cause of action of mediation. If it does not contain that, the case will not be included in the scope of Art. 5/A and consequently will not be subject to the cause of action of mediation. For instance, tangible and intangible claims for damages pertaining to disputes with relation to the field of intellectual and industrial law will be subject to the cause of action of mediation. On the other hand, actions of nullity (nullity of a trademark, etc.)[141] and cases covering requests for the determination of an act of violation will not be included in the scope of Art. 5/A on the grounds that they do not comprise claims for damages and receivables with regard to the payment of a certain amount of money. Consequently, they will not be subject to the cause of action of mediation.[142]

C. Objective Case Accumulation (Merger of Cases)

As a requirement of the nature of some disputes, the circumstances arising in cases where a plaintiff may come up with more than one claim against the defendant through the same statement of claim are called "accumulation of cases or objective case merger".[143] This matter is regulated in Art. 110 of the CCP under the heading of "Merger of Cases".

140 For explanations and assessments related to these discussions, see Osman Umut Karaca, "Dava Şartı Olan Arabuluculuk Kapsamındaki Sınai Mülkiyet Uyuşmazlıkları", *FMR*, Vol. 1, Iss. 2019, 2019, pp. 48-50.

141 Paslı (n66), 21.

142 Paslı (n66), 20-21.

143 Yardım (n112), 101; see Section III, B, 3, C for explanations on the circumstances wherein cases referring to the objective joinder of action (or piling up of cases) occur by making these claims with claims for tangible and intangible damages.

The following wording is seen in this provision: "A plaintiff party may come up with more than one principal claim in disfavour of the same defendant and independent of each other in his statement of claim. To this end, it is necessary for the claims forming the subject matters of the cases to take place within the same type of jurisdiction and have a common competent court with respect to all of the claims pertaining thereto".

As is understood from this provision, the four conditions indicated below are necessary for the occurrence of the legal status described as the merger of cases or objective case accumulation:

1) There must be more than one claim that the plaintiff may bring against the same defendant.

2) There must not be the states of essentialness or accessoriness among the claims brought forth thereunder.

3) All of the claims must be included in the scope of the same type of jurisdiction.

4) The court where the action will be filed and claims to be brought forth must have a common jurisdiction with respect to all claims.

In this case, notwithstanding that there is only one statement of claim formally available, there are various cases that are separate and independent from each other, as many as the number of claims principally. In the judicial process, every claim is separately preceded on an independent basis from the others and concluded according to the provision of Art. 297 of the Code of Civil Procedure.[144]

For instance, in the case of a legal action filed with the claim of trademark infringement and, furthermore, in the event that the determination, prevention of infringement, reinstatement, and bringing of claims for tangible and intangible damages are brought forth with the same statement of claim in the same case, then there will be an objective merger of cases. These types of cases are frequently seen in the field of commercial law.[145] This circumstance arises in cases filed against acts of unfair competition-based infringements and also infringements of intellectual and industrial property rights, especially as indicated in the previous example. In this context, it is possible to explain the legal question arising hereunder with respect to the determination of the scope of Art. 5/A under these kinds of circumstances: In the event that there is a claim for damages together with claims such as determination, prevention, reinstatement, and so on, then the legal action will be subject to mediation

144 Yılmaz Ejder, *Hukuk Muhakemeleri Kanunu Şerhi C 3*, Yetkin Press, 2017, p. 1689; Pekcanıtez (n29), 1092; Süha Tanrıver, *Medeni Usul Hukuku, C. I*, Yetkin Press, 2018, p. 629; Uğur Bulut, *Medeni Usul Hukukunda Davaların Yığılması: Objektif Dava Birleşmesi* (Adalet Press, 2017), pp. 23-27.

145 See Füsun Nomer Ertan, *Haksız Rekabet Hukuku: 6102 Sayılı Türk Ticaret Kanunu'na Göre*, XII (Levha Press, 2016), pp. 393-429 for detailed explanations related to various claims that may be asserted in cases that will be filed against any unfair competition acts.

as a cause of action with respect to the claim for damages. In the event that the action has been filed without fulfilment of the cause of action of application to a mediator, will it be dismissed inclusively of claims that are not subject to the cause of action of mediation? There is no doubt that, in such a case, the dismissal of the action in its entirety will constitute a contradiction with the procedural economy, the resolution process will be lengthened, and the dispute will maintain its uncertainty for a longer period of time. This circumstance will constitute a contradiction to the principle of trust that has been the main principle of commercial law and commercial activities. There have been different views put forth in the doctrine with relation to the resolution of this legal question. From the point of view of one of these opinions, it is necessary to separate the part of the action containing the claim for damages and to keep handling the case from the point of view of the other claims.[146]

The opinion indicating that the provision of Art. 5/A pertaining to the cause of action of mediation would be applied with respect to the principal request containing the claim for damages and receivables, the subject of which refers to only the payment of a certain amount of money under circumstances where an objective merger of case(s) is available and the opinion that the other principle claim(s) would not be applied, has been explained in an electronic publication of the Head Office of the Division for Mediation of the Directorate General for Legal Affairs of the Ministry of Justice.[147]

The 11th Civil Chamber of the Supreme Court of Appeals concluded in a recent decision[148] adjudging that a claim for damages and receivables, the subject matter of which is related to the payment of a certain amount of money, brought forth together with a claim not subject to mediation as a cause of action would not be subject to mediation in its decision for the resolution of the aforementioned problem.[149]

146 Paslı (n66), 25.

147 Koçyiğit and Bulur (n109), 69.

148 Yarg. 11. HD, 17.02.2020, Basis No. 2029/197, Decision No. 2020/1578. In an event subject to this decision, the plaintiff claimed that the person in charge of the defendant company collected money with the commitment that such money might be collected back at any time within the discretion of the payer of said money and a high proportion of profit would be distributed/given for the said money, and that this individual relied on that commitment and deposited money of the defendant company in Euro against a partnership status document. However, it was not possible to say that a valid partnership relationship was set up by and between the partners thereunder and it was alleged that the defendant company and the persons in charge of it were responsible for the return of the foregoing money. As a consequence, determination was requested regarding the fact that this individual was not a partner of the defendant company and had asked for the collection of the amount of money deposited in Euro from the defendants. The Commercial Court of First Instance dismissed the case on procedural grounds as "mediation was not resorted thereto as a cause of action in advance of the initiation of the case as a requirement of the provision of Art. 5/A of the TCC". The Regional Court of Justice (or Circuit Court of Appeal) decided to dismiss the case on a procedural basis on the same grounds (for the relevant text, see https://www.lexpera.com.tr/yargitay-kararlari (15.05.2020)).

149 The Supreme Court of Appeals reversed the decision of the Regional Court of Justice: "Notwithstanding that the action for collection, the subject of which refers to the payment of a certain amount of money, is subject to mediation, as the action pertaining to the determination of the fact that a valid partnership relationship has not been set up, is not an action of debt or action for damages, the subject of which refers to the payment of a certain amount of money, and it will not be subject to mediation. In this case, since an action for collection filed with a case not subject to mediation will not be subject to the cause of action, the grounds of the court in the reverse direction have not been found as right or convenient" (https://www.lexpera.com.tr/yargitay-kararlari (15.05.2020).

IV. Fundamental Principles of Mandatory Mediation in the Turkish Commercial Code Pertaining to the Procedure

The principles with relation to procedure among the principles pertaining to mandatory mediation in the TCC are regulated in Art. 18/A of the MCoCD and the MCoCD Reg. in the nature of a general norm different from the principles related to the merits. In other words, there is no legal regulation in the nature of a special norm regulating the principles related to the procedure.[150]

In our following explanations, five principles pertaining to the procedure of mediation taking place within the framework of these regulations in the TCC are presented. These principles are as follows: "The Procedure of Filing an Action in a Case Where No Settlement Is Achieved at the End of Mandatory Mediation Activities", "Place and Mode of Application to Mandatory Mediation", "Durations or Terms Pertaining to the Conclusion of Mandatory Mediation Activity", "Effects of Mandatory Mediation Application on Durations", and "Legal Consequences of Filing a Legal Action Without Resorting to Mandatory Mediation". Discussions regarding the content of these principles and basic legal questions occurring within this context and resolutions to these questions will be examined in the following subsections.

A. The Procedure of Filing an Action in the Event That No Settlement Is Achieved at the End of a Mandatory Mediation Process

It is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement was achieved at the end of the due mediation process or a copy of the same, certified by the mediator, to his statement of claim (Art. 18/A-II of the MCoCD and Art. 22-I). In the event that conformity with the said necessity is not achieved, the court shall send a letter of invitation containing a warning to the plaintiff indicating that the final report has to be submitted to the court within a peremptory term of one week or else the legal action or case related thereto will be dismissed on a procedural basis (Art. 18/A-II of the MCoCD and Art. 22-II of the MCoCD Reg.). In the event that the requirement of this letter of warning is not satisfied, it may be decided to dismiss the case on a procedural basis without sending the statement of claim to the counter-party (Art. 18/A-II of the MCoCD and Art. 22-II of the MCoCD Reg.).

B. Principles Pertaining to the Place and Mode of Application to Mandatory Mediation

An application for mediation is submitted to the Bureau of Mediation of the place where the competent court is located according to the subject matter of the dispute

150 See Section IIV, A.

and to the designated registry of the court in places where no Bureau of Mediation is established (Art. 18/A-IV of the MCoCD). The same matter is arranged in a more detailed manner and with some small differences in Art. 18/A-IV of the MCoCD regulation in response to this principle in Art. 23/I-IV of the MCoCD Reg. Namely, the arrangement considers the location of application at the MCoCD arrangement, saying that the application shall be made for the location of the opposing party and that if the opposing party is more than one then to the Bureau of Mediation at the place of settlement of any of them or the courthouse mediation bureau at the place where the work was carried out, and in case of places where no courthouse mediation bureau is established, then to the registry of the designated civil court of peace (Art. 23/I).

In the MCoCD Reg., however, the form of application that might be made by petition or upon filling with the forms available in bureaus or via electronic media is explained. The mode of application seen more frequently in practice is application to mediation by filling in a form at a Bureau of Mediation without a requirement to the statement of claim (Art. 23/III of the regulation).

Again, it is regulated in the MCoCD Reg. that during the application for mediation, the applicant shall be required to explain the matters in question subject to the dispute (Art. 23-IV of the MCoCD Reg.). In practice, despite this regulation, it appears that mediation bureaus do not require any definite or detailed explanations on the subject matter of the dispute and that it is possible to submit a mediation application with substantially general and uncertain expressions. However, when it is taken into consideration that the mandatory mediation activity is a pre-action procedure, it is inevitable that this matter may cause uncertainty and problems.[151]

C. Principles for the Durations or Terms Pertaining To the Conclusion of a Mandatory Mediation Activity (Process)

The provision in the field of the TCC in Art. 5/A-II states that in the case of an application to mandatory mediation it shall be necessary for the mediator to finalize the application within a period of six weeks from the date when the relevant assignment was made and the said period of time might be extended for at most a further period of two weeks. On the other hand, in Art. 18/A of the MCoCD wherein the general principles of mandatory mediation are thereto regulated, in the case of application to mandatory mediation, it is necessary for the mediator to conclude the application within a period of three weeks from the date upon which he/she was appointed and this duration can be extended by one week at maximum due to necessary circumstances (Art. 18/IX, Art. 25/V of the MCoCD Reg.).

151 Yardım (n62), 105.

In the field of the TCC, it is beyond doubt that Art. 5/A-II of the TCC as a requirement of the priority principle of the special norm of Art. 18/A of the MCoCD in the nature of a general norm and Art. 5/A-II of the TCC as special norm have different contents with respect to mandatory mediation. However, the field of commercial activities requires trust and speed to ensure the protection and maintenance of the existence of commercial activities. In this context, while legal arrangements are made with relation to the field of commercial activities, various periods of time are arranged in a shorter manner in comparison to the general provisions in order to fulfil the legal regulations.

When the periods of time are determined with relation to mandatory mediation in the field of commercial law, the opposite is determined. Explicitly, the period of time in the case of the special norm is six weeks for the termination of the mediation activity and, while it may be extended by at most two weeks to become eight weeks all in all, the period of time for the general norm with relation to the same subject matter is three weeks and may be extended for a maximum term of one week, reaching, in total, a full period of four weeks. Thus, the main objective for the existence and maintenance of commercial activities is violated by the extension of the resolution process of commercial disputes.

D. Principles on the Effects of Mandatory Mediation Application on Durations

To ensure the negotiations of the parties without being subject to the pressure of the termination of periods for foreclosure or lapse of time to enable the mediation activity to function properly, the provision in Art. 18/A-XV of the MCoCD specifies that the periods for the lapse of time suspended and terms for foreclosure will not function beyond the duration elapsed from the date of application to the mediation bureau to the date of issuance of the final report (Art. 27/I of the MCoCD Reg).

It is necessary to clarify under which circumstances the final report is issued for this arrangement. According to Art. 18/A-X of the MCoCD, the final report will be issued by the mediator upon termination of the mediation activity and the subject matter will immediately be reported to the mediation bureau. There are four circumstances that necessitate the termination of the mediation activity. These are cases involving impossibility from the point of view of the mediator to get in touch with the related parties, inability to conduct meetings/negotiations since the parties related thereto did not attend the first meeting, agreement of the parties, and disagreement of the same (Art. 18/A-X of the MCoCD).

In Art. 18/A-XVI of the MCoCD, however, the hesitations[152] that may arise with respect to the mentioned arrangements are eliminated through the indication of the

152 See Yardım (n112), 107 for relevant explanations.

fact that this provision has been valid and applicable with respect to the term of litigation as well, regulated in Art. 264/I of the EBL and with issuance of a cautionary attachment decision pursuant to Art. 397/I of LPL No. 6100.

E. Legal Consequences of Filing a Legal Action Without Applying to Mandatory Mediation

The regulations pertaining to mandatory mediation in the nature of a cause of action in the MCoCD are parallel in content to these general principles in the civil procedural law, as well. Namely, according to the regulation in the MCoCD: "It is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement has been achieved at the end of the mediation activity or a copy of the same, certified by the mediator, to his statement of claim. In the event that conformity with the said necessity is not achieved, the court will send a letter of invitation containing a warning to the plaintiff indicating that the final report must be submitted to the court within a peremptory term of one week; otherwise, the legal action/case will be dismissed on a procedural basis. In the event that the requirement of this letter of warning is not fulfilled, then it may be decided to dismiss the case on a procedural basis without sending the statement of claim to the counter-party. In the event that it is understood that the legal action was filed without referring to the mediator, it will be decided to dismiss the action on a procedural basis as a result of the lack of the cause of action without undertaking any procedure" (Art. 18/A-II of the MCoCD; Art. 22/I of the MCoCD Reg.). This regulation contains a few possibilities that must be assessed here.[153]

It is clearly understood from this regulation, as in the general provisions, that it is necessary for the plaintiff to refer to the mode of mediation before filing any action and, without doing the latter, not to file any action directly. If he files any action, it will be dismissed on a procedural basis. The plaintiff will only be able to file an action in the event that no agreement is reached at the end of the mediation activity. To ensure the functionality of this system practically, the regulation has been brought forth indicating that it is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement was achieved at the end of the mediation activity related thereto or a copy of the same certified by the mediator to his statement of claim.

Notwithstanding that it is noted here that the final report is not added to the statement of claim (apart from a case where it is understood that mediation is not referred thereto), a letter of invitation containing a warning will be sent by the court to the plaintiff indicating that it is necessary for the final report to be submitted to the attention of the court within a weekly peremptory term; otherwise, the action

153 Yardım (n112), 109.

will be dismissed on a procedural basis. In the event that the requirement of the letter of warning is not fulfilled, a decision will be made for the dismissal of the case on a procedural basis without sending the statement of claim for notification to the counter-party.[154]

In practice, the statement of claim is examined for the first time with the preliminary proceedings report. The judge will examine before all else whether it has been referred to mediation as a cause of action before the action was filed. If it is understood in this examination that no referral was made to mediation before the action was filed, dismissal of the case on a procedural basis will be decided without taking any further action as a consequence of the lack of the cause of action (Art. 18/A-II of the MCoCD, final sentence). As can be comprehended from this arrangement, the action will be dismissed on a procedural basis without taking any further action, not under the circumstances wherein the plaintiff fails to attach the final report, but in the event of understanding that the matter was not referred to mediation only.[155] In the event that it is understood long after the fact that the action was filed without referring the matter to mediation either within the period elapsed when the judge examines the statement of claim or fails to notice it and a report of disagreement is possibly issued and the court is applied thereafter, what kind of a decision should be made by the judge? According to the opinion on this matter, notwithstanding that it is not possible to apply Art. 115/II of the LPL with relation to the assignment of a period of time, it is possible to apply Art. 115/III. According to this regulation, if the judge did not notice the lack of the cause of action without getting into the merits of the case and the same was not asserted by the parties related thereto, if that lack or deficiency was eliminated at the moment of decision, then it is necessary to not dismiss the case on a procedural basis as a result of the lack of the cause of action at the beginning.[156]

According to another opinion on the contrary, however,[157] no matter the stage at which the judge notices the fact that mediation was not applied thereto before the legal action was filed (either before or after, without getting into the merits of the case), it is necessary for the judge to dismiss the case on a procedural basis without taking any further action. Under this circumstance, Art. 115/III of the LPL cannot be applied. This is because Art. 18/A-II has brought a more stringent regulation in comparison to the general provisions pertaining to the actions of cause. Notwithstanding that the author asserts that within the framework of the current arrangements or regulations the correct solution is the one he claimed, again, he further adds that it is necessary to make a clear arrangement with respect to what had to be done.[158]

154 Koçyiğit and Bulur (n109), 48.

155 Yardım (n112), 108.

156 Yardım (n112), 109

157 Yardım (n112), 108-109.

158 Yardım (n112), 110.

From our point of view, if an assessment is made in consideration of the objective of the arrangements regarding mandatory mediation to reduce caseloads of the courts related thereto, no matter the stage of action at which the judge notices that mediation was not applied thereto in advance when the action was filed, the case does not have to be dismissed on a procedural basis on the grounds of the lack of the cause of action. Thus, referral to mediation will be achieved without the engagement of the courts. The opposite resolution, however, will create ease in the system, thus encouraging the parties to abstain from applying to mediation. This is because a generalization has been made with a clear and definite expression through the provision in Art. 18/A-II of the MCoCD as follows: "In case it is understood that an action is filed before referral to mediation, it will be decided to dismiss the case on a procedural basis as a result of the lack of cause of action without undertaking any further procedures". This generalization encompasses the current possibility, as well. Apart from this, it is necessary to give a place to a clear arrangement such as the arrangement of sending a letter of invitation containing a warning for granting a weekly peremptory term for a resolution that may create ease in the system. The lawmaker did not want to give any exception that would cause ease in the system apart from this circumstance, arranged explicitly. Along with all possibilities, in the event that it has been understood that mediation has been resorted thereto but the final report was not available as a cause of continuation of the process, what kind of decision should be made by the court has not been regulated on an explicit basis, either. According to an opinion,[159] in light of this possibility, when it is understood that mediation was applied, it should not be possible to dismiss the case without undertaking any further procedures. It is necessary for the judge to grant a reasonable period of time for the submission of the final report.

In our opinion, since the stipulation to refer the matter to mediation has been fulfilled before the case is filed from the point of view of this possibility, the best solution is to grant a reasonable period of time and make a request for the submission of the final report. This is because the parties filed the legal action while the mediation process continued. This circumstance clearly demonstrates that the parties, as a matter of fact, do not have any intention of reaching an agreement.

V. Mandatory Mediation Applications in Turkish Commercial Law

Mandatory mediation has been applied in the field of Turkish commercial law for approximately 1.5 years. Although this duration is considerably short for making any assessment regarding the application of a legal regulation, the applications to date within the field of Turkish commercial law do contain data that offer an opportunity to make an assessment even if it is restrictive.

159 Yardım (n112), 109-110.

A. Determinations Pertaining to Mandatory Mediation Applications in the TCC

Mandatory mediation has been applied for approximately 1.5 years at the time of writing upon the entry into force of Law No. 7155, dated as 06.12.2018, on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts as of 01.01.2019 and also the regulation of Art. 5/A added to TCC No. 6102. Statistical data pertaining to the determination of mandatory mediation applications in the field of commercial law for the period between 02.01.2019 and 02.12.2019 were published by the Head Office of the Division for Mediation of the Ministry of Justice[160] in 2020. According to these data, the number of files wherein a mediator assignment was made in the field of commercial law within that one-year period was 146,413. Of those, the number of files finalized with agreement was 73,046, or 57%; on the other hand, the number of files not finalized with agreement and referred to the related commercial courts was 55,773, or 43%.

However, it has been determined within the scope of another scientific study[161] related to mandatory mediation applications in the field of Turkish commercial law that various actions were filed directly by lawyers without referral to mediation at all for various disputes that appeared to be included within the scope of this regulation after the entry into force of the regulations of Art. 5/A of the TCC and that those actions were dismissed on a procedural basis on the grounds that the foregoing actions were not referred to mandatory mediation. These cases considered within the scope of Art. 5/A of the TCC were carried over by the lawyers directly to the commercial courts knowing that they would be dismissed without referring to mandatory mediation,[162] or, in other words, in a deliberate manner, in consideration of the fact that the attorney fees for the latter choice would probably be lower.

B. Assessments Pertaining to Mandatory Mediation Applications in Turkish Commercial Law

Statistical data[163] on the applications of Turkish commercial law and in light of the elimination of the principle of voluntariness from mandatory mediation rebuts the

160 http//www.adb.adalet.gov.tr (05.03.2020).

161 Ümit Erdem, *Ticaret Mahkemesi Kararlarında Dava Şartı Zorunlu Arabuluculuk*, Seçkin Press, 2019.

162 The 7th Commercial Court of First Instance of Istanbul indicated in its decision of 40/5331.01.2019 that "it has been decided to dismiss the case on a procedural basis as a result of unavailability of the cause of action upon the fact that the plaintiff directly filed an action without referral to mediation as per his case petition and that mandatory mediation was at issue with respect to the claim for debt subject to the action in this respect…" Furthermore, the 2nd Commercial Court of First Instance of Istanbul indicated in its decision of 540/353 31.01.2019 that "since the fact that no action with relation to the payment of a certain amount of money could be filed without referral to a mediator as a requirement of Subparagraph No. 5/A-1 of TCC No. 6102 entered into force on the date of 01.012019, and it is a proven fact that the action has been filed without referral to a mediator, it has been decided to dismiss the case on a procedural basis without undertaking any further procedure…" See Erdem (n161), 29-304 for various decision models of this type.

163 See Section V, A.

thesis of the supporters of the opinion[164] arguing that the principle of voluntariness is an indispensable condition of mediation with a strict approach indicating that the possibility of mediation processes commencing with compulsion is very difficult or of little likelihood.

Furthermore, the acts of lawyers appear to be another point of determination with relation to said applications and the preference for filing an action directly for various disputes subject to mandatory mediation, giving rise to the possibility of lawyers faced with these disputes having a conscious preference on the grounds of their own interests, such as receiving slightly higher attorney fees to be paid to them in this respect.

Conclusion

We may outline the outcomes of this work as follows:

The lawmaker has shown the will to limit the scope of mandatory mediation in Art. 5/A of the TCC. This is partly because mandatory mediation is exceptional and partly because the goals can be achieved even under these limits. Thus, only those commercial actions containing claims for damages and receivables are made subject to mandatory mediation. The need for speed and security in commercial activities is felt especially for these proceedings. Therefore, uncertainties in relation to the payments may be eliminated through the application of mandatory mediation.

In our opinion, the limitations regarding mandatory mediation that the lawmaker determined in Art. 5/A of the TCC and other laws are in conformity with the nature and requirements of commercial law.

The most fundamental criticism of mandatory mediation is that this model is against the principle of voluntariness. According to this criticism, it is a low possibility that mandatory mediation will result in the agreement of the parties and so it is not practical.

In our opinion, the most accurate reply to this criticism is given by the statistical results on mandatory mediation applications in Turkish commercial law. The number of disputes resolved by the mandatory mediation process is 14% higher than the number of disputes that were not resolved by mandatory mediation and passed on to the courts. This shows that the criticism about mandatory mediation applications in Turkish commercial law is incorrect and that mandatory mediation reached the expected goals in this area.

Finally, with regard to mandatory mediation in Turkish commercial law, since attorneys may tend to take cases to court to receive more fees and some lawsuits are

164 See Section III, C, 2 for explanations regarding the supporters of this opinion and its content.

rejected on the basis of the cause of action of mandatory mediation, the lawmaker must have prescribed strict rules to solve this problem.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Fracture of Shareholders' Rights to Participate in Management in Joint Stock Company: Establishment of Usufruct on the Share

Anonim Ortaklıkta Pay Sahibinin Yönetime Katılma Haklarında Kırılma: Pay Üzerinde İntifa Hakkı Tesisi

Esra Cenkci*

Abstract

According to the provisions of property law, the usufruct grants the owner the power to possess, manage, use and benefit from the subject of the usufruct. This study determines how these powers will spread to rights to participate in management arising from the company's share when the subject of the usufruct is a share of a joint stock company. The issue is handled in the center of article 432 II of the Turkish Commercial Code. The Turkish Commercial Code differs from the provisions of the Swiss Code of Obligation 690 II and the Turkish Commercial Code numbered 6762 in certain points and regulates that the voting right arising from the share which has usufruct on it is used by the usufructuary, but the usufructuary shall be liable for any loss incurred when he / she does not respect the interests of the shareholder.

When evaluated together with the rules of property law, this study concludes that the provision brings a regulation in terms of voting rights; the usufructuary who has voting rights can also use other rights to participate in management, thus taking over the management of the share. However, the shareholder is not completely ineffective in this case. Some of the rights to participate in the management can also be used by the shareholder. Nevertheless, this does not include the right to file an annulment action, which is at least as effective as the voting right.

This study also discusses whether the shareholder can maintain his or her authority over the share, despite there being a usufruct on the share, by stipulating otherwise in the articles of association or an agreement between parties.

Keywords

Share of joint stock company, usufruct, voting right, right to attend assembly general meetings, right to demand information, right to file an annulment action

Öz

Eşya hukukuna ilişkin hükümler uyarınca intifa hakkı, sahibine, intifa konusunu zilyetliğinde bulundurma, yönetme, kullanma ve ondan yararlanma yetkilerini tanımaktadır. Bu çalışmada, intifa hakkının konusu anonim ortaklık payı olduğunda anılan yetkilerin ortaklık payından doğan yönetime katılma haklarına nasıl sirayet edeceği incelenmektedir. Konu, Türk Ticaret Kanunu 432 II merkezinde ele alınmaktadır. Türk Ticaret Kanunu bu konuda gerek mehaz İsviçre Borçlar Kanunu 690 II hükmünden gerekse 6762 sayılı Türk Ticaret Kanunu'ndan bazı noktalarda ayrılarak üzerinde intifa hakkı bulunan paydan doğan oy hakkının intifa hakkı sahibi tarafından kullanılacağını; pay sahibinin menfaatlerini gözetmeyen intifa hakkı sahibinin tazminat sorumluluğunun doğacağını düzenlemektedir.

Eşya hukuku kuralları ile birlikte değerlendirildiğinde hükmün oy hakkı açısından bir düzenleme getirdiği; oy hakkına sahip olan intifa hakkı sahibinin diğer yönetime katılma haklarını da kullanabildiği ve böylece payın yönetiminin intifa hakkı sahibinde olduğu sonucuna ulaşılmaktadır. Öte yandan, pay sahibi bu durumda tamamen etkisiz değildir; yönetime

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katılma haklarının bazıları pay sahibi tarafından da kullanılabilmektedir. Ne var ki, bu kapsama en az oy hakkı kadar etkili bir hak olan iptal davası açma hakkı dahil değildir.

Çalışmada ayrıca, esas sözleşmede veya özel bir anlaşmada hükmün aksinin öngörülerek payın üzerinde intifa hakkı bulunmasına rağmen pay sahibinin payı üzerindeki otoritesini sürdürüp sürdüremeyeceği de tartışılmaktadır.

Anahtar Kelimeler
Anonim ortaklık payı, intifa hakkı, oy hakkı, genel kurula katılma hakkı, bilgi alma hakkı, iptal davası açma hakkı

Fracture of Shareholders' Rights to Participate in Management in Joint Stock Company: Establishment of Usufruct on the Share

Introduction

According to the Swiss Code of Obligation[1] (SCO) 690 II, when a usufruct exists on a share, it is represented by the usufructuary, but the usufructuary who does not respect the interests of the shareholder shall be liable for any loss against her / him. The provisions of Turkish law on this subject were taken from Swiss law SCO 690 II and was transferred to Turkish Commercial Code[2] (TCC) 432 II with small differences. According to the aforementioned provision, when there is a usufruct on the share, unless otherwise agreed, the voting right is used by the usufructuary. The usufructuary is responsible to the shareholder when he / she does not respect the interests of the shareholder.

The subject of the usufruct on the share is the rights provided by the share[3]. There is no doubt that the main interest of usufructuary is for financial rights[4]. However, considering that management rights, voting rights, the right to attend assembly general meetings, and the right to demand information and right to file an annulment action can all be considered within the scope of the usufruct, constitutes an important problem. The provision in the Code (SCO 690 II, TCC 432 II) is insufficient to provide a solution to this problem, as the code requires that the rules regarding company law and property law are taken into account.

1 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations).

2 Turkish Commercial Code, Code Number: 6102, Acceptance Date: 13.1.2011, Official Gazette 14.2.2011/27846.

3 Martin Bichsel and Kaspar Mauerhofer, in Jolanta Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Frankhauser (eds), *ZGB Kommentar* (3rd edn, Orell Füssli 2016) Art 745 N 11; Walter Boss, in Jolanda Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Fankhauser (eds), *OR Kommentar* (3rd edn, Orell Füssli 2016) Art 690 N 6; Stephan Dekker, in Jeannette K. Wibmer (ed), *Aktienrecht Kommentar: Aktiengesellschaft, Rechnungslegungsrecht, VegüV, GeBüV, VASR* (1st edn, Orell Füssli 2016) Art 690 N 11; Peter Forstmoser, Arthur Meier-Hayoz and Peter Nobel, *Schweizerisches Aktienrecht* (1st edn, Stämpfli 1996) § 45 N 13; Abuzer Kendigelen, *Anonim Ortaklık Payı Üzerinde İntifa Hakkı* (1st edn, Beta 1994) 28; Andreas Länzlinger, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar: Obligationenrecht II Art. 530-964 OR inkl. Schlussbestimmungen* (5th edn, Helbing Lichtenhahn 2016) Art 690 N 12; Alain Raemy and Simon Gabriel, in Vito Roberto and Hans Rudolf Trüeb (eds), *Handkommentar zum Schweizer Privatrecht Bd. 7: Personengesellschaften und Aktiengesellschaft – Vergütungsverordnung [Art. 530-771 OR und VegüV]* (3rd edn, Schulthess 2016) Art 690 N 7; Christoph Thurnherr, in Peter Breitschmid and Alexandra Jungo (eds), *Handkommentar zum Schweizer Privatrecht Bd 3: Sachenrecht Art. 641-977 ZGB* (3rd edn, Schulthess 2016) Art 745 N 4.

4 Werner Weber, *Das Stimmrecht bei Aktien in Nutzniessung* (J. Kalt-Bucher 1927) 52.

This study will attempt to determine the distribution of authority between a shareholder and a usufructuary in respect to the use of the management rights provided by a share. Financial rights such as the right to demand dividend, liquidating dividends, pre-emptive rights and so on are not in the scope of this study. While doing this, the Swiss and the Turkish law literature and practice will be used.

I. Usufruct in General

Usufruct is an easement which allows a certain person full benefits of a property, right or estate. In this respect, usufruct is a limited real right that provides the widest authority on the subject of usufruct in favor of a person after the owner. In fact, through the establishment of usufruct, the naked ownership or the eigenvalue of property or right remains in the possession of the owner. The power to possess, manage, use this right or property and benefit from it belongs to a certain person[5]. Even though the parties may agree to exclude the authority to benefit in certain matters from the usufruct (SCivC[6] 745 II, TCivC[7] 794 II), the authority to benefit from the usufruct should belong to the usufructuary in its widest scope[8]. The usufructuary has to exercise care as a good manager when using his or her powers (SCivC 755 III, TCivC 803 II).

It is possible to establish a usufruct, either by an agreement between the shareholder and the usufructuary, or in connection with the use of a right arising from the law; also, the surviving spouse can ask for a usufruct on the residence where they lived with the deceased spouse (SCivC 612a, TCivC 652 II)[9].

II. Establishment of Usufruct on the Share

Shares of a joint stock company may also be subject to the usufruct. The fact that the share is tied to a bill does not change the fact that the subject of the usufruct is a right; it is only important for the formal transactions required to establish usufruct on the share[10]. That is to say, the promissory transaction to establish usufruct on the share is not subject to a form. However, the disposal transaction takes place in accordance with rules regarding the transfer of the negotiable instruments when the share is tied to a bill. Accordingly, the registered shares should be endorsed, and their possession should be transferred (SCO 967 I II, TCC 490 II). Including the statement "for usufruct" in the endorsement transaction prevents the usufructuary from transferring the bill as if he is

5 Bichsel and Mauerhofer (n 3) Art 745 N 13; Kemal Oğuzman, Özer Seliçi and Saibe Oktay-Özdemir, *Eşya Hukuku* (14th edn, Filiz 2011) 662, 694, 679.

6 Swiss Civil Code of 10 December 1907.

7 Turkish Civil Code, Code Number: 4721, Acceptance Date: 22.11.2001, Official Gazette 8.12.2001/24607.

8 Bichsel and Mauerhofer (n 3) Art 745 N 8, Art 755 N 1; Bülent Köprülü and Selim Kaneti, *Sınırlı Ayni Haklar* (Fakülteler Matbaası 1972-1973) 97; Oğuzman, Seliçi and Oktay-Özdemir (n 5) 661; Thurnherr (n 3) Art 745 N 5.

9 For the view that the legal usufruct cannot be qualified as narrow and technically usufruct, as they have different features than the usufruct arising from an agreement, see: Köprülü and Kaneti (n 8) 85.

10 Köprülü and Kaneti (n 8) 83; Kendigelen (n 3) 29.

an owner against third parties in good faith[11]. It is sufficient to transfer the possession of the bearer shares in order to establish usufruct on them[12].

Restrictions imposed by the articles of association regarding the transfer of registered shares also go for the usufruct (SCO 685a II, TCC 492 II). In this case, usufruct on a share can only be established with the approval of the company (SCO 685a I, TCC 492 I).

Usufructuaries are also registered in the book of shares. In relations with the company, usufructuaries, which are registered in the book of shares, are accepted as rights holders (SCO 686 IV, TCC 499 III). However, since the registration in the book of shares does not have a constitutive effect in terms of gaining entitlement, the usufructuary who proves this title in other ways may also use his rights against the company.

III. Distribution of Rights to Participate in Management

A. Voting Rights

1. As a Rule: Use of Voting Rights by the Usufructuary

A vote is a unilateral declaration of intention that enables the shareholder to participate in the will of the company. Although the shareholder has only one share, he has at least one voting right (SCO 692 II, TCC 434 II). This "minimum voting right" is an inalienable shareholder right (SCO 707b I 1, TCC 447 I a). Aforesaid nature of the voting right contradicts the rights of usufructuary. It is stated in the SCO 690 II that the share which has usufruct on it will be represented ("vertreten") by the usufructuary[13]. The TCC includes a provision on the subject of voting rights. Accordingly, voting rights arising from the share which has usufruct on it is used by the usufructuary (TCC 432 II). In this case, voting rights are used directly as a rightsholder by the usufructuary, but not as a representative of the shareholder[14].

11 Max Baumann, 'Nutzniessung und Wohnrecht, Art. 745-778 ZGB' in Peter Gauch and Jörg Schmid (eds), *Zürcher Kommentar ZGB Band IV/2a/2 - Das Sachenrecht - Die beschränkten dinglichen Rechte* (3rd edn, Schulthess 1999) Art 773, 774, 775 / A. - C. N 20; Weber (n 4) 26.

12 Baumann, 'Nutzniessung und Wohnrecht' (n 11) Art 773, 774, 775 / A. - C. N 21; Kendigelen (n 3) 87, 94; Köprülü and Kaneti (n 8) 81, 83; Oğuzman, Seliçi, Oktay-Özdemir (n 5) 664; Yiğit Tahsin Okur, 'Hisse Senetleri Üzerinde İntifa Hakkı Tesisi' (1971) 18(6) İktisat ve Maliye Dergisi 224, 224 ff; Weber (n 4) 26. For the view that an annotation like "for usufruct" on the bearer share will eliminate the good faith of third parties see: Baumann, 'Nutzniessung und Wohnrecht' (n 11) Art 773, 774, 775 / A. - C. N 21.

13 Since there was no provision about this issue before SCO 690 II, for different opinions see Weber (n 4) 36 ff. The Federal Court decided (50 II 545 ff) that voting rights should be used by the shareholder and usufructuary together, such as co-owners on the share before the article 690 II of the SCO came into force.

14 Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 13-14; Sandro Germann, *Die personalistische AG und GmbH - Unter besonderer Berücksichtigung von Aktionär- und Gesellschafterbindungsverträgen, SSHW Band/Nr. 327* (Dike 2015) N 663; Peter Jung, in Lukas Handschin (ed), *Zürcher Kommentar: Allgemeine Bestimmungen, Art. 620-659b OR Die Aktiengesellschaft*, (2nd edn, Schulthess 2016) 625 N 67; Kendigelen (n 3) 207 ff; Erdoğan Moroğlu, 'Anonim Ortaklıkta Genel Kurul' in Erdoğan Moroğlu (ed), *Makaleler* (On İki Levha 2010) 291, 299-302; Ömer Teoman, 'Anonim Ortaklıkta Paylar Üzerinde İntifa Hakkı Bulunması Durumunda Oy Hakkı Dışındaki Yönetim Haklarının Kimin Tarafından Kullanılacağı Sorunu' in Ömer Teoman (ed), *Tüm Makalelerim*, *vol. I-II: 1971-2001* (2nd edn, On İki Levha 2012) 365, 373. Jung, entitles the usufructuary who has voting right as *de facto shareholder* ("Quasi-Aktionär") (Jung ibid Art 625 N 93).

The use of the expression "vertreten", which means "represent" in the SCO does not change this result[15]. Thus, an exception is made to the rule that the minimum voting right is an inalienable shareholder right.

The fact that the voting right belongs to the usufructuary is based on the fact that this right is an important tool in using the power to manage provided by the usufruct[16]. According to a view against this, the use of the voting right is a management process aimed at benefiting from the fruits of the share; however, its legal effect is in any case closely related to the eigenvalue of the share. Since this circumstance exceeds the limits of the power to manage and benefit which is granted to the usufructuary to obtain the fruits, the voting right should not be considered within the scope of the power to manage[17]. In my opinion, the fact that the interests of the shareholder regarding the eigenvalue of the share will be adversely affected when the voting right is used by the usufructuary is a matter that can be considered in terms of the appropriateness of granting the voting right to the usufructuary. However, this does not prevent the voting right from being evaluated within the scope of the power to manage.

When it comes to the matter of whether granting the voting right to the usufructuary is the most appropriate when the balance of interests is considered, Kendigelen asserts that the provision of TCC 432 II (SCO 690 II) does not bring a correct solution. According to him, the voting right is of equal importance for both the shareholder and the usufructuary; however, the interest of the shareholder acting for the purpose of protecting the assets and value of the share is fundamental in face of the interest of the usufructuary acting only for profit. Furthermore, the majority of the decisions taken at the assembly general meeting are related to the eigenvalue of the share and they concern the interests of the shareholder. The principle of liability that will apply when the voting right is used in a way that disregards the interests of the other party is more applicable when the voting right is used by the shareholder. In this respect, the interests of the shareholder can only be protected when the voting right is granted to the shareholder and, in this case, an adequate protection can also be provided for rights of the usufructuary[18]. In case the usufruct is established on a share, interests

15 Peter Böckli, *Schweizer Aktienrecht mit Fusionsgesetz, Börsengesellschaftsrecht, Konzernrecht, Corporate Governance, Recht der Revisionsstelle und Abschlussprüfung in neuer Fassung – unter Berücksichtigung der angelaufenen Revision des Aktien- und Rechnungslegungsrechts* (4th edn, Schulthess 2009) § 12 N 137; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 13; Jung (n 14) Art 625 N 67; Länzlinger (n 3) Art 690 N 12.

16 Baumann, 'Nutzniessung und Wohnrecht' (n 11) Art 773, 774, 775 / A. - C. N 41; Boss (n 3) Art 690 N 8; Botschaft des Bundesrates an die Bundesversammlung zu einem Gesetzesentwurf über die Revision der Titel XXIV bis XXXIII des schweizerischen Obligationenrechts vom 21. Februar 1928 (BBl 1928 I 205) 246; Dekker (n 3) Art 690 N 11 15; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 13; Länzlinger (n 3) Art 690 N 12; Arzu Oğuz, 'Pay Senetleri Üzerinde İntifa Hakkı Kurulması ve İntifa Hakkının Kapsamı' (1991) (1) Ankara Barosu Dergisi 23, 37; Yiğit Tahsin Okur, 'Üzerinde Kısmen İntifa Hakkı Tesis Olunmuş Hisse Senetlerinden Doğan Oy Hakkının Kime Ait Olacağı' (1971) 18(7) İktisat ve Maliye Dergisi 273, 274; Raemy and Gabriel (n 3) Art 690 N 7 10; Thurnherr (n 3) Art 755 N 3.

17 Kendigelen (n 3) 236-240.

18 Kendigelen (n 3) 240-248. On the same page, see Weber (n 4) 51 ff.

of the parties conflict, because the interest of usufructuary is to benefit from the fruits of the share to the maximum while the interest of the shareholder is to protect the eigenvalue of the share. Taking into consideration the nature of usufruct, the usufructuary is charged with not harming the eigenvalue of the share while using his rights and thus an attempt at a balance was made between these conflicting interests (SCO 690 II, TCC 432 II). This charge prevents the unrestricted use of the voting right by the usufructuary, when the decision to be taken at the assembly general meeting concerns the eigenvalue of the share[19]. Therefore, the use of the rights by the usufructuary on the condition that not harming the eigenvalue of the share would not cause the usufructuary to be isolated from the power to manage the share; on the contrary, this restriction imposed on the power of the usufructuary ensures the use of the power to manage by himself. Under this requirement lies the thought that general meeting resolutions regarding the eigenvalue of the share also affect the right to the benefits of the usufructuary in some way. For example, although the decision for a merger is a decision concerning the eigenvalue of the share, the results of the merger affect the fruits of the share, which are the most important interest of the usufructuary. Moreover, even if individual interests conflict, the common interest of the shareholder and usufructuary is the growth and the maximum profit of the company. As such, the results of the right to manage used by the usufructuary in decisions concerning the eigenvalue of the share will generally be in the interest of the shareholder.

On the other hand, the preferences of the usufructuary on matters concerning the eigenvalue of the share may not always serve the common interest. Since the usufructuary will focus on the short-term results of the decision taken while using the voting right, the decision may have a negative effect on interests of shareholders in the long term. There are provisions to protect shareholders against this danger. Firstly, a legal relationship arises between the usufructuary and the shareholder when the usufruct is established[20]. The breach of this relationship, which necessitates the protection of the eigenvalue and the prudent management of the share by the usufructuary, is the reason for liability (SCivC 752, SCO 97, TCO[21] 112). This point is enacted in SCO 690 II and TCC 432 II exclusively for the use of voting rights[22]. A shareholder may also benefit from general provisions regarding usufruct: He may contest the use of the voting right in violation of his interest; on condition that he proves that his rights fell into danger, he may request assurance from the usufructuary (SCivC 759, 760, TCivC 807, 808). If the usufructuary does not provide assurance or does not end the unlawfulness, the shareholder may litigate for the immediate

19 Raemy and Gabriel (n 3) Art 690 N 10.

20 Kendigelen (n 3) 117; Köprülü and Kaneti (n 8) 68.

21 Turkish Code of Obligations, Code Number: 6098, Acceptance Date: 11.1.2011, Official Gazette 4.2.2011/27836.

22 Baumann, 'Nutzniessung und Wohnrecht' (n 11) Art 773, 774, 775 / A. - C. N 41.

transfer of the management of the share to the trustee (SCivC 762, TCivC 810). As can be seen, the power to manage has been granted to the usufructuary in accordance with the definition and nature of the usufruct by both general and special provisions. The usufructuary's power to manage in matters related to the eigenvalue is limited and preventive measures are taken to protect the shareholder against the risk of a breach of this limit.

2. As an Exception: Use of the Voting Right by the Shareholder

When there is a usufruct on a share, the rule that the voting right will be used by the usufructuary is not mandatory[23]. Unlike the SCO, it is explicitly stated in the TCC with the expression "if not otherwise agreed". Therefore, parties may make an agreement that is different from the legal regulation and serves the interests of both parties[24]. The shareholder and the usufructuary may agree that the voting right will be used by the shareholder[25]. It is not necessary to have a provision in the articles of association to make such an agreement[26]. This agreement which is not subject to a form[27] is relatively effective between parties[28].

Leaving the voting right to the shareholder means that the power to manage is exercised by the shareholder. Changing of the content of the usufruct in this way does not contradict the nature of limited real rights and the rule that limited real rights are subject to the type restriction, because the provisions related to the property law allow for such a change within the scope of the usufruct (SCivC 745 II, 755 II, TCivC 794 II, 803). As stated above, since the primary interest of the usufructuary is to benefit from fruits of the share, the usufruct focuses on shareholding rights related to assets. Thus, the use of the voting right by the shareholder does not harm the core of the usufruct.

When it comes to the matter of whether articles of association can include a provision stating that the voting right will be used by the shareholder, According to

23 Zühtü Aytaç, *Sermaye Piyasası Hukuku ve Hisse Senetleri* (BTHAE 1988) 122-123; Herald Bärtschi, 'Pfandrecht und Nutzniessung an Gesellschaftsanteilen' in Peter V. Kunz, Florian S. Jörg and Oliver Arter (eds), *Entwicklungen im Gesellschaftsrecht VII* (Stämpfli 2012) 338; Kendigelen (n 3) 257 ff; Rudolf Koeferli, *Die Nutzniessung an Wertpapieren unter besonderer Berücksichtigung der Nutzniessung an Aktien* (P.G. Keller 1954) 77; Oğuz (n 16) 36-37; Jung (n 14) Art 625 N 64 ff.

24 For the view that such an agreement is inevitable in order to protect the interests of both parties, see: Baumann, 'Nutzniessung und Wohnrecht' (n 11) Art 773, 774, 775 / A. - C. N 43. For a view that such an agreement would be against the principle of indivisibility of the share, see: Weber (n 4) 59.

25 Aytaç (n 23) 123; Bärtschi (n 23) 338; Boss (n 3) Art 690 N 9; Dekker (n 3) Art 690 N 13; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 23; Kendigelen (n 3) 260; Länzlinger (n 3) Art 690 N 13; Oğuz (n 16) 36-37; Raemy and Gabriel (n 3) Art 690 N 8.

26 Jung (n 14) Art 625 N 66.

27 Kendigelen (n 3) 268-269; Hüseyin Ülgen, 'Anonim Ortaklıklarda Paylar Üzerinde İntifa Hakkı Halinde Oy Hakkının Malik Tarafından Kullanılmasını Öngören Sözleşmelerin Geçerliliği' (1977) 28(12) İktisat ve Maliye Dergisi 488, 495; Weber (n 4) 59.

28 Böckli (n 15) § 12 N 137.

Böckli, changes regarding the voting right within the corporate area of the company can only be made by the articles of association. Unless there has been a provision contrary to SCO 690 II in the articles of association, such an agreement, which is relatively effective between parties, cannot be claimed against the company; with this agreement, all that can be said is that the shareholder has been authorized to use the voting right[29]. Another view is that it is not compulsory to have a provision in the articles of association; however, this issue can be foreseen in the articles of association as well as in an agreement between parties[30]. The reasons Koeferli offers, are remarkable. According to him, parties can freely agree on this issue since there is no public interest in using voting rights by the usufructuary and there is no prohibition in entitling the shareholder to vote by the usufructuary. In addition, since the company has sovereignty in determining its organization, voting rights can be bestowed to the shareholder through the articles of association[31]. It should be emphasized that there is no explicit provision in the SCO that the articles of association may include a provision contrary to the SCO 690 II. Indeed, the expression "voting right of shareholders" in the SCO 626 (I 5), where the mandatory content of the articles of association is regulated, refers to the regulation to limit voting rights of those holding more than one share (SCO 692 II) and the regulation regarding that each share has one vote, regardless of its nominal value (SCO 693). These are also considered to be included in conditionally mandatory content (SCO 627 10)[32]. Therefore, the legal order does not allow for such a provision in the articles of association[33]. In addition, issues related to the corporate area of the company are issues such as limitation of voting rights and privileges in voting. Since the use of voting rights by the usufructuary or the shareholder is not in the scope of the corporate area, it is not compulsory to have a basis in the articles of association. Acceptance of the opposite view requires that a provision should also be sought in the articles of association for an appointment of a representative. Besides, the right to change the content of the agreement between the shareholder and the usufructuary regarding the establishment of usufruct on the share belongs to parties of this relationship to the

29 Böckli (n 15) § 12 N 137; Jung (n 14) Art 625 N 67.

30 Bärtschi (n 23) 338; Boss (n 3) Art 690 N 9; Dekker (n 3) Art 690 N 13; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 23; Länzlinger (n 3) Art 690 N 13.

31 Koeferli (n 23) 77-78.

32 Böckli (n 15) § 1 N 484 500; Wolfgang Zürcher, in Jolanda Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Fankhauser (eds), *OR Kommentar* (3rd edn, Orell Füssli 2016) Art 626 N 11; Adrian Plüss, in Jeannette K. Wibmer (ed), *Aktienrecht Kommentar: Aktiengesellschaft, Rechnungslegungsrecht, VegüV, GeBüV, VASR* (1st edn, Orell Füssli 2016) Art 626 N 5; Conradin Cramer, in Lukas Handschin (ed), *Zürcher Kommentar: Allgemeine Bestimmungen, Art. 620-659b OR Die Aktiengesellschaft* (2nd edn, Schulthess 2016) Art 626 N 49; Martin Waldburger, in Vito Roberto and Hans Rudolf Trüeb (eds), *Handkommentar zum Schweizer Privatrecht Bd. 7: Personengesellschaften und Aktiengesellschaft – Vergütungsverordnung [Art. 530-771 OR und VegüV]* (3rd edn, Schulthess 2016) Art 626 N 9.

33 On the other hand, Jung argues that the conditional mandatory content regulated in SCO 627 is not limited to those listed in this article (see for the same view: Böckli (n 15) § 1 N 508; Cramer (n 32) Art 627 N 24; Waldburger (n 32) Art 627 N 1); hence, the fact that the use of voting right arising from the share which has usufruct on it is not stated in SCO 627 does not mean that there can bring no provision in the articles of association in this matter; nevertheless, such a provision, which will later be included in the articles of association, must be approved by the usufructuary [Jung (n 14) Art 625 N 64].

extent permitted by law. Thereby, the relativity of the agreement prevents inserting provisions that will affect this relationship in the articles of association. The desire to include such a provision in the articles of association may arise from the idea of protecting the economic independence of the company by preventing interference in its management. The way that the company can achieve this is regulated in the TCC 492 II (SCO 685a II). Accordingly, an establishment of usufruct may be subject to an approval of the company by a provision in the articles of association[34]. TCC 492 II (SCO 685a II) stipulates that the power of the company to establish usufruct on shares is not unlimited; the right to attend the assembly general meeting and the voting right of the usufructuary can only be prevented by the company in certain cases. Therefore, the company cannot prevent the use of the voting right by the usufructuary through a general provision stipulated in the articles of association[35].

It is also possible to distribute voting rights between the usufructuary and the shareholder on the basis of a variety of matters[36]. For example, it may be decided that the voting right belongs to the shareholder in matters related to the change of structure and capital, but it shall be used by the usufructuary in other matters. Since there is no simultaneous use or demand for the same right by more than one person, such an agreement does not contradict the principle of the indivisibility of shares. Parties may also agree that a part of voting rights arising from the shares that are subject to the usufruct shall be used by the shareholder and the remaining portion by the usufructuary[37]. Although it is theoretically possible to make an agreement that the voting right shall be used together, it will be in the interest of neither the company nor the parties if they cannot agree on matters where their interests conflict and that this situation is continuous[38].

The possibility of making an agreement on the use of voting rights between parties brings the problem of how the company shall determine who is entitled to use the voting right. As it is known, besides registered shareholders, usufructuaries are also registered in the book of shares, and the person who has been registered in the book of shares is accepted as a shareholder or a usufructuary (SCO 686 I IV, TCC 499 IV). The reason for the usufructuaries also being registered in the book of shares is that the authority to represent the share is given to the usufructuary with the SCO 690 II (TCC

34 On this subject, see Hanspeter Kläy, *Die Vinkulierung, Theorie und Praxis im neuen Aktienrecht* Helbing & Lichtenhahn 1997) 308, 511 ff; Thomas Nagel, 'Die statutarische Vinkulierung nicht kotierter Namenaktien' (2015) (1) AJP/PJA 191, 196-197.

35 For the view that the voting right cannot be given to the shareholder by the articles of association, see: Kendigelen (n 3) 266-267; Okur, 'Oy Hakkı' (n 16) 274-275.

36 Aytaç (n 23) 123; Max Baumann, *Praktische Probleme der Nutzniessung an Aktien, Obligationen und Anlagefonds-Anteilscheinen* (Schulthess Polygraphischer 1980) 53; Kendigelen (n 3) 265.

37 Baumann, *Nutzniessung an Aktien* (n 36) 55 ff.

38 Botschaft des Bundesrates an die Bundesversammlung zu einem Gesetzesentwurf über die Revision der Titel XXIV bis XXXIII des schweizerischen Obligationenrechts vom 21. Februar 1928 (BBl 1928 I 205) 246; Koeferli (n 23) 75; Weber (n 4) 46, 49-51.

432 II) and shareholding rights arising from the registered shares can be used by the persons registered in the book of shares (SCO 689a). Therefore, the company should be notified that the voting right is left to the shareholder by an agreement, or the issues for which the shareholder is entitled to vote, and this should be recorded in the book of shares[39]. Since these records have a reporting effect, it should not be forgotten that it can be claimed against the company by proving the right-holding in other ways. Although the notified company did not comply with this, and did not do the necessary transactions, an annulment action can be filed for decisions of the assembly general meeting (SCO 706, TCC 446). When the agreement regarding the use of the voting right is not notified to the company or the entitlement cannot be proved, esteeming of the company to the legal regulation should be justified, as the shareholder must suffer the consequences of not fulfilling the obligation of notification or burden of proof.

The shareholder uses the voting right obtained by the agreement directly as a right holder, not as a representative[40]. When using the voting right, the shareholder has to comply with obligations arising from the legal relationship that causes the usufruct on the share. Hereunder, the shareholder should act taking into consideration rights of the usufructuary; otherwise, he is obliged to pay damages to the usufructuary (SCO 97, TCO 112).

3. Use of the Voting Right in Case the Share is Partially Subject to the Usufruct

The question of who will use the voting right arising from the share that is partially subject to usufruct is disputable. According to Kendigelen, when interests are compared, the voting right should belong to the shareholder if the usufruct is 50% or less, but if it exceeds 50% of the share, the provision of law (SCO 690 II, TCC 432 II) should be applied by analogy and the voting right should be used by the usufructuary[41]. In Turkey, the Supreme Court of Appeals has decided that the voting rights arising from the shares that are subject to the usufruct belong to the usufructuary by law[42] (TCC 432 II). TCC 432 II (SCO 690 II) has the purpose of granting the voting right to the usufructuary based on reasons that interests of the usufructuary should be protected against the shareholder who is in a stronger position. Thus, the shareholder is already protected against dangers arising from the use of voting rights by the usufructuary with the same provision[43]; the use of the voting rights by the usufructuary is not regulated depending on a proportion in the

39 Kendigelen (n 3) 265-266, 269; Ülgen (n 27) 495.

40 Kendigelen (n 3) 261; Ülgen (n 27) 495

41 Kendigelen (n 3) 256-257.

42 Eleventh Civil Department of the Supreme Court of Appeals, 2243/2768, 28.5.1981 < www.sinerjimevzuat.com.tr > accessed 15 February 2019; Second Business Department of the Supreme Court of Appeals, 3004/, 30.3.1973 [Hayri Domaniç, *Anonim Şirketler Hukuku ve Uygulaması - TTK Şerhi II* (Temel 1988) 791-792].

43 Okur, 'İntifa Hakkı' (n 12) 278.

law[44]. In this case, since there is more than one right on a share, it is conceivable that the voting right can be used through a joint representative[45], but conflicting interests of the usufructuary and the shareholder prevent them from demonstrating their will through a joint representative. This is because conflicting interests, aside from the appointment and dismissal of the representative, also bring uncertainties about how the representative will perform the different orders[46].

In my opinion, the will of the shareholder, who permits partial usufruct on his share, is different from the establishment of a usufruct on the whole share. The shareholder does not want to lose control of the share in this way and the usufructuary implicitly accepts the authority of the control of the shareholder by consenting to obtain usufruct partially. In this respect, when the usufruct right is partially established on a share, TCC 432 II (SCO 690 II) which brings an exception to the shareholder's voting right should not be applied; it shall be accepted that the voting right belongs to the shareholder by respecting the will of the parties which can be seen in the agreement between them. In this case, the shareholder does not use the voting right as a representative of the usufructuary; he uses the voting right as a right holder. While using this right, the shareholder is obliged to comply with the provisions of the legal relationship with the usufructuary, while at the same time, being obliged not to violate the right to benefit of the usufructuary. Otherwise, he has to pay the damages of the usufructuary (SCO 97, TCO 112).

When a share is subject to more than one usufruct, the discussions above have no place because of the harmony of the interests of right holders. In this case, voting rights provided by shares should be used through a joint representative[47].

B. Right to Attend Assembly General Meetings

Since the voting right can be used in the assembly general meetings, the usufructuary who is authorized to use the voting right, also has the right to attend assembly general meetings[48]. The fact that TCC 432 (SCO 690) is regulated under the heading of "I-Attendance to the assembly general meeting" confirms this. The right to attend assembly general meetings includes the right to participate in discussions in the assembly general meeting *a fortiori*.

There are different opinions in the doctrine whether or not the shareholder can also attend assembly general meetings, when the voting right is used by the usufructuary. According to some, when the voting right belongs to the usufructuary, the shareholder

44 Aytaç (n 23) 122; Oğuz (n 16) 39.

45 Indeed, see: Domaniç (n 42) 784.

46 Kendigelen (n 3) 252; Oğuz (n 16) 39; Okur, 'İntifa Hakkı' (n 12) 277-278.

47 Aytaç (n 23) 123; Domaniç (n 42) 784; Kendigelen (n 3) 253; Oğuz (n 16) 39.

48 Bärtschi (n 23) 337; Jung (n 14) Art 625 N 67; Kendigelen (n 3) 326; Moroğlu, 'Genel Kurul' (n 14) 299 ff; Teoman (n 14) 374.

does not have the right to attend assembly general meetings[49]. Holders of this view do not state any explicit reason for their view. Contrarily, others argue that as it is understood from the marginal heading of the SCO 689 (TCC 425), this provision aims not to jointly use a part of rights flowing from attendance to the assembly general meeting. For this reason, in this case, attendance of the shareholder near to the usufructuary to the assembly general meeting is under the initiative of the company[50]. The right to attend assembly general meetings is an inalienable right of shareholders (SCO 706b, TCC 447). It cannot be said that TTK 432 II (SCO 690) forecloses this right. This provision also gives the usufructuary the opportunity to attend assembly general meetings, as the voting right can be used in the assembly general meeting[51]. Indeed, this right is also important for shareholders in terms of the use of certain rights that will not be affected by the usufruct on the share. In this respect, even if there is a usufruct on a share, the shareholder who is authorized to attend the assembly general meeting should also be invited to the meeting.

In case it is decided that the voting right will be used by the shareholder, the usufructuary's right to attend assembly general meetings, which is granted to him with an exceptional provision and in connection with the voting right, is eliminated[52].

C. Right to Demand Information

The right to demand information is a wide-ranging concept. It contains three types of informing. Firstly, the company must keep the basic information (annual report and audit report) ready for review by the shareholders (SCO 696, TCC 437 I). This obligation is fulfilled spontaneously by the company without any demand (active information). Apart from that, shareholders may also demand to be informed about certain issues (SCO 697, TCC 437 II IV). In this case, the company becomes obliged to provide information after the demand of the shareholder (passive information). The third type of informing is through special audit (SCO 697a-697g, TCC 438-444). In this way, the balance is redressed between the interest of the shareholder regarding the disclosure of the information and the interest of the company not to disclose the secret information, thanks to the special audit conducted by a third party[53].

49 Aytaç (n 23) 123; Böckli (n 15) § 12 N 137; Dekker (n 3) Art 690 N 12; Raemy and Gabriel (n 3) Art 690 N 9.

50 Boss (n 3) Art 690 N 9; Länzlinger (n 3) Art 690 N 13.

51 For others who agree with the opinion that shareholders may also attend assembly general meeting, see: Bärtschi (n 23) 337; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (13th edn, Vedat 2014) N 679a; Kendigelen (n 3) 326; Teoman (n 14) 375.

52 For the opinion that in this case, the usufructuary has the right to passive attendance, see: Jung (n 14) Art 625 N 67.

53 BGE 133 III 453 E. 7.2; BGE 140 III 610 E. 2.2; Dekker (n 3) Art 696 N 5; Peter Forstmoser, 'Informations- und Meinungsäusserungsrechte des Aktionärs' in Alain Hirsch, Peter Nobel, Peter Böckli, Peter Forstmoser and Jean Nicolas (eds), *Rechtsfragen um die Generalversammlung* (Schulthess 1997) 89; Urs Kägi, in Jolanda Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Fankhauser (eds), *OR Kommentar* (3rd edn, Orell Füssli 2016) Art 696 N 3, 697 N 2; Peter V. Kunz, 'Das Informationsrecht des Aktionärs in der Generalversammlung' (2001) (8) AJP/PJA 883, 883-884; Raemy and Gabriel (n 3) Art 696 N 1; Rolf H. Weber, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar: Obligationenrecht II Art. 530-964 OR inkl. Schlussbestimmungen* (5th edn, Helbing Lichtenhahn 2016) Art 696 N 1b.

The right to demand information is an inalienable right of the shareholder[54]. The feature of this right, which is an independent shareholding right[55], is to enlighten the shareholder and thus ensure the proper use of other rights. For this reason, this right is in close connection with the rights of shareholders, such as the right to file an annulment, nullity and responsibility action, the right to demand a special audit, and especially the voting right[56]. This right, which has been granted in order to make the voting right effective, is a natural extension of the voting right[57]. Therefore, although there is no clarity on this subject in the law, this right should also be used by the usufructuary when the voting rights belong to him[58]. Otherwise, the usufructuary's ability to fulfill the obligation of careful management may be questioned. Consequently, results that do not comply with the interests of the shareholder may arise, since the voting right cannot be used properly. As the right to demand information is granted to the usufructuary in connection with the voting right, the usufructuary who does not have the voting right shall not have the right to demand information[59].

However, the use of the right to demand information by the usufructuary does not prevent the shareholder from using it[60]. Because the acceptance that the shareholder does not have the right to demand information means that the use of this right has been waived by the shareholder with an agreement for establishment of usufruct, this result is contrary to the inalienable character of the right. Furthermore, since the shareholder is given the opportunity to check whether his interests are observed by the usufructuary, the fact that the shareholder has the right to demand information is appropriate to the nature of the usufruct relationship.

The right to demand a special audit should be considered within the scope of the shareholder's right to demand information in a broad sense[61]. Because the shareholder may demand the appointment of a special auditor for clarification of certain issues (SCO 697a, TCC 438). The use of the right to demand information in accordance with the TCC 437 (SCO 696, 697) constitutes a prerequisite for using

54 Felix Horber, 'Das Auskunftsbegehren und die Sonderprüfung - siamesische Zwillinge des Aktienrechts' (1995) (91) SJZ 165, 165; Arslan Kaya, *Anonim Ortaklıkta Pay Sahibinin Bilgi Alma Hakkı* (BTHAE 2001) 76 ff; Kunz, 'Informationsrecht' (n 53) 884.

55 BGE 112 II 147; BGE 109 II 47, 48; Kägi (n 53) Art 697 N 3; Kunz, 'Informationsrecht' (n 53) 884; Weber (n 53) Art 697 N 1.

56 Kaya, *Bilgi Alma Hakkı* (n 54) 80.

57 Bärtschi (n 23) 337; Teoman (n 14) 372.

58 Aytaç (n 23) 124; Bärtschi (n 23) 337; Boss (n 3) Art 690 N 11; Dekker (n 3) Art 690 N 16; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 22; Kaya, *Bilgi Alma Hakkı* (n 54) 153; Kendigelen (n 3) 322; Länzlinger (n 3) Art 690 N 16; Oğuz (n 16) 40; Raemy and Gabriel (n 3) Art 690 N 12; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku II* (13th edn, Vedat 2017) N 974; Teoman (n 14) 372-373; Jung (n 14) Art 625 N 67.

59 For the opposite view, see: Jung (n 14) Art 625 N 67.

60 Aytaç (n 23) 124; Bärtschi (n 23) 337; Boss (n 3) Art 690 N 11; Dekker (n 3) Art 690 N 16; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 22; Kaya, *Bilgi Alma Hakkı* (n 54) 154; Kendigelen (n 3) 323; Länzlinger (n 3) Art 690 N 16; Oğuz (n 16) 40; Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku II* (n 58) N 974; Raemy and Gabriel (n 3) Art 690 N 12; Teoman (n 14) 373.

61 Urs Schenker, 'Die Sonderprüfung – ein schwieriges Instrument' (2019) (1) GesKR 18, 19.

the right to demand a special audit[62]. The right to demand a special audit has been granted to shareholders as an additional opportunity, who think that they have not obtained sufficient information despite using their right to demand information[63]. In this respect, the reasons requiring the right to demand information to be granted to the shareholder as well as the usufructuary are also valid for the right to demand a special audit. The power to manage grants the usufructuary the authority necessary to benefit fully from the usufruct issue. Due to the right to demand a special audit, the usufructuary has the opportunity to realize maximum profit expectation by preventing possible corruption. The usufructuary whose demand for attending a special audit is rejected by the assembly general meeting is also eligible to apply to the court for an auditor appointment provided that he constitutes a minority pursuant to the TCC 439 (SCO 697b).

D. Right to File an Annulment Action

There is no doubt that an action for the nullity of the decisions of the assembly general meeting and board of directors, which can be filed by anyone with interest, can also be filed by the usufructuary independent of the voting right.

Who should use the right to file an annulment action is disputable. In doctrine, Okur is of the opinion that the usufructuary does not have the right to file an annulment action, since the usufructuary is not ranked among those who can file an annulment action (SCO 706 I, TCC 446)[64]. Riemer and Tanner argue that the SCO 690 II was regulated under the heading of "Attendance to the assembly general meeting" (OR 689) and this provision does not include the annulment action due to the aforementioned system. Likewise, the voting right and the right to file an annulment action are different rights, and are not connected[65]. Moroğlu suggests that both of them (the usufructuary and the shareholder) are authorized to file an annulment action, the legal nature of the relationship among them is the facultative joinder of parties. The possibility of filing an annulment action constitutes the legal guarantee of the right to attend assembly general meetings and the voting right from the point of the usufructuary, even if the usufructuary is lacking in the voting right, he may file an annulment action just like shareholders without the voting right. Likewise, when the voting right belongs to the usufructuary, the shareholder may use the right to file

62 Arslan Kaya, 'Özel Denetim İsteme Hakkının Bilgi Alma ve İnceleme Hakkı İle İlişkisi' (2015) 31(1) BATİDER 61, 71; Peter V. Kunz, 'Zur Subsidiarität der Sonderprüfung' (1996) (92) SJZ 1, 2 ff ; Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku II* (n 58) N 1016d; Schenker (n 61) 19 ff.

63 Kaya, 'Özel Denetim' (n 62) 71-72; Schenker (n 61) 19.

64 Yiğit Tahsin Okur, *L'action en annulation des décisions de l'assemlée générale des actionnaires dans la société anonyme* (Delachaux et Niestlé 1965) 106.

65 Hans M. Riemer, *Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht* (Stämpfli 1998) N 160; Brigitte Tanner, in Lukas Handschin (ed), *Zürcher Kommentar Band: Obligationenrecht. Art. 698-726 und 731b OR - Die Aktiengesellschaft (Generalversammlung und Verwaltungsrat, Mängel in der Organisation)* (3rd edn, Schulthess 2018) Art 706/ I. - IV. N 48.

an annulment action (by voting negative and writing the opposition to the protocol according to the Turkish law) as he has the right to attend assembly general meetings. When there is a partial usufruct on the share, both may file an annulment action separately provided that they fulfill the mentioned conditions[66]. In Switzerland and Turkey, the view that the annulment action can be filed by both of them is dominant[67].

Teoman, on the other hand, states that the voting right and the right to file an annulment action constitute a whole. The usufructuary has to file an annulment action (with the provision to vote negative and write the opposition to the protocol according to the Turkish law) when the interests of the owner require, otherwise he will be responsible to the shareholder. The acceptance that the shareholder is also authorized to file an annulment action may render it meaningless that the voting right is only granted to the usufructuary and it also means that the system accepted by the TCC in terms of the right to file an annulment action would be extended through comments[68].

When we look at this in practice, in a decision dated 28.5.1981, the Eleventh Civil Department of the Supreme Court of Appeals demonstrated preference on behalf of the last opinion by making a decision that even if there is a partial usufruct on share, the right to file an annulment action would belong to the usufructuary; the shareholder has no right on this subject[69]. In its decision dated 2.6.2015, the Federal Court stated that there was no provision stating that the right to file an annulment action belongs to the usufructuary or the shareholder when the share has a usufruct, and in the article 690 II, only a provision regarding the attendance to the assembly general meeting was envisaged[70]. Although it can be accepted that with this decision, the Federal Court holds the opinion that the usufructuary does not have the right to file an annulment action, it would not be wrong to say that the Court did not assert a clear view on this matter.

The fact that the voting right belongs to the usufructuary or the shareholder means that he is authorized to determine the direction of the vote and therefore the will of the company. Acceptance of the right to file an annulment action can be used by both right holders causes the one's voting right to be deactivated by the other through filing an annulment action. As stated, the person who is entitled to use the voting right

66 Erdoğan Moroğlu, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü* (8th edn, On İki Levha 2017) 258 ff.

67 Bärtschi (n 23) 337; Boss (n 3) Art 690 N 11; Dekker (n 3) Art 690 N 16; Forstmoser, Meier-Hayoz and Nobel (n 3) § 45 N 22; Jung (n 14) Art 625 N 67; Kendigelen (n 3) 302 ff; Koeferli (n 23) 80; Länzlinger (n 3) Art 690 N 16; Oğuz (n 16) 41-43; Yavuz Okçuoğlu, 'Anonim ve Kooperatif Şirketler Genel Kurul Kararlarının İptali İçin Gerekli Olan Muhalefet ve Muhalefetin Tutanağa Geçirilmesi' in *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu II* (BTHAE 1985) 279; Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku II* (n 58) N 974; Raemy and Gabriel (n 3) Art 690 N 12; Paul Stadlin, 'Über die Rechtsstellung des Eigentümers von in Nutzniessung stehenden Aktien' (1945) 17 SAG 185, 191.

68 Teoman (n 14) 374-375. See for the same view: Halil Arslanlı, *Anonim Şirketler II: Anonim Şirketin Organizasyonu* (İstanbul Üniversitesi 1959) 77; Aytaç (n 23) 124; Domaniç (n 42) 890.

69 Eleventh Civil Department of the Supreme Court of Appeals, 2243/2768, 28.5.1981; Eleventh Civil Department of the Supreme Court of Appeals, 12676/4234, 29.4.2003 < www.sinerjimevzuat.com.tr > accessed 1.10.2019.

70 BGE 4A_706/2014 E. 3.1.

is obliged to observe the interests of the other's while using this right. Sanctions on the violation of this obligation are not an invalidation of the vote or the decision of the assembly general meeting, but are the payment of any damages arising from this reason to the other. *De lege lata,* it is not possible to accept the reasons asserted[71], in case the other is also entitled to file an annulment action. Occurrence of damage can be prevented and the risk of not compensating the damage can be eliminated. For this reason, the right to file an annulment action should be used only by the person who has the voting right.

Conclusion

When the subject of the usufruct constitutes a share of a joint stock company, scope of the power to manage, on which property law is based, should be determined by taking into consideration the principles of the company law. Accordingly, the voting right, which is the center of the power to manage, is used by the usufructuary as a rule, and this power of usufructuary also grants him the right to attend assembly general meetings, demand information and file an annulment action. Although there is a significant fracture in the powers of the shareholder against this position of the usufructuary, the shareholder continues to use his rights to attend assembly general meetings and demand information in accordance with the basic principles of the company law.

The shareholder can maintain his authority over the shares subject to usufruct by holding the voting right through an agreement between them. This time, his situation is stronger than the usufructuary who has the voting right, because when the voting right belongs to the shareholder, the usufructuary also loses his right to attend assembly general meetings, demand information and file an annulment action which can be entitled to him due to the voting right. This result does not contradict the power to fully benefit the usufructuary. Because even in this case, the usufructuary continues to benefit from the financial rights provided by the share. And, if the use of management rights by the shareholder damages the power to fully benefit the usufructuary, the shareholder shall be held liable for any loss incurred.

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71 See Koeferli (n 23) 80; Stadlin (n 67) 191.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Short-Termism in Publicly Listed Companies and Corporate Governance

Halka Açık Şirketlerde Kısa Vadecilik ve Kurumsal Yönetim

Fatih Buğra Erdem*

Abstract

Short-termism is known as sacrificing long-term sustainable earnings for short-term returns. The pressure on management to obtain short-term results usually generates negative medium and long-term outcomes. This is because investors are inclined to sell their stocks when they hear about a shadow of bad news. In this context, business executives can decide to meet short-term shareholders expectations or prioritise the growth of their company. In other words, on the one hand, the company management should consider all possible economic variables within the scope of the necessity of protecting the company's capital, on the other hand, it should also ensure the participation to the capital that will benefit the financial structure of the company, especially from the cash flow point of view. Short-termism hinders effective company management, particularly for publicly listed companies, due to the convenience of trading stock transactions and more transparent management decisions. Considering abovementioned facts, this study examines the increasing trend in short-termism as an intertemporal choice and discusses solutions that can be offered through corporate governance principles.

Keywords

Short-Termism, Publicly Listed Companies, Corporate Governance, Intertemporal Choice Problem

Öz

Kısa vadecilik, pay sahiplerinin kısa dönemde kar elde etmek için uzun dönemli sürdürülebilir gelirlerini feda etmesi olarak tanımlanmaktadır. Kısa vadede getiri elde etmek isteyen şirket ortaklarının şirket yöneticilerine yaptıkları baskı orta ve uzun vadede olumsuz sonuçlar doğurmaktadır. Aslında bu durum, pay sahiplerinin ortağı oldukları şirketlere dair olumsuz bir duyum almaları halinde, paylarını derhal satışa çıkarmaya meyilli olmalarından kaynaklanmaktadır. Hal böyle iken, yöneticiler pay sahiplerinin kısa dönemli getiri beklentilerini karşılamak ya da şirketin uzun dönemli büyüme hedeflerini yerine getirmek hususlarında bir öncelik ayrımına sürüklenmektedirler. Başka bir deyişle, şirket yönetiminin bir yandan şirket sermayesinin korunması gerekliliği kapsamında olası tüm ekonomik değişkenleri derpiş etmesi gerekirken, bir yandan da şirketin finansal yapısına, özellikle nakit akışına, fayda sağlayacak sermayedar katılımını da sağlaması gerekmektedir. Bu kapsamda, özellikle halka açık şirketlerde pay devri işlemlerinin kolaylığı ve alınan kararların şeffaf olması gerekliliği gibi hususlar etkin bir yönetimin sağlanabilmesine engel teşkil etmektedir. Bu makale, yukarıda açıklanan nedenler bağlamında, kısa vadecilik cereyanını zamanlararası bir tercih problem olarak incelemekte ve kurumsal yönetim ilkeleri bağlamında sunulabilecek potansiyel çözüm önerilerini irdelemektedir.

Anahtar Kelimeler

Kısa Vadecilik, Halka Açık Şirketler, Kurumsal Yönetim, Zamanlararası Tercih Problemi

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Short-Termism in Publicly Listed Companies and Corporate Governance

I. Introduction

Publicly listed companies usually focus heavily on their quarterly earnings due to the popularity of short-termism, rather than focusing on annual, five-year, or ten-year earnings; this is focusing on the short-term yields of corporate decisions in lieu of long-term benefits. In simple terms, short-termism is making management decisions that can benefit in the short term but have the potential to impair the company in the future;[1] it is managerial myopia.[2] Consequently, one of the most frequent discussions on corporate governance over the past decade has been the disagreement on company decision-making in respect of their short and long-term strategies.[3]

There is a difference of opinion in the literature as to whether short-termism really poses a problem.[4] On the one hand, it has been argued that short-termism (also known as quarterly capitalism) leads to a major problem for public firms and the economy.[5] From another point of view, some scholars, who argued short-termism poses a problem, are sceptical to what extent it produces social harm.[6] On the other hand, there are some other scholars finding short-termism beneficial in terms of providing market discipline.[7] For the sake of contributing to this debate, this study examines to what extent stakeholders will benefit from short-termism in a micro perspective in terms of long-term appreciation of shareholders of companies.

1 Kevin Laverty, 'Economic "Short-Termism": The Debate, the Unresolved Issues, and the Implications for Management Practice and Research' (1996) 21(3) The Academy of Management Review 825-60; David Marginson and Laurie McAulay, 'Exploring the debate on short-termism: a theoretical and empirical analysis' (2008) 29(3) Strategic Management Journal 273.

2 Maurizio Catino, *Organizational Myopia: Problems of Rationality and Foresight in Organizations* (Cambridge University Press 2013); Alex Edmans, Vivian Fang and Allen Huang, 'The Long-Term Consequences of Short-Term Incentives' (European Corporate Governance Institution, Finance Working Paper No. 527/2017, June 2020) 15 <http://ssrn.com/abstract_id=3037354> accessed 19 April 2021.

3 Gavin Hinks, 'EU urges firms to focus on long-term strategy over short-term goals' (Board Agenda, 3 August 2020) <https://boardagenda.com/2020/08/03/european-commission-urges-long-term-strategy-over-short-term-goals> accessed 19 April 2021.

4 Martin Petrin and Barnali Choudhury, 'Corporate Purpose and Short-Termism' in Afra Afsharipour and Martin Gelter (eds), *Comparative Corporate Governance: Research Handbooks in Comparative Law Series* (Edward Elgar 2021); Robert Rhee, 'Corporate Short-Termism and Intertemporal Choice' (2018) 96(3) Washington University Law Review 495-557.

5 Mark Joe, 'Stock Market Short-Termism's Impact' (2018) 167(71) University of Pennsylvania Law Review 71-121; Filip Gregor and Frank Bold, 'How EU can end corporate short-termism and create sustainable financial system' (Euractiv, 22 August 2017) <https://www.euractiv.com/section/energy-environment/opinion/how-eu-can-end-corporate-short-termism-and-create-sustainable-financial-system> accessed 19 April 2021; John Coffee Jr. and Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (Columbia Law School Working Paper 1928, 2015) <https://scholarship.law.columbia.edu/faculty_scholarship/1928> accessed 19 April 2021; Ronald Gilson and Jeffrey Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113(4) Columbia Law Review 863-927; Gregory Milano and Fortuna Advisors, 'Corporate Short-Termism and How It Happens' (2018) 30(4) Journal of Applied Corporate Finance 27; Gregory Milano, *Curing Corporate Short-Termism* (Fortuna Advisors 2020); Alfred Rappaport, *Saving Capitalism from Short-Termism: How to Build Long-Term Value and Take Back Our Financial Future* (McGraw-Hill 2011) 5.

6 Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 Journal of Finance 383; Michael Jensen, 'Some anomalous evidence regarding market efficiency' (1978) 6(2-3) Journal of Financial Economics 95-101; Rappaport (n 5).

7 Lawrence Summers, 'Corporate long-termism is no panacea – but it is a start' (Financial Times, 9 August 2015) <https://www.ft.com/content/97f3db5e-3d11-11e5-bbd1-b37bc06f590c> accessed 19 April 2021.

The structure of the paper covers five sections including this preliminary section, which presents an introductory remark, Section 2 established a theoretical background for corporate short-termism by arguing the difference between shareholder and stakeholder primacies. Section 3 discusses potential remedies for short-termism via corporate governance by taking the issue from European and American perspectives. Section 4 debates short-termism as an intertemporal choice problem through particularly indicating the issue of quarterly capitalism. Finally, Section 5 provides concluding remarks.

II. Corporate Short-Termism Amidst Shareholder and Stakeholder Primacies

The issue of corporate short-termism in corporate decision-making could be argued under mainstreams of shareholder and stakeholder primacies. Scholars, lawmakers, and institutions have plunged into a quest for arriving at a sub-optimal consensus between shareholder and stakeholder primacy, particularly in the last decade. Before arguing this dichotomy, these terms should be defined. While the term of shareholders is only used for company partners, the term of stakeholder is a more inclusive concept including employees of the company, other companies with a professional relation, bondholders of corporate debt securities, customers, and even the state at a macroeconomic level. To put it simply, shareholder refers only to people and institutions having the company's shares, whereas stakeholder refers to "persons or groups that have, or claim, ownership, rights, or interests in a corporation and its activities, past, present, or future."[8] Therefore, wealth maximisation of shareholders by establishing a legal and organisational framework is expected with the shareholder primacy.[9] On the contrary, stakeholder primacy supporters hold the view that companies need to manage the coordination of internal and external interests, and companies should consider generating and protecting shareholders' interests as well as other constituencies.[10]

It increasingly draws more attention to pursue the long-term interests of all stakeholders in a broader framework, rather than corporations primarily serving the interest of shareholders.[11] Global issues such as the 2008 economic crisis and the

8 Max Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20(1) The Academy of Management Review 92-117. On the other hand, there is another view that argues the ambiguity concerning the limits of the stakeholder definition. See, Emerson Mainardes, Helena Alves and Mario Raposo, 'Stakeholder theory: Issues to Resolve' (2011) 49(2) Management Decision 226-52.

9 Franklin Allen, 'Corporate Governance in Emerging Economy' (2005) 21(2) Oxford Review of Economic Policy; Bob Tricker, *Corporate Governance Principles, Policies, and Practice* (OUP 2008) 38.

10 Andrew Crane and Dirk Matten, *Business Ethics: A European Perspective: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (OUP 2010); Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman Publishing 1984); Gérard Charreaux and Philippe Desbrières, 'Corporate Governance: Stakeholder Value Versus Shareholder Value' (2001) 5 Journal of Management and Governance 107-28; Peter Koslowski, 'The Limits of Shareholder Value' (2000) 27 Journal of Business Ethics 137-48.

11 David Katz and Laura McIntosh, 'The Long Term, The Short Term, and The Strategic Term' (Harvard Law School Forum on Corporate Governance, 27 September 2019) <https://corpgov.law.harvard.edu/2019/09/27/the-long-term-the-short-term-and-the-strategic-term> accessed 19 April 2021.

Covid-19 crisis accelerated the understanding of the importance of the transformation towards stakeholder primacy. In particular, the 2008 crisis led shareholders to focus on more short-term investing strategies. So, with a Keynesian expression, the understanding of 'we are all dead in the long run' has prevailed. On the other hand, it should be considered that failures of companies negatively affect economic development and employment (i.e. wellbeing of the society) in the long run, since corporations play significantly large societal roles. To take a step further, according to Dodd, stakeholder primacy should be regulated at a basic level by the state and the functioning should be in the favour of the society as a whole, not just for the benefit of shareholders,[12] as short-termism culture causes the decrease of economic growth, employment, and welfare in general.[13] In this regard, the main task of the managers is to maintain a balance between these two priorities, as overwhelming one of these would likely pose problems.[14]

Shareholder primacy is associated with Friedman's shareholder value maximisation thesis, which demonstrates the sole purpose of companies is to increase profits by using their all resources in the most effective manner.[15] Furthermore, shareholder primacy is also directly associated with the agency theory, which shows company directors as performing on behalf of shareholders with the transference of authority as a nexus of contract. Accordingly, these managers are expected to act in the best manner, and in favour of shareholders, since the performance evaluation is made to what extent they meet and protect shareholders' expectations.[16] Incentive systems and pre-determined performance criteria are used for controlling managers. Therefore, even if the shareholders want to make risky investments, a more risk-averse approach would likely be followed by managers.[17] Nevertheless, managers might seek ways to benefit from these incentives by misleading shareholders with the help of information asymmetry.

12 Merrick Dodd, 'Is Effective Enforcement of Fiduciary Duties of Corporate Managers Practicable' (1935) 2(2) The University of Chicago Law Review 184-207.

13 Milano and Fortuna Advisors (n 5) 27-36.

14 For instance, Thyssenkrupp, a German firm focusing on steel production, could be taken as an example of pro-stakeholder primacy. Activist institutional shareholders (also known as short-term shareholders) of Thyssenkrupp insisted on selling the lift department for making money hand over first, this request startled stakeholders due to its potential long-term detriments. Thyssenkrupp's largest shareholder is a charity, and it has been argued that it has a responsibility to increase its share values to fund charity activities while carefully observing its requirements to protect the integrity of the company. See, Jordi Gual, 'When the problem is short-termism, foundations are a solution' (Financial Times, 2 February 2020) <https://www.ft.com/content/5fb1540e-434e-11ea-a43a-c4b328d9061c> accessed 19 April 2021.

15 Milton Friedman, 'The social responsibility of business is to increase its profits' (New York Times Magazine, 13 September 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 19 April 2021.

16 Michael Jensen and William Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (1976) 3(4) Journal of Financial Economics 305-60; Eugene Fama and Michael Jensen, 'Separation of Ownership and Control' (1976) 26(2) The Journal of Law and Economics 301-25; Razeen Sappideen, 'Focusing on Short-Termism' (2011) 20 Singapore Journal of Legal Studies 413-8.

17 Malcolm Salter, 'How Short-Termism Invites Corruption …And What to Do About It' (Harvard Business School Working Paper, 12 April 2012); Andrew Keay, 'Risk, shareholder pressure and short-termism in financial institutions: does enlightened shareholder value offer a panacea?' (2011) 5(6) Law and Financial Markets Review 436-9.

From another point of view, it has been demonstrated that managers who can act in accordance with their personal interests will maximise their benefits if they act in favour of the company within the scope of the stewardship theory. This theory shows that collectivist behaviours in the interest of the company are superior to stewards acting individually in their own goods. Hence, there is no conflict of interest between shareholders and managers.[18] It has been also theorised that the purpose of the company should not only be to maximise the profits of its shareholders, but also to maximise the benefits of all other segments (i.e. stakeholders such as employees, suppliers, customers, society, and the state) that will be affected by its long-term success.[19] The crux of the matter is to put theory into practice, where there is no directive determining how managers will behave towards other social partners as well as their shareholders, it is also unclear what kind of sanctions will be imposed on the contrary case. Despite corporate social responsibility announcements, they are generally not binding.

Apart from the agency and stewardship theories, although there have been other related theories developed in academic literature such as managerial tyranny and transaction theory, the most relevant theory with this paper is a myopic market theory, which argues that the great interest of the market for short-term returns leads to corporate governance failures.[20] In other words, short-term wealth increases are preferred by sacrificing long-term interests. In order to respond to the myopic view of the market, executives focus on projects that will contribute to company valuation by providing short-term returns by focusing on shorter-term results.[21] Although short-term results are important intensives for short-term financing of the company, it carries great risks for long-term investors.[22]

The European Commission (EC) stated that the main focus of companies' decision-makers is to maximise the value of their stakeholders and long-term shareholders. In this context, it was stated that the legislation should be revised to support more sustainable company management. In particular, changing the scope of responsibility and accountability for the management of the company, and preventing the sole focus of board policies on short-term goals were emphasised.[23]

18 Melinda Muth and Lex Donaldson, 'Stewardship Theory and Board Structure: A Contingency Approach' (1998) 6(1) Scholarly Research and Theory Papers 5-6.

19 Thomas Donaldson and Lee Preston, 'The Stakeholder Theory of the Corporation: Concept, Evidence, and Implications' (1995) 20(1) Academy of Management Review 70.

20 Kevin Keasey, Steve Thompson and Mike Wright, *Corporate Governance: Economic and Financial Issues* (OUP 1997).

21 It is also worth noting that in terms of capital market law, the peak of the share price will not mean that the welfare of the partners has reached the highest point.

22 Roland Bénabou and Jean Tirole, 'Intrinsic and Extrinsic Motivation' (2013) 70(3) The Review of Economic Studies 489-520.

23 European Commission and EY, 'Study on directors' duties and sustainable corporate governance' (2020) <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> accessed 19 April 2021.

It would not be wrong to say that the EU is on course for stakeholder capitalism.[24] The EC has also found that short-term business thinking does not contribute to the United Nations Sustainable Development Goals, specifically the Goal 10 of financing sustainable growth, nor to the Paris Agreement on climate change**.** Regarding the environmental point of view, fierce competition forces companies to employ more short-term strategies, which lowers the environmental performance of companies.[25] Under-investment for long-term promising companies would likely be detrimental to social purposes, such as boosting human capital and innovation as well as investments made towards a more sustainable environment.[26] All in all, the EC proposed three options as a solution for short-termism. Although two of these options are soft and non-legislative approaches, which are not legally binding, a legally binding way is also proposed as the third option.[27]

The first option includes encouraging sustainable corporate governance actions by increasing awareness through publishing communiqués and reports. The second option is about promoting national regulatory initiatives aimed at making corporate governance approaches more sustainable through recommendations. Finally, the third option covers setting minimum rules for long-term value creation by levelling the playing field through legal interventions at the Union. These three options could be considered with three types of directors defined by Lorsch and Maciver, namely traditionalists, rationalists, and broad constructionists. While traditionalists give particular prioritisation to shareholders, rationalists find what is beneficial to shareholders, beneficial to stakeholders. On the other hand, broad constructionists have a more sense of responsibility in terms of stakeholders.[28] This paper proposes to combine applying these options with said director types as indicated below.

24 For an in-depth study, which focuses on managerial capitalism instead of shareholder and stakeholder capitalism, see, Lucian Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review 91-178; Ryan Flugum and Matthew Souther, 'Stakeholder Value: A Convenient Excuse for Underperforming Managers? (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725828> accessed 19 April 2021.

25 Johan Graafland, 'Price competition, short-termism and environmental performance' (2016) 116 Journal of Cleaner Production 125-34.

26 European Securities and Markets Authority, 'Survey on undue short-term pressure on corporations from the financial sector' (Explanatory Note, ESMA30-22-620, 24 June 2019).

27 European Commission and EY (n 23) 7-12.

28 Jay Lorsch and Elizabeth Maciver, *Pawns or Potentates: The Reality of America's Corporate Boards* (Harvard Business Review Press 1989).

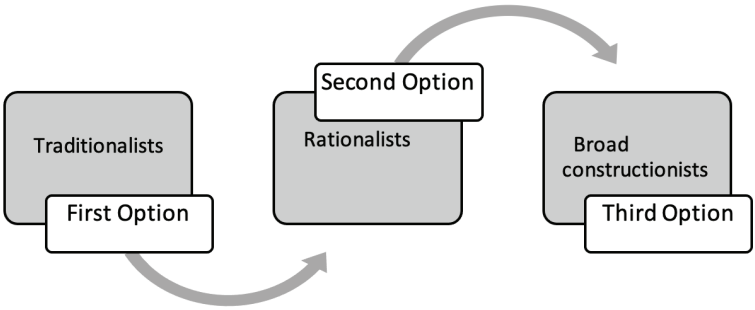

Table 1. *Trivet application in regard to manager types*[29]

Countries that want to generate solutions for short-termism could follow these options after they identify their predominant director type or types. It should be noted that there is no restriction of applying two or three approaches together.

III. Remedies for Short-Termism Via Corporate Governance

One of the main corporate problems of companies is deemed to be managerial myopia concerning short-termism trends in the current financial order due to the uncertainty of long-term outcomes. It should be noted that the European Union recognised and gave utterance to the short-termism issue before the 2008 economic crisis by necessitating to make provisions against it.[30] In this regard, changes have been planned in the Shareholder Rights Directive, and it is planned to reward long-term shareholders with tools such as additional voting rights and loyalty dividends to discourage short-termism.[31] In terms of corporate governance, the main purpose is to secure investors' returns from their investments with an effective check and balance mechanism. Hence, it is a matter of managing and controlling the company's activities with the efficient use of the company's capitals.[32] Therefore, corporation law mechanisms could offer substantial remedies for fleeting hitches by safeguarding managerial boards from financial market pressure.[33]

29 İbid.

30 Although short-termism has been analysed in the US, UK, and EU, there are not many studies for reform efforts against short-termism. See, Kim Willey, *Stock Market Short-Termism: Law, Regulation, and Reform* (Palgrave Macmillan 2019) 3; Andrew Johnston and Paige Morrow, 'Commentary on the Shareholder Rights Directive' (University of Oslo Faculty of Law Research Paper No. 2014-41, 2014); Dieter Pesendorfer, 'Capital Markets Union and Ending Short-Termism: Lessons from the European Commission's Public Consultation' (2015) 9(3) Law and Financial Markets Review 202-9; Lucia Quaglia, *Governing Financial Services in the European Union: Banking, Securities and Post-Trading* (Routledge 2010) 82; European Commission, 'Green Paper: The EU Corporate Governance Framework' (2011) COM(2011) 164 final.

31 Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM(2014) 213 final, Brussels, 9 April 2014; For more regulatory measures after crisis, see, Izabela Jedrzejowska-Schiffauer, Peter Schiffauer and Eleftherios Thalassinos, 'EU Regulatory Measures Following the Crisis: What Impact on Corporate Governance of Financial Institutions?' (2019) 22(3) European Research Studies Journal 432-56.

32 John Paterson, 'The Company Law Review in the UK and the Question of Scope: Theoretical Concerns, Practical Constraints and Possible New Directions' in Robert Cobbaut and Jacques Lenoble (eds), *Corporate Governance: An Institutional Approach* (Kluwer Law International 2003) 141.

33 Mark Roe, 'Corporate Short-Termism: In the Boardroom and in the Courtroom' in Jeffrey Gordon and Wolf-George Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2018).

There is no doubt that investments made by companies in technology or in their employees increase the welfare level. Indeed, it has been demonstrated that companies making long-term investments could create greater financial values as well as greater standards for their employees.[34] On the other hand, companies focusing on short-term gains postpone long-term problems in order to redound to their investors' gains. Under these circumstances, it is a fact that companies with more profit-making potential in the short term attract a lot of attention from short-term investors, but these companies are more volatile and riskier to invest due to their fragile nature concerning all related negative news that weakens shareholders' ties with the company.[35] The fact that long-term investments are not encouraging enough for investors is the underlying phenomenon of the current short-term understanding.[36] Data on the increasing trend towards short-termism can be verified from the table below, which shows the holding periods of investors' stocks on the NYSE from 1930 to 2020.

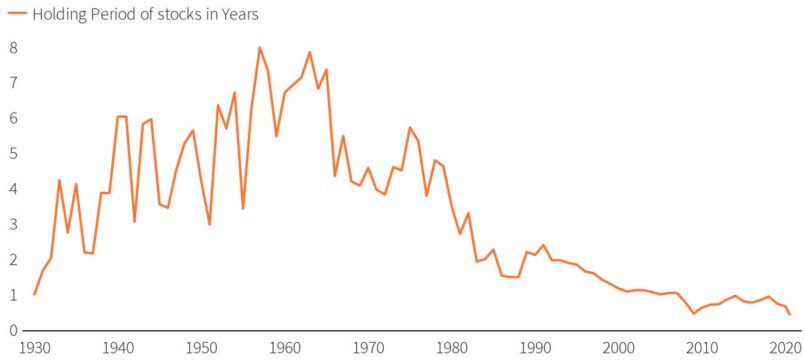

Table 2. *Holding Stock Periods of New York Stock Exchange*[37]

As can be seen from the graph, there has been a fundamental decline since 1970 with the collapse of Bretton Woods. Accordingly, it would not be wrong to say that this trend does not only reflect American tendency but a global one. Since the mind focused on short-termism causes delaying current costs to the future, this future externality is instrumental for shareholders as it eases to push off costs, whereas stakeholders' interests are harmed.[38] However, it is very contradictious that shareholders holding

34 Joseph Bower and Lynn Paine, 'The Error at the Heart of Corporate Leadership' (Harvard Business Review, May-June 2017).

35 Francois Brochet, Maria Loumioti and George Serafeim, 'Short-Termism, Investor Clientele, and Firm Risk' (Harvard Business School Working Paper No. 12-072, 2012).

36 Alana Semuels, 'How to Stop Short-Term Thinking at America's Companies' (The Atlantic, 30 December 2016) <https://www.theatlantic.com/business/archive/2016/12/short-term-thinking/511874> accessed 19 April 2021.

37 David Hunkar, 'Average holding period for U.S. Stocks is Just 5-1/2 months in 2020' (Top Foreign Stocks, 4 August 2020) <https://topforeignstocks.com/2020/08/04/average-holding-period-for-u-s-stocks-is-just-5-1-2-months-in-2020> accessed 19 April 2021.

38 Kent Greenfield, 'The Puzzle of Short-Termism' (2011) 46 Wake Forest Law Review 625-40; Dirk Hackbarth, Alejandro Rivera and Tak-Yuen Wong, 'Optimal Short-Termism' (European Corporate Governance Institution, Finance Working Paper No. 546/2018, November 2018) <http://ssrn.com/abstract_id=3060869> accessed 19 April 2021.

stocks for the short term do not care what would happen to the company after selling their assets, but their impact on the management is highly remarkable.[39] Hence, investor-oriented mainstream impairs long-term investments of companies through putting managers under the cosh by shareholders. This consequently necessitates corporate law regulations to be shaped in light of the stakeholder model in order to ensure more financially stable and sustainable companies.[40]

Concerning the inclusion of short-termism in corporate cultures, it was determined that the managers are inclined to overreact when severe changes in the total demand and supply of companies' shares in line with the future predictions occur[41] despite the fact that these expectations generally do not reflect reality .[42] As a consequence of this, several managers admitted that they are acting to the detriment of the long-term interests of the company in order to meet short-term expectations.[43] Furthermore, managers generally try to maximise their companies' profits by prioritising short-term goals to secure their interests by usually hiding long-term issues from the board.[44]

The consequences of short-termism on corporate governance could be listed as the shrinking tenures of managers together with the neglect of investment and human capital. In addition, short-termism also negatively affects companies' performance in the long run, economic growth, social welfare, and intergenerational justice.[45] According to a study conducted by Masouros about the great reversal in corporate governance and shareholders, it was observed that after the collapse of the Bretton Woods system, five foremost markets, namely Germany, France, the Netherlands, the UK, and the US have been affected with the low GDP levels due to the mainstream of short-termism.[46]

39 Greg Milano and Fortuna Advisors (n 5) 27.

40 Jesse Fried and Charles Wang, 'Short-Termism, Shareholder Payouts, and Investment in the EU' (2021) 1 European Financial Management 1-25; Hana Horak and Kristijan Poljanek, 'Fighting Short-Termism in EU Company Law after the Financial Crisis' (2020) 17(4) European Company Law 115-22.

41 Jose Barrero, 'The Micro and Macro Managerial Beliefs' (SocArXiv fctsb, Center for Open Science, 2020); Pedro Bordalo and others, 'Real Credit Cycles' (National Bureau of Economic Research Working Paper No. 28416, 2020); Stephen Terry, Toni Whited and Anastasia Zakolyukina, 'Information versus Investment' (Becker Friedman Institute for Research in Economics Working Paper 2020-110, 2020).

42 Luis Armona, Andreas Fuster and Basit Zafar, 'Home Price Expectations and Behaviour: Evidence from a Randomized Information Experiment' (2018) 86(4) The Review of Economic Studies 1371-1410; Olivier Coibion, Yuriy Gorodnichenko and Saten Kumar, 'How Do Firms Form Their Expectations? New Survey Evidence' (2018) 108(9) American Economic Review 2671-2713.

43 Lawrence Mitchell, *The Speculation Economy: How Finance Triumphed over Industry?* (Berrett-Koehler Publishers 2007).

44 Ralph Walkling, 'CEO-centric Firms: Risks and Remedies' (Directors and Boards Magazine, January 2010); Pornsit Jiraporn, 'Corporate Governance, Shareholder Rights and Firm Diversification: An Empirical Analysis' (2006) 30(3) Journal of Banking and Finance 947-63.

45 Kim Wiley, *Stock Market Short-Termism: Law, Regulation, and Reform* (Palgrave Macmillan 2019); Andrew Haldane and Richard Davies, 'The Short Long' (29th Société Universitaire Européene de Recherches Financières Colloquium, 2011); Roeland Veld and Louis Meuleman, 'Sustainable development and the Governance of Long-term Decisions' in Roeland Veld (ed), *Knowledge Democracy: Consequences for Science, Politics, and Media* (Springer 2010) 255-81; Elke Weber and Howard Kunreuther, 'Aiding Decision Making to Reduce the Impacts of Climate Change' (2014) 37(3) Journal of Consumer Policy 397-411.

46 Pavlos Masouros, 'Corporate law and economic stagnation: how shareholder value and short-termism contribute to the decline of the Western economies' (PhD thesis, Leiden University 2012) 319.

IV. Short-Termism as an Intertemporal Choice Problem

The main reason for the problems related to short-termism is the gradual shrinkage of time horizons regarding the interaction between managers and shareholders. Short-term trading is becoming very common in stock markets with the help of a computerised dealing system. Moreover, the volume of trading has also increased with institutional shareholders and robotic investors equipped with artificial intelligence. Therefore, it can be said that the increasing pressure on managers stems from the accelerated trading transactions through newer technologies and media coverage that catalyse commercial occupations.[47]

The current phenomenon is quarterly capitalism, which simply represents the quarterly announcement of earnings.[48] Depending on whether the quarterly profits meet the expectations of the analysts for the relevant quarters, it brings positive or negative changes in the stock market shares of the company. The pressure of meeting these expectations causes detrimental consequences,[49] although the company management is strengthened by legal principles such as transparency and accountability. In this context, it is of primary importance to consider long-term performance evaluation in the calculation of managers' remuneration.[50] Apart from this, it may be a solution to give managers longer tenures for taking the burden away from managers.[51]

There is also an opinion that the existence and continuity of the company depend on the success in short-term results that could potentially boost the long-term performance of the company.[52] According to this view, short-termism in stock trading has been a topical issue for a long time.[53] The paradox is that share prices increase when short-term strategies overweigh long-term strategies.[54] If capital markets had

47 Bartosz Olesiński and others, 'Short-termism in business: causes, mechanisms and consequences' (EY Poland Report 2014) <https://assets.ey.com/content/dam/ey-sites/ey-com/en_pl/topics/eat/pdf/03/ey-short-termism_raport.pdf> accessed 19 April 2021.

48 However, it should be noted that quarterly reporting of companies has not empirically been proved to lose their share values in the long-term. See, Malgorzata Janicka, Aleksandra Pieloch-Babiarz and Artur Sajnóg, 'Does Short-Termism Influence the Market Value of Companies? Evidence from EU Countries' (2020) 13 Journal of Risk and Financial Management 271.

49 Martin Lipton, 'Takeover Bids in the Target's Boardroom' (1979) 35(1) The Business Lawyer 101-34; Alex Edmans, Vivian Fang and Katharina Lewellen, 'Equity vesting and investment' (2017) 30(7) Review of Financial Studies 2229-71; Jamie Dimon and Warren Buffett, 'Short-Termism is Harming the Economy' (Wall Street Journal, 6 June 2018) <https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801> accessed 19 April 2021.

50 Although executive compensation reform is considered essential for the development of managers' long-term understanding, other pressures on the stock price will neutralise these reforms. See, David Walker, 'The Challenge of Improving the Long-Term Focus of Executive Pay' (2010) 51(2) Boston College Law Review 435, 441-2; Gregg Polsky and Andrew Lund, 'Can Executive Compensation Reform Cure Short-Termism?' (2013) 58 Issues in Governance Studies 1-9.

51 Gregory Jackson and Anastasia Petraki, *Understanding Short-Termism: The Role of Corporate Governance* (Glasshouse Forum 2011) 7.

52 Kenneth Merchant and Wim Van der Stede, *Management Control Systems: Performance, Measurement, Evaluation and Incentives* (Prentice-Hall, 3rd ed, 2011).

53 Emeka Duruigbo, 'Tackling Shareholder Short-Termism and Managerial Myopia' (2012) 100(3) Kentucky Law Journal 53; Marjorie Kelly and Allen White, 'Corporate Design: The Missing Organizational and Public Policy Issue of Our Time' (2008) 42 New England Law Review 763; Carolyn Brancato and Michael Price, 'The Institutional Investor's Goals for Corporate Law in the Twenty-First Century' (2000) 25 Delaware Journal of Corporate Law 35.

54 Polsky and Lund (n 50) 1-9.

worked truly efficiently, the focus on short-sighted strategies would have affected stock prices negatively. However, the long-term growth of companies needs to be encouraged by investors for the increase in patient capital. These investors are generally institutional shareholders, such as hedge funds, endowments, and sovereign wealth funds despite a large number of individual mom-and-pop investors.[55]

Large shareholders (also known as blockholders), which usually care about long-term investments and growth of the company, may threaten corporate management with selling their large number of shares.[56] These shareholders play an essential role to hinder managerial myopia.[57] While this could likely pose managerial opportunism, corporate failures could also occur. So, it should be considered that either undervaluing or overvaluing long-term profit predictions would pose problems.[58] Another factor that should be noted is castle-in-the-air investing, where investors do not specifically focus on estimating the intrinsic value of the firm but analysing the majority of investors' tendency to plant seeds for an uncertain future of revenues/profits. [59] However, in this point of view, it is worth noting that people do not generally go by the book, i.e. behave rationally.[60] As theorised by Thaler and Sunstein, people are susceptible to make poor choices due to biases.[61] This could bring unexpected buying or selling of shares of the company regardless of truly promising valuations. For example, investors could hold the opinion that there is safety in numbers of other investors' transaction volumes. Nevertheless, this also might count for nothing. Therefore, the management of the company should dissociate shareholders' pressure from the company's short- and long-term plans as far as possible.[62]

V. Conclusion

This study observed the tendency of short-termism in public companies that leads to pressure on management due to urgent shareholder profit expectations and the reduction in transaction times and fees, with the help of technology and media coverage. It was suggested that short-termism reduces the board of directors' tenure, which results in neglecting human capital. Moreover, short-term performance

55 The Aspen Institute, 'Overcoming Short-Termism: A Call for a More Responsible Approach to Investment and Business Management' (Business and Society Program, 16 September 2009).

56 Anat Admati and Paul Pfleiderer, 'The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice' (2009) 22(7) Financial Studies 2645-85.

57 Sang Cho, Chune Chung and Chang Liu, 'Does Institutional Blockholder Short-Termism Lead to Managerial Myopia? Evidence from Income Smoothing' (2018) International Review of Finance 1-11.

58 Ken Favaro, 'Long-Termism is Just as Bad as Short-Termism' (Harvard Business Review, 25 September 2014) <https://hbr.org/2014/09/long-termism-is-just-as-bad-as-short-termism> accessed 19 April 2021.

59 Wiley (n 45).

60 Greg Milano and Fortuna Advisors (n 5) 32.

61 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books 2009).

62 Lynne Dallas, 'Short-Termism, the Financial Crisis, and Corporate Governance' (2012) 37(2) The Journal of Corporation Law 267-364.

pressure with regard to quarterly company earnings damages the long-term company value. Many companies respond to this pressure by reducing their promising research and development expenditures or changing the managerial board. Instead of temporary solutions, companies need to develop their financial benefits, such as long-term and sustainable cost reduction. It was consequently seen that companies focusing on short-term investment horizons are less willing to meet concerns with regard to long-term growth and productivity, which would likely harm the economy as a whole. This strong trend with shareholder activism hinders propelling future investments due to the appetence of getting short-term gains; consequently, this issue is getting worse as it triggers budget cuts in research and development activities at the expense of providing immediate outcomes. What makes this problem insolvable is the satisfaction of both shareholders and managers in the absence of long-term corporate culture. In this context, optimal corporate law remedies should be generated against short-termism via adhering to corporate governance principles. The transition from shareholder primacy to stakeholder primacy is significant because if executives are accountable not only to shareholders but to all stakeholders, it will ensure more effective and secure markets, as well as long-lasting companies.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts

AİHM ve Ulusal Mahkemeler İçtihadında Temel Hakların Yorumunda Hermeneutiğin Yükselişi

Murat Erdoğan*

Abstract
This paper aims to argue that over approximately the last 70 years, both constitutional courts in Continental European legal systems and the European Court of Human Rights have implemented an evolutive (dynamic) approach to human rights by making broad interpretation of both constitutional or Convention rights. It also argues that the philosophical grounds of this interpretive approach are consistent with Gadamer's conception of "philosophical hermeneutics," which refers to interpretation as a cognitive dialogue on the text, between the author's and the reader's intent, which is not strictly bound by an obligation on the reader to adhere to the author's intent.

Keywords
Legal Hermeneutics, Gadamer, Interpretation of Human Rights, Judicial Review, ECtHR

Öz
Bu çalışmada, son 70 yılda gerek Avrupa İnsan Hakları Mahkemesi gerekse de Kıta Avrupası ülkelerindeki Anayasa Mahkemelerinin Sözleşme'de yer alan haklar ya da Anayasalarda yer alan temel hak ve özgürlükleri genişletici bir şekilde yorumlayarak bu haklara evrimsel (dinamik) bir yaklaşım kazandırdıkları öne sürülmektedir. Dahası, Mahkemelerin benimsediği bu yorumsal anlayışın temelinde Gadamer'in "felsefi hermeneutik" adını verdiği bir kavramsallaştırmanın yattığı ileri sürülecektir. Bu anlayış, yorum faaliyetini, yazar ile okuyucunun niyeti arasında, okuyucunun yazarın niyetine sıkı sıkıya bağlı olmadığı bilişsel bir diyalog süreci olarak algılamaktadır.

Anahtar Kelimeler
Hukuksal Hermeneutik, Gadamer, Temel Hakların Yorumu, Yargısal Denetim, AİHM

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The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts

Introduction

This paper aims to argue that the philosophical grounds of the European Court of Human Rights' (hereinafter ECtHR) current interpretive approach to human rights corresponds to Gadamer's new hermeneutics, which refers to interpretation as a cognitive dialogue on the text, between the author's and the reader's intent, which is not strictly bound by an obligation on the reader to adhere to the author's intent.[1]

The protection of human rights by judiciary constitutes a significant part of rights protection in the contemporary legal culture of Europe. This is mostly because of the rise of constitutional review, which began in the United States and then spread all over continental Europe, starting from Germany after the Second World War and to East Central European countries in the post-communist era, which is the so-called *expansion of judicial review*.[2] However, it would not be wrong to say that judicial interpretation of constitutional rights is not the only determinant factor in a legal system when it comes to protecting human rights. The success of the protection for human rights also depends on civil society's power to protect these rights and the efficiency of political participation through democratic institutions.[3] This debate over who protects human rights – courts or people- has been and continues to be the dominant controversy since human rights emerged as a legal concept both domestically and internationally.

To shed a light upon this dichotomy is only a completion of half of the task of showing the significance of interpretation. In order for there to be protection of human rights, there should also be an integrated interpretive approach to rights for common and civil law systems' judiciary, which they can embrace no matter how they are designed. On that matter, Dworkin and Gadamer's similar views on interpretation contemporarily become much more visible than ever in judicial interpretation of human rights within European judiciaries. Indeed, Dworkin's interpretive theory bore a striking resemblance to the work of Gadamer, particularly in terms of interpretation.[4] The common point of these two philosophers is that the process of interpretation and understanding is based on the idea that it is a free activity of the interpreter herself/himself. This is the so-called "*philosophical hermeneutics*," which

1 Hans-Georg Gadamer, 'Classical and Philosophical Hermeneutics' (2006) 23 (1) Theory, Culture And Society 29, 45

2 Tom Ginsburg, Judicial Review In New Democracies Constitutional Courts In Asian Cases (1st edn, Cambridge University Press 2003) 3

3 For an argument that rights could be best protected through democratic institutions and processes, see, Richard Bellamy, Political Constitutionalism: Republican Defence of the Constitutionality of Democracy (Cambridge University Press 2007)

4 For e.g., Paolo G. Annino, An Evaluation Of Ronald Dworkin's Hermeneutical Theory Of Law (Dphil Thesis, Fordham University 1997) 3

constitutes a background of a particular method for human sciences. Therefore, it is crucially important to clarify these ideas for a better understanding of human rights interpretation.

I. The Reasons for Adopting a Hermeneutical Approach to Interpretation of Human rights

Constitutional judicial review[5] has developed dramatically over the last century.[6] It follows from this that a particular form of judicial review has been expanding its authority and jurisdiction; a rights-based approach to adjudication has been displacing the previous goal-based or duty-based approaches.[7] Though a great number of Anglo-American scholars criticize it harshly,[8] it is necessary to demonstrate why it is unavoidable in today's democracies that there is an expansion of judge-making law through judicial interpretation and what the consequences of this development are for the interpretive positions of courts.

A. The Dichotomy Between Political (or Popular) and Legal Constitutionalism

The background for the evolution of the interpretation of rights to be described has been a controversy among legal scholars since the second half of 20th Century to present day over who protects human rights – courts or legislations- though it has grown old and tired today.[9] In this section, I will try to sketch distinctive features of this debate as a controversy between legal and political constitutionalism.

According to Montesquieu, those who form the judicial power will not make law; they will be "only the mouth that pronounces the words of the law." Similarly, in the 18th Century, Jeremy Bentham used the term "judiciary law" to describe the position that a judge should make the law rather than declaring the existing law, a judicial approach he disagreed with.[10] As Cappelletti accurately argues, the scope of

5 By using the term judicial review, I am making a reference to constitutional review, which involves constitutionality of norms and acts of state. Thus the term judicial review used here is not in administrative sense, but in constitutional sense. However, it is very hard to distinguish these two in common law systems to the contrary to Continental European legal systems, yet, judicial review of administrative acts by courts is on the rise and expanding its boundaries as well as constitutional review. For the rise and expansion of administrative judicial review in United Kingdom, see Mark Elliot, The Constitutional Foundations of Judicial Review (Hart Publishing 2001) 1-3, 17-19

6 Ginsburg (n 2) 3

7 I am borrowing this terminology from Dworkin, for rights-based approach as well as duty-based and goal-based approaches, see Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1978) 90-96

8 For an ultimate overview for these criticisms see, Jeremy Waldron, 'The Core of The Case Against Judicial Review' (2006) 115 (6) The Yale Law Journal., 1346, 1348-1353, for two significant works on the case against judicial review, also see, Mark Tushnet, Taking the Constitution Away from The Courts (Princeton University Press 1999), particularly, 153-156, Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004)

9 Kent Roach, 'The Varied Roles of Courts and Legislatures in Rights Protection' in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds) *Parliaments and Human Rights Redressing the Democratic Deficit* (Hart Publishing 2015) 405

10 Mauro Cappelletti, The Judicial Process in Comparative Perspective (Clarendon Press 1989) 3

judiciary law has undergone an enormous expansion since those thinkers' days.[11] The underlying reason of this is that the twentieth century brought something different to the world's conception and understanding of law. Contrary to Bentham and Montesquieu's views, law under legislation was not perfect at all; in fact, without leaning towards a moral ground, these modern institutions posed a great danger of democracy turning into a majoritarian tyranny, which is likely to cause horrible consequences, such as those that became evident during World War II.[12] This simply sank legal scholars around the whole world into a great despair and led to emergence of legal realism and critical legal thought.[13]

Critical legal thinkers thought that there was an inevitable vagueness implicit in the nature and concept of law which led to understanding of law under political terms as it is surrounded by ambiguities. Under this postmodern approach, the concept of law had begun to be seen as equal with politics[14] until famous legal philosopher Ronald Dworkin made an attempt to rescue the reputation of law. His grasp of law as an interpretation was clearly an objection against such views of law as an indeterminate concept.

According to Dworkin's legal philosophy, law can be best understood as an interpretive concept.[15] Whereas a traditional approach to law considers that interpretation is necessary to resolve the ambiguities caused by textual materials such as a word, a clause, or a rule and to choose between alternative reasonable determinations of the meaning,[16] Dworkin held an account that interpretation should be studied as a general activity in law, i.e., a mode for knowledge.[17] Considering interpretation as a general activity in the judicial process inevitably brings out the fact that every case is a hard one and every case is a matter of interpretation. According to him, interpretive concepts are of a special kind whose correct application depends not on a fixed criteria or an instance-identifying decision procedure but rather on the normative or evaluative facts that best justify the total set of practices in which that concept is used.[18] That is to say that Dworkin's interpretive account has put the judiciary into a crucial position to define the legal meanings of constitutional texts.

11 ibid 3

12 For a similar argument see e.g. William Scheuerman, Carl Schmitt: The End of Law (Rowman&Littlefield Publishers 1999) 139

13 For cases of legal realism of 1920's American legal thought and its revival under the name of critical legal thought, see, John Hasnas, 'Back to the Future: From Critical Legal Studies forward to Legal Realism, or How not to Miss the Point of Indeterminacy Argument' (1995) 45 (84) Duke Law Journal 84, 86-98

14 For the sum of thoughts in favour of legal indeterminacy see e.g. Lawrence B. Solum, 'Indeterminacy' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 479-491

15 For e.g. Ronald Dworkin, A Matter of Principle (Harvard University Press 1985) 167-181

16 Donald E. Bello Hutt, 'Against Judicial Supremacy in Constitutional Interpretation' (2017) (31) Revus, Journal for Constitutional Theory and Philosophy of Law 83, 86

17 For e.g. Ronald Dworkin, 'Law as Interpretation' 1982 (60) Texas Law Review 179, 182

18 D. Plunkett and T. Sandel, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' 2013 (19) Legal Theory 242, 243

Now, there is the other side of coin. Many famous scholars in the United States defend the popular constitutionalism, which means that "the ordinary citizens," rather than the courts, "are the most authoritative interpreters of the Constitution."[19] Their criticisms against judicial supremacy and their argument are based on the idea that rights could be best protected by the people themselves rather than the courts, and this positioncannot be ignored. Furthermore, it is possible to see echoes of their popular constitutionalist ideas on the other side of Atlantic as well in the United Kingdom, being defended by Richard Bellamy under the name of political constitutionalism[20] or civic republicanism.

There are some critical approaches to this dichotomy between the cases against and in favour of judicial review. In a creative work by John Hart Ely, he defends a theory of judicial review between interpretivism and non-interpretivism, which he defines the former as the idea that judges deciding constitutional issues should confine themselves to enforcing norms explicit or implicit in the Constitution whereas he defines the latter as courts needing to go beyond that set of references to enforce norms that cannot be discovered within the four corners of the document.[21] Ultimately, he rejects both ideas formed upon judicial review, and instead, he defends a participation-oriented and representation-reinforcing approach of judicial review,[22] which means a restricted judicial review that scrutinizes democratic participation processes strictly but does not get involved with policy-making. In fact, what he defends is an institutional model middle way between against and in favour of judicial review, but of course as he defends it, it is criticized for being too vague and incomplete.[23]

It is clear that there is a dichotomy of opinion regarding the scope of judicial review. If one speaks of the authority to interpret the constitution belonging to representative bodies elected by the popular will of the people, the inevitable outcome she/he would reach is to be the weak form of judicial review, in which the scope of judicial review is narrow and judicial interpretation of the constitution can be displaced by ordinary legislative majorities in the relatively short run.[24] It follows from this that in a weak form of judicial review, the basic method for defining the person who is the ultimate

19 H.J. Knowles and J.A. Toia, 'Defining 'Popular Constitutionalism: The Kramer versus Kramer Problem' (2014) 42 (1) Southern University Law Review 31, 31

20 Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 (4) Perspectives on Politics 805, 805-806, also for sum of ideas articulated by political constitutionalists see e.g. Richard Bellamy, 'Political Constitutionalism and The Human Rights Act' (2011) 9 (1) International Journal of Constitutional Law 86, 90-91

21 John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980) 1, also it should be carefully pointed out that, in Ely's work, interpretivisim is about the same thing as positivism whereas non-interpretivism is one form of natural law approach. Therefore, in Ely's terminology, contemporary usages of these two words are upside down.

22 ibid 88

23 Stanley Conrad Fickle, 'The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory' (1981) 56 Indiana Law Journal 637, 637-638

24 Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 (8) Michigan Law Review 2781, 2786

interpreter of the constitution is determined through a process of exchange between the courts and legislatures over time,[25] which brings out a moderate dialogue between these two. Conversely, if one argues that judges are in a better position to interpret the Constitution, she/he is a defendant of strong judicial review, in which the courts have general authority to determine what the Constitution means and in which the courts' constitutional interpretations are authoritative and binding on the other branches, at least in the short to medium run.[26]

Constitutional Courts, taking place in civil law systems particularly in Continental European and Asian legal systems, are often considered as a strong form of judicial review, which means that they have a strong and binding authority on other branches of the state.[27] We can observe that when it comes to strong or weak forms of judicial review, there is a great emphasis on the finality of courts' judgments,[28] but there is no emphasis on to what extent courts' precedents and interpretation are binding on the legislative and judicial branches. This idea deserves attention because though it seems true in procedural terms once its limits are understood, it is extremely difficult to defend the idea that constitutional courts constitute a strong form of judicial review. Indeed, Constitutional Courts such as those of Germany, Italy, and Turkey have the ultimate power to strike down a law; however, on the contrary to Supreme Courts in common law systems, Constitutional Courts have no authority to impose a judicial order on nor to require their decision to be followed by other courts. It follows from here that a remedy such as constitutional complaint or individual application to constitutional courts emerges as a result of constitutional courts' pursuit of effective implementation of their judgments.

A supreme court of a common law system has absolute binding precedent on other courts' jurisprudence. However, a constitutional court has no binding precedent on other supreme courts such as the Court of Appeal and the Court of Administration, which coexist in civil law systems. Therefore, a constitutional court in such legal orders are under pressure to enforce the minimum requirements of human rights on the one side and complying with other courts' jurisdictions on the other. According to Samuel Issacharoff;

> "… even if constitutions are anticipated to be incompletely realized agreements, courts are unlikely to find fully satisfactory guidance within the four corners of the text or through the more common forms of contract interpretation. At the time of constitutional negotiations, particularly in societies quickly emerging from authoritarian rule, the participants in the constitutional bargain are unlikely to have longstanding relations

25 Mark Tushnet, 'Weak Form Judicial Review and "Core" Civil Liberties' (2006) 41 Harvard Civil Rights-Civil Liberties Review 1, 3

26 Tushnet 'Alternative Forms of Judicial Review' (n 24) 2784

27 Ginsburg (n 2) 7-8

28 For e.g. Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 Columbia Journal of Transnational Law 285, 292

> of trust among themselves, nor much experience with what may be the difficult issues of implementation in the new constitutional order. The result is likely to be a document that is in large part aspirational and that uses terms of broad ambition but little specificity (for example, "due process of law," "equal protection," or "privileges and immunities"). This places a distinct institutional pressure on constitutional courts in new democracies to act as common law rather than civil law institutions, ones attendant to the incremental realization of core constitutional objectives through the accretion of decisional law. For jurists largely trained in the civil law tradition of close-quartered exposition of textual commands, the transition is challenging."[29]

It is this challenge that makes constitutional courts be a negotiator among other courts in centralized judicial review systems, in which the interpretive principles of constitutional rights developed within this institutional environment. Put it differently, the underlying reason behind the emergence of constitutional complaint procedures, e.g., in Germany and Turkey, and aggressive implementation of norm review judgments in Italy are not coincidental developments. They are rather an inevitable pathway in civil law systems where constitutional courts search for a legal environment for their judgments to be followed by other courts. Under such conditions, constitutional complaint procedure have been introduced, and national constitutional courts, just as the ECtHR, have been forced to develop a more rights-based and interpretive approach to human rights which they ought to discover underlying norms and principles.

I will argue that the philosophical foundations of this interpretive approach were "*philosophical hermeneutics*."

B. Philosophical and Legal Hermeneutics: a Theoretical Frame

One of the most influential legal philosophers of the 20th Century, Ronald Dworkin had a conception of law that it was not based solely on written legal rules but also based on moral principles underlying beneath such written rules. This conception was crucial for post-World War II Continental European legal orders, in which the legal system is mostly based on strict textuality.[30] Another famous philosopher of 20th Century was Gadamer, who developed the "philosophical hermeneutics" approach for the interpretation of texts. There is a striking resemblance between the opinions of these two philosophers regarding the nature of interpretation. This is so-called hermeneutics.

29 Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 9 (4) The Georgetown Law Journal 961, 983

30 For e.g. Jeffrey B. Hall, 'Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany' (2008) 9 (6) German Law Journal 771, 771-772

1. Philosophical Hermeneutics

Hermeneutics is a term that covers many different areas. The term itself comes from ancient stories in Greek mythology. According to said stories, Hermes was the messenger of the gods who brought the messages of the gods to human beings, delivering the messages verbatim.[31] Similarly, in theology, hermeneutics signifies the art of rightly interpreting the Holy Scriptures, which is an important ancient art.[32]

Today, hermeneutics is described as a field of philosophy most concerned with investigating the nature of understanding and interpretation.[33] Thus, the term hermeneutics is used to define a particular method of interpretation in human sciences, which was developed by Gadamer in line with the work of Heidegger's systematic views on the philosophy of being (ontology). According to Mootz, for post-Heidegger philosophers, hermeneutics is an inquiry into the modalities of "being-in-the-world" that allow all meaning to emerge and is thus ontological.[34] However, hermeneutics' revolutionary approach in terms of interpretation lies not only in ontology but also in philosophy of knowledge, epistemology, for hermeneutics constitutes a scientific method in human sciences.

According to Hoy, ever since Kant, epistemologists have taken one particular area of knowledge, natural sciences, as paradigmatic of all other areas of knowledge, which makes accounting for the possibility of scientific knowledge the major part of their task.[35] However, in the 19th and 20th Centuries, this epistemological position was challenged. Consequently, in contrast to the natural sciences method, a new method for human sciences, which is more preoccupied with procedures for understanding and interpreting, emerged.[36]

Finally, one can clearly see that a new approach to hermeneutics has gained a crucial importance, particularly in the field of international law since the beginning of the 21st Century. According to Kemmerer;

> "Gadamer's conversational hermeneutics opens new perspectives for a contextual theory and praxis of international legal interpretation that brings together various disciplinary perspectives and cultural experiences, and thereby allows for a more nuanced and dynamic understanding of sources and their interpreters within their respective interpretative communities."[37]

31 Gadamer, Classical and Philosophical Hermeneutics (n 1) 29

32 ibid 30-31

33 David Couzens Hoy, 'Interpreting The Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 (135) Southern California Law Review 135, 136

34 Francis J. Mootz, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' (1988) 68 Boston University Law Review 523, 526-527

35 Hoy (n 33) 136

36 ibid 136

37 Alexandra Kemmerer, 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations' in Samantha Besson and Jean d'Aspremont (eds) *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 29

The premises of hermeneutics, in fact, began to emerge in the 19th Century as a method against the strict legislative position of scientific positivism, particularly the position resulting from ideas uttered by Schleiermacher and Dilthey. Schleiermacher was the first philosopher who attempted to free hermeneutics from all theological and dogmatic characterization by conceiving it as a universal scientific doctrine of understanding and interpretation.[38] According to him, understanding is a relative and never-ending process carried out by the reader of a text; thus, it has a circular character. The reader's position amongst the author's intent, text, and himself ought to be one in such a way that the reader should understand the author better than the author herself/himself.[39] In order to achieve this, the reader must recreate the historical and psychological situations in which the author of an interpreted work found himself[40].

Wilhelm Dilthey was the philosopher who carried Schleiermacher's approach to hermeneutics one step further, approaching it as a scientific method. According to him, hermeneutics is a method used for understanding human phenomena, and a methodology which is appropriate to natural objects is not adequate for this purpose. It follows from this that Dilthey distinguishes human studies from natural sciences and calls the former "*human sciences (Geistewissenschaften)*."[41] That makes hermeneutics a theory of the art of understanding the manifestations of life which are fixed in writing.[42] However, understanding such manifestations of human phenomena cannot be possible unless the reader engages with not only text but the author's experiences in a historical and psychological sense.[43]

Schleiermacher and Dilthey were two philosophers whose, among others, theory has changed the grasp of interpretation once and for all. However, there is something common in both philosophers' views regarding interpretation; that is that the reader is under psychological obligation to engage with the both the context of writing and the author's intent. In other words, these two philosophers tell interpreters what they *ought* to do. Gadamer does not for he is only after what *is* truly happening to the reader within the process of interpretation.[44] It follows that the views of Gadamer is based on the opinions of Heidegger, who stresses that being precedes the method. This is so-called "*the ontology of understanding*."[45]

38 Gadamer, Classical and Philosophical Hermeneutics (n 1) 34

39 J. Stelmach and B. Brozek, The Methods of Legal Reasoning (Springer 2006) 177

40 ibid 177

41 For e.g. Richard Palmer, Hermeneutics Interpretation Theory in Schleiermacher, Dilthey, Heidegger and Gadamer (Northern University Press 1969) 103-104

42 Stelmach and Brozek, (n 39) 178

43 Palmer (n 41) 108-118

44 Stelmach and Brozek (n 39) 190

45 Gadamer, Classical and Philosophical Hermeneutics (n 1) 34, also see Stelmach and Brozek (n 39) 168

Gadamer points out in his popular work *Truth and Method* that the purpose of his hermeneutics conception "is not to develop a procedure of understanding, but to clarify the conditions in which understanding takes place. But these conditions do not amount to a "procedure" or method which the interpreter must of himself bring to bear on the text; rather, they must be given."[46] Gadamer's theory, on the contrary to intentionalist theories, does not rely on a search for objectivity on determining the author's intention; rather, it relies on a battle or play among the author's intent, the reader's intent, and the text itself.[47] Notwithstanding the rules that are imposed on himself, what the reader in fact does is to try to find for herself/himself an appropriate context based on his/her own experiences and prejudices. Thus, the process of interpretation can, in no circumstances, be considered as a given activity that is likely to be regulated by such given rules. Eskridge puts this as: "… interpretation is neither the discovery of the text's intended meaning, nor the imposition of the interpreter's views upon the text; rather, interpretation is the common ground of interaction between text and interpreter, by which each establishes its being."[48]

Intentionalists reproach Gadamer's theory to be too variable and relative, that focusing on the reader's intentions rather than the author's is likely to conclude that the reader can consciously decide textual meaning by arbitrarily altering the context.[49] Gadamer's response to such criticisms is that the context itself conditions the reader's grasp of the text, not the other way around. However, the reader cannot be considered to be completely free to decide the meaning of the text for the text is already determinate enough, i.e., to narrow the range of possible contexts.[50] Following from that, though interpretation is a free activity, the integrity of a text is still able to constrain the reader's understanding of a part as it best fits within the whole.[51] Thus, as Heidegger put it before, such interaction between the text and interpreter has a circular character. This conception, known as a hermeneutical circle, is highlighted by Eskridge as follows:

> "Just as the horizon of the text changes over time, partly through interpretive encounters, so too the interpreter's viewpoint, or horizon, is transformed in the encounter. …The dynamic process of interpretation works thus: Upon our first approach to the text, we project our pre-understandings onto it. As we learn more about the text, we revise our initial projections, better to conform with the presumed integrity of the text as it unfolds to us. Essential to the interpreter's conversation with the text is her effort to find a common ground that will both make sense out of the individual parts of a text and integrate them into a coherent whole."[52]

46 Hans-Georg Gadamer, Truth and Method (Continuum 2004) 295

47 Hoy (n 33) 137

48 William Eskridge, 'Gadamer/Statutory Interpetation' (1990) 90 Columbia Law Review 609, 617

49 Hoy (n 33) 136

50 ibid 136

51 John Mcgarry, Intention, Supremacy and the Theories of Judicial Review (Routledge 2017) 15, also see Gadamer, *Truth and Method* (n 46) 294

52 Eskridge, (n 48) 627

2. A Passage from Philosophical Hermeneutics to Legal Hermeneutics: Dworkin's Legal Theory

Soon after his work was published, it did not take too much time for legal scholars to realize that Gadamer's theory was, in a great extent, applicable to the interpretation of legal texts, most specifically statutory provisions.[53] Contemporarily, Ronald Dworkin's account for interpretation is marked as one of the most important examples of legal works influenced by Gadamer's hermeneutical theory.[54] Furthermore, Dworkin himself clearly states that he was influenced by Gadamer's account, as he describes it as recognizing, while struggling against, the constraints of history striking the right note[55]. Therefore, Dworkin's account of interpretation, in one sense, is a passage through philosophical hermeneutics to legal hermeneutics.

Like Gadamer, Dworkin relies on the idea that an act of interpretation is unavoidably conditioned by the position of the interpreter. This demonstrates that two philosophers agree on the phenomenology of interpretation and on the role that criteria play within it.[56] Moreover, Dworkin shares Gadamer's view on the integrity of texts as a coherent whole under his conception of law as integrity. In *Law's Empire,* he clearly states that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.[57] Through this, law is a concept that might be understood under the light of coherent integrity reached by an interpretive approach implicit in judicial decisions.

Dworkin used a famous *chain novel* metaphor to manifest the interpretive aspect of law as integrity. Accordingly, he describes judges as writers of a novel which has been and continues to be written. Each writer contributes a single chapter and "the writer's first task is to fashion a critical interpretive view of the received text and provide new material that fits the novel."[58] Dworkin names this approach, in which the present interpretation is shaped by the past, as *constructive interpretation*.

Dworkin, in order to understand the logic of interpretation, identifies three separate stages that together produce it. The first one is preinterpretive stage, which consists of the identification of "the rules and standards taken to provide the tentative content of the practice" to be interpreted. The second one is the interpretive stage, in which "justification will take the form of an argument made with reference to the political

53 ibid 612

54 For e.g. Kenneth Henley, 'Protestan Hermeneutics and the Rule of Law: Gadamer and Dworkin' (1990) 3 (1) Ratio Juris 14, 16, 22

55 Ronald Dworkin, Law's Empire (Harvard University Press 1986) 62

56 Hoy (n 33) 148

57 Dworkin, A Matter of Principle (n 15) 225

58 James Donato, 'Dworkin and Subjectivity in Legal Interpretation' (1998) 40 (6) Stanford Law Review 1517, 1532

principles that best justify the practice." The third one is the post-interpretive stage, which "serves to permit adjustments or reforms in the justification of a practice."[59] Hence, this stage is one where interpretation reshapes itself.

It is not difficult to observe that Dworkin's stages of interpretation have significant resemblance with a legal hermeneutical circle. Thus, Dworkin uses Gadamer's emphasis on the circular character of interpretation and adopts it to a legal scheme. However, though these two philosophers' accounts on interpretation have several striking characteristics in common, each of their accounts also have some differences as well. The best piece to reveal such a difference, quoted by Hoy from Dworkin's work, is as follows:

> "…an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools or traditions of interpretation disagree, on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of literature better than another."[60]

As Hoy interprets Dworkin's work by inferring from this statement, he states that: "(Dworkin) wants to model legal on literary interpretation, whereas Gadamer prefers to model literary on legal interpretation."[61] In line with this, Dworkin held the position that when judges face an interpretive challenge in any hard case, there will always be competing conceptions in front of them, which they interpret concepts such as equal concern and respect, justice and fairness.[62] This unavoidably urges judges to make a choice between different conceptions. In order to find the right answer that best justify the total set of practices in which a related concept is used, judges always have to hold the balance between these different conceptions. Thus, Dworkin's "*Hercules*" arises as a judge who discovers the right answer or principle with a grasp of past practices and future expectations.

The criticism on Dworkin's position is mostly based on the assumption of his expectation from judges to balance different conceptions without taking their own value-judgments into account. According to such critics, "contrary to Dworkin's analysis, there are as many valid legal interpretations as there are different conceptions of justice and of fairness consistent with the equal concern and respect principle, just as there are as many "best" aesthetic interpretations as there are different plausible aesthetics."[63] This point is also dissenting position of John Hart Ely's charge on Dworkin. According to Ely, "the error here is one of assuming that

59 Gregory Leyh, 'Dworkin's Hermeneutics' (1987) 39 Mercer Law Review 851, 858-859

60 Hoy (n 33) 148, Dworkin, 'Law as Interpretation' (n 17) 531

61 Hoy (n 33) 148

62 Dworkin, Law's Empire (n 55) 70-72

63 Michel Rosenfeld, 'Dworkin and the One Law Principle: A Pluralist Critique' (2005) 3 (233) Revue Internationale de Philosophie 363, 388

something exists called the method of moral philosophy, whose contours sensitive experts will agree on."[64]

This point can be seen as a connection point between the hermeneutical approach to rights and the Federal German Constitutional Court. It is possible to understand such point by taking Robert Alexy's work into account on fundamental (constitutional) rights. According to Alexy, values and value-judgments are two different things. If somebody states something *has* a value, this is a *value-judgment.* However, it is entirely different to manifest that something *is* a value. Whereas value-judgments lead someone to engage in *evaluation*, values serve as *the criteria of evaluation*.[65] Evaluations can be based on a single criterion of evaluation or on several. However, evaluations according to one criterion can have fanatical tendencies. Therefore, on a pluralist account, evaluative criterions as a basis for evaluations are to be balanced with each other.[66] This is the exact point of why the Federal German Constitutional Court states that, "freedom of the press carries with it the possibility of coming into conflict with other values upheld by the Basic Law."[67] In sum, Alexy states that the Federal Constitutional Court regards different rights and freedoms as the values to be balanced among each other.

II. The Implementation of Hermeneutical Approach by Domestic Courts and the ECtHR

Not surprisingly, the interpretative approach mentioned above flourished in a Continental European rights protection system, which had been influenced by common law, and it has led to the emergence of a unique interpretive approach adopted by the European Court of Human Rights. In this section, I will describe how it has been implemented both by the Federal German Constitutional Court and the European Court of Human Rights.

A. The Emergence of a New Interpretive Approach by the German Constitutional Court

The absence of *stare decisis* in Continental European legal orders is a procedural challenge in establishing a strong form of judicial review. However, some such Constitutional Courts in past 70 years have evolved from being just a negative lawmaker into a much more effective representative of increasingly legal constitutionalism by trying to develop an effective judicial rights protection mechanism. For instance, the Federal German Constitutional Court has done this by developing an evolutive

64 Ely (n 21) 57-58

65 Robert Alexy, A Theory of Constitutional Rights (Julian Rivers tr, Oxford University Press 2002) 88-89

66 ibid 90

67 ibid 86

interpretation using its constitutional complaint jurisdiction, which enables the Court to decide on a different but stable basis for each case under the light of a principle-oriented approach.[68]

According to Alexy, rules are definitive norms whereas principles could be seen as norms competing with each other as a result of their nature as optimization requirements.[69] This optimization process over principles also builds a bridge between common law thinking and the strict textuality of the Continental European law tradition by finding a middle way that it is a matter of choices among principles in every case. Thus, the principles model functions as a bridge connecting the application of German basic rights with common law traditions. Through this, it has become that the defining term of German constitutional law is constitutionalization rather than constitutionalism.[70] Therefore, it would be useful to examine the interpretation made by the Court, in particular *Elfes* in 1957 and *Lüth* Case in 1958, which has been shown as the cornerstones of German constitutional rights interpretation.

In the Elfes Case, the complainant was a socialist politician whose participation in a congress abroad was obstructed by the government's refusal to renew his passport. German Court, in this case, had to decide, though it is not expressed textually in German Basic Law (*Grundgesetz*), whether the complainant has a right to movement to go abroad or not. In a much clearer sense, the German Court had to decide whether the human rights of the Basic Law extended beyond the explicit guarantees of the Constitution, and this was indeed a problem with the interpretation of Article 2 of German Basic Law, which acknowledges and protects the freedom of action generally.[71] The German Court acknowledged that the freedom of action encapsulates the right to move abroad and found the complaint admissible by extending its jurisprudence beyond textual interpretation.[72] Thus, the Elfes Case of the Federal German Constitutional Court has been shown as one of the most important cases in German constitutional history as a beginning point of constitutionalization of German legal system[73].

Through the Elfes Judgment, the German Constitutional Court adopted an evolutive interpretation approach, and since that point, it has been acknowledged that the interpretation of constitutional rights has had a significant effect on whole legal system. However, this is not enough. What makes the constitutionalization

68 For e.g. see Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From anti-Nazism to Value Formalism' (2014) 12 (3) International Journal of Constitutional Law 626, 642-644

69 Alexy (n 65) xxviii, also 47-48

70 Jan Henrik Klement, 'Common Law Thinking in German Jurisprudence-on Alexy's Principles Theory' in Matthias Klatt (ed), Institutionalized Reason: The Jurisprudence of Robert Alexy (Oxford University Press 2012) 199

71 Alex Tschentscher, The Basic Law (Grundgesetz): The Constitution of Federal Republic of Germany (May 23rd, 1949), (Jurisprudentia, 2016) 19.

72 *BVerfGE 6, 32.*

73 Tschentscher (n 71) 19

of a legal system possible is its capacity of extendibility to all specific matters of private law as well as public law. It was the Lüth Case that opened a door to private law matters by bringing up the horizontal effect of constitutional rights into the agenda.[74] As to the facts of case, Erich Lüth was a politician who had publicly called for the boycott of a film by a director who was notorious as a Nazi film maker. For his public calls, civil court convicted him to pay an indemnity, and Lüth lodged a constitutional complaint against the decision. Consequently, the Court extended the controlling power of basic rights to the domain of private law by requiring an interpretation of contractual obligations and other private interactions that are compatible with human rights.[75]

B. ECtHR's Hermeneutical Approach to Human Rights

Interpretive methods and principles in every system develop in terms of premises of a legal system in which these methods and principles are used.[76] The European Court of Human Rights, so far, has seemed to shape its interpretive position under interpretive principles such as the living instrument approach with evolutive interpretation,[77] autonomous concepts,[78] positive obligations,[79] and horizontal effect of rights[80] as well as proportionality and margin of appreciation.[81] The former four characterise the principles of a broad interpretation of human rights whereas latter two represent a narrower approach. However, the ECtHR's interpretive principles are enumerated. According to Koch:

> "It has often been noticed that the Court reads the ECHR as a *living instrument* and that it has adopted an even very *dynamic style of interpretation*. The by now quite aged Convention is interpreted in the light of *present-day conditions*, and limited emphasis is accordingly put on the preparatory works. It is also common knowledge that the Court applies a *contextual style of interpretation* in order to establish "harmony with the logic of the Convention", and that the Court reads the treaty in the light of its *object and purpose*. Also, the principle of *effectiveness* is usually referred to when discussing the principles of interpretation of the Court indicating that the Court prefers a "practical and effective" solution to one which is "theoretical and illusory". Finally, for a long

74 For e.g. Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 1989) 376

75 Tschentscher (n 71) 20

76 By methods, I mean textual, historical, systematic and teleological interpretation, which are granting authority to a certain reasoning on the basis of different reasons, depending on the theory behind the interpretation method. However, principles serve as an objective or aim that can be taken into account when interpreting a provision with the help of an interpretation method. These can be identified autonomous concepts, margin of appreciation, evolutive interpretation etc. on this matter, *see*, Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, (Intersentia 2009) 45-47

77 *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) paras 31-33

78 *Engel and Others v. Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 08 June 1976) paras 81-82

79 *Airey v. Ireland* App no 6289/73 (ECtHR, 09 September 1979) para 24

80 *X and Y v. Netherlands* App no 8978/80 (ECtHR 26 March 1985) para 23

81 *Ireland v. The United Kingdom* App no 5310/71 (ECtHR 18 January 1978) para. 36

> time is has been generally recognised that the Convention encompasses what is called *'positive' obligations* including those stemming from the notion of 'Drittwirkung' or third-party effect."[82]

The European Court, from time to time, has used such interpretive principles as a tool for "European integration through law" as it has been evolving from the position of a legal diplomatic institution to an effective court which has an integrationist jurisprudence.[83] Recently, alongside the increase of the contracting parties' number, the overall population under the jurisdiction of the Court has reached approximately 850 million people, which brings a huge caseload for the ECtHR. In 2012, the European Court stated in the Final Declaration of Brighton Conference that it welcomed and encouraged open dialogue between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention.[84] Thus, the interpretive principles of the ECtHR have been and continue to be transferred into domestic legal systems. Along these lines, acceptance and domestic implementation of judgments by the contracting parties to the ECHR will be ensured[85].

1. Classical Hermeneutics in Early Jurisprudence of the ECtHR

How could an international treaty become such an important document that demonstrates its contracting parties' commitment to human rights as an idea? The answer to this question lies in the usage of interpretive principles by the ECtHR in its jurisprudence. The Court, above all, is an international institution. Therefore, the Court's interpretation, in the beginning years of its jurisprudence, was formed under the *jus cogens* rules of the interpretive method.[86] Peremptory rules of treaty interpretation, later on, were codified in the Vienna Convention on the Law of Treaties within articles 31-33. The Court, clearly refers to the Vienna Convention, in the Loizidou Case, stating that the Convention (ECHR) must be interpreted in the light of the rules of the interpretation set out in the Vienna Convention.[87]

Article 31/1 of the Vienna Convention states that: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of*

82 Ida Elisabeth Koch, Human Rights as Indivisible Rights The Protection of Socio-Economic Demands under the European Convention on Human Rights (Martinus Nijhoff Publishers 2009) 39

83 Madsen, Mikael Rask, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011) 46-47

84 Council of Europe, *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration*, Brighton, 18-20 April 2012, H/Inf (2012) 3, 117.

85 Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 (10) German Law Journal 1730, 1730

86 For e.g. Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treatise in the Recent Jurisprudence of European Court Human Rights' (2003) 14 (3) European Journal of International Law 529, 561-563

87 *Loizidou v. Turkey* App no 15318/89 (ECtHR 18 December 1996) para 41

the treaty in their context and in the light of its object and purpose." Though this provision constitutes a general frame of interpretation which falls within the scope of textualism, Article 32 of the Convention states that "supplementary means of interpretation" should be considered as well:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

In the first years of its jurisprudence, even before the Vienna Convention had been drafted, the ECtHR frequently referred to "ordinary meaning to be given to the terms of the treaty." In its very first case, *Lawless v. Ireland*, the Court held that the plain and natural meaning of that provision was that a person may be detained only for the purpose of bringing him before a competent legal authority whether or not he is detained on suspicion of having committed a crime or to prevent him from committing an offence. The Court also held in its judgment that it was not permissible to resort to preparatory work when the meaning of the clauses to be construed was clear and unequivocal.[88]

The Court continued its textual approach in the cases throughout the 1960's. In the *Belgian Linguistic Case* of 1968, as the Court interpreted Article 2 of the Protocol (P1-2), it held that "this provision does not require of States that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions. To interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there."[89] One can clearly see that the Court's interpretive approach in these years was a strict textual interpretation alongside an intentionalist approach.

2. A Hermeneutical Turn in the Jurisprudence of the ECtHR after 70's

In the year 1968, the Court held in *Wemhoff v. Germany* that it was necessary to seek the interpretation that was most appropriate in order to realise the aim and achieve the object of the treaty, in which case it was not possible for the Court to

88 *Lawless v. Ireland* App no 332/57 (ECtHR 01 July 1961) paras 11, 14

89 *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium* (Merits) App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (ECtHR 23 July 1968) para 6.

accept the restrictive meaning of "trial" [90] and that the meaning of word "trial" should be interpreted under substantive accounts. Under such interpretation, the Court began to move from its textual approach. This has become much more visible in the judgments of the ECtHR in 1970's starting from *Golder v. The United Kingdom*.

According to Letsas, *Golder* was a case that laid the foundations for interpretative principles, which have now become important for the thousands of applications that the Court receives each year.[91] In the *Golder Case*, the applicant was a prisoner serving his sentence and had been denied permission to consult a solicitor with the aim of instituting libel proceedings against a prison officer. The United Kingdom argued that the ECHR does not confer a right to access to court, given the absence of an explicit provision which clearly indicates such a right.[92] However, the Court held that Article (6/1) embodies the "right to a court," of which includes the right of access, i.e., the right to institute proceedings before courts in civil matters. Added to this are the guarantees laid down by Article 6 para. 1 (art. 6-1) in regards to both the organisation and composition of the courtand the conduct of the proceedings.[93]

The *Golder Case*, thus, introduced a new debate to European legal systems, which has been held between originalists and non-originalists in the context of American constitutional law, namely that of 'unenumerated' rights.[94] Following that, the European Court of Human Rights, from that time on, has improved its jurisdiction in terms of interpretation from a strict textuality to a philosophical hermeneutics approach. Thus, the Court's interpretive ethic, as Letsas points out, became more focused on the substance of the human right at issue and the moral value of it in a democratic society rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters.[95]

Within the following four years of *Golder*, ECtHR made its approach much clearer in the *Engel*, *Tyrer*, and *Airey* Cases. In the *Engel Case*, the Court regarded the term "criminal charge" as an autonomous concept from the domestic laws of contracting parties.[96] The Court in 1978 acknowledged the "living instrument" approach, in which the interpretive principle underlies *Tyrer*.[97] These interpretive principles have

90 *Wemhoff v. Germany* App no 2122/64 (ECtHR 27 July 1968) paras 7-8

91 George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 (3) European Journal of International Law 509, 515

92 ibid 515

93 *Golder v. United Kingdom* App no 4451/70 (ECtHR 21 February 1975) para 36

94 Letsas (n 91) 515

95 ibid 520

96 (n 78)

97 (n 77)

become quite familiar for domestic rights protection systems as well as international mechanisms, in which they constituted a philosophical and legal hermeneutics approach to rights.[98]

The ECtHR did not stop there; it extended its interpretive approach to even social and economic rights. In the *Airey* Case, the Court held that fulfilment of a duty under the Convention, on occasion, necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive, and "there is ... no room to distinguish between acts and omissions."[99] Furthermore, the Court, in this case, broadened the scope of rights in favour of social and economic rights, stating that an interpretation of the Convention might extend into the sphere of social and economic rights. The Court continued by stating that there should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[100]

The world in the 1980's was undergoing a crucial transformation with the third wave of democratization, which refers to transitions to democracy in mostly Eastern European countries. These countries gradually recognised the compulsory jurisdiction of the Court, and among them, there were countries suffering from crucial structural human rights problems. In line with this, the Court found a chance to apply and develop its interpretive principles more broadly and perhaps more bravely.[101]

In 1993, the Court held in *Öneryıldız v. Turkey* that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entailed, above all else, a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[102] Thus, by using the positive obligations principle, the Court began to extend the scope of rights into third generation rights such as the right to environment.

The above cases demonstrate that the ECtHR, as an international rights protection mechanism, changed the rules of the game in interpretation. The Court developed interpretive principles, reasonably inspired by domestic jurisdictions of its contracting parties, such as the Elfes and Lüth Decisions of the Federal German Constitutional Court. In any case, the European Court of Human Rights' interpretive principles has been and continues to be formed under the postulates of philosophical and legal hermeneutics[103]. However, the ECtHR's explicit focus on the substance of the

98 Koch (n 82) 39-40

99 (n 79) para 5.

100 (n 79) para 26.

101 For an example of the Court's double standard, see the comparison between Aksoy v. Turkey and Brannigan and McBride v. The United Kingdom in Marie-Benedicte Dembour, Who Believes in Human Rights Reflections on the European Convention (Cambridge University Press 2006) 51-53

102 *Öneryıldız v. Turkey* App no 48939/99 (30 November 1993) para 89

103 Koch (n 82) 56-57

human rights has led the Court to go further. The Court, in 2002, released the *Pretty* Judgment, which manifests the ECtHR's understanding of human rights and should be marked as one of the cornerstones in the Court's jurisprudence. The importance of the judgment was its emphasis on human dignity as one's freedom and capacity to choose and on the conception of dignity as a basis of rights.[104] Though the ECtHR has mentioned human dignity several times before[105] *Pretty*, this was one of the very first cases that the Court put not only legal but also a moral flesh on the bare bones of human rights. Thus, the Court took a truly hermeneutical step that, from that time on, the concept of human rights is to be understood not only by the Convention's object and purpose but also by human dignity as personal autonomy.[106] In 2006, the Court, in *Sorensen and Rasmussen,* held that 'the notion of personal autonomy' is an important principle underlying the interpretation of the Convention guarantees,[107] and it repeated this wording in *Vordur Olafsson v. Iceland*.[108]

The European Court of Human Rights, from time to time, uses textual interpretation as well, for instance, *Johnston v. Ireland* in 1986[109] and the *Bankovic* Case in 2001.[110] However, one can argue that the Court's evolutive interpretation prevails over the textual and intentional approach. Thus, the European Court of Human Rights' interpretive principles, in a hermeneutical sense, is shaping human rights conceptions of European domestic legal orders.

Today, partially because of the past temperamental relationship between them, the ECtHR relies on domestic courts' judgments more than it used to.[111] Thus, it is a well-known fact that the ECtHR has made a procedural turn in the protection of human rights in recent years,[112] meaning that the Court chooses a path that is marked by a preference for a procedural review of national authorities as well as the domestic courts rather than a strict scrutiny of the facts (substantial review). Such an approach would naturally give rise to a responsible domestic courts doctrine, allowing domestic courts a larger discretionary space with regard to making rights violation

104 Benedict Douglas, 'Too attentive to our duty: the fundamental conflict underlying human rights protection in the UK' (2018) 38 (3) Legal Studies 360, 362

105 ibid 362

106 For e.g. N.R. Koffeman, *(The right to) personal autonomy in the case law of the European Court of Human Rights,* (LL.M), Leiden, 2010, available at: https://scholarlypublications.universiteitleiden.nl/access/item%3A2885722/view, Access: 21.08.2021, 5-8.

107 *Sorensen and Rasmussen v. Denmark,* App Nos 52562/99 and 52620/99, (ECtHR, 11 July.2006) para 54.

108 *Vordur Olafsson v. Iceland,* App no 20161/06, (ECtHR, 27 April 2010) para 46.

109 *Johnston and Others v. Ireland,* App No 9697/82, (ECtHR, 18 December 1986) para 52.

110 *Bankovic and Others v. Belgium and Others,* App no. 52207/99, (ECtHR, 12 December 2001).

111 Eirik Björge, 'Bottom-Up Shaping of Rights: How the Scope of Human Rights at the National Level Impact upon Convention Rights', in Eva Brems, Janneke Gerards (eds) *Shaping Rights in the ECHR: The Role of The European Court of Human Rights in Determining the Scope of Human Rights,* (Cambridge University Press, 2013) 229.

112 Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards, Eva Brems (eds) *Procedural Review in European Fundamental Rights Cases,* (Cambridge University Press, 2017) 17-18.

determinations and also that domestic courts should responsibly take into account the interpretation of the Convention rights as developed through ECtHR case law[113].

Particularly, Protocol No. 16 to the European Convention on Human Rights approved by the Plenary Court on 18 September 2017 corresponds to the "*shared responsibility*" doctrine by promoting a legal interaction between national courts and the ECtHR. Article 1 of Protocol No. 16 to the Convention confers jurisdiction on the Court to give advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined in the Convention or the Protocols. The aim of the procedure has been anticipated to further the interaction between the Court and the national courts and tribunals of the Contracting Parties to the Convention by promoting constructive dialogue between the Court and the national courts and tribunals.[114] Although much praised, some procedural challenges can be observed in Protocol No. 16 such as the parallel existence of two similar types of optional preliminary rulings in the Court of Justice of the European Union (CJEU) and the ECtHR, which might unnecessarily complicate the harmonious coexistence of the various legal orders[115] and might cause delays and confusion[116] in judicial proceedings.

It should be noted, furthermore, that the "procedural turn" of the ECtHR has been criticised for coming at the expense of the implementation of a dynamic approach through judicially restraining the Court and international judges in favour of national authorities.[117] However, the procedural move has been praised and claimed to be synergetic with an effective right protection. According to Kleinlein,

> "Contrary to the fears expressed by some critics, this move, while closely intertwined with the concept of subsidiarity, does not diminish substantive human rights obligations… *as* the procedural approach facilitates a dynamic evolution either in the practice of Convention States (analytic or bottom-up approach) or by the Court (constructive or top-down approach) ..."[118]

113 Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddný Mjöll Árnadóttir, Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Between the ECHR, EU, and National Legal Orders,* (Routledge, 2016), 155.

114 European Court of Human Rights, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017),* para 2.

115 Koen Lemmens, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019), European Constitutional Law Review 15 (4), 691, 693.

116 Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights A Comparative and Critical Appraisal' (2014) Maastricht Journal of European and Comparative Law, 21 (4) 630, 632.

117 see for. e.g. P. Cumper, T. Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court Of Human Rights' (2019) International and Comparative Law Quarterly, 68 (3) and Øyvind Stiansen, Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) International Studies Quarterly 64 (4)

118 Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019), International and Comparative Law Quarterly, 68 (1) 91, 92, see also Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) Human Rights Law Review, 18 (3)

Either way, it should be acknowledged that as a result of the "*procedural turn or approach*," the hermeneutical interaction between the ECtHR and domestic courts –particularly Constitutional or Supreme Courts- of the parties to the Convention will be the determinant factor in the future.

Concluding Remarks: Why do we oblige our judges to apologize?

Like any revolution, the judicial revolution of rights in Europe were twofold: First, below to top, then the other way around. It started with a pressure from legal systems and jurisdictions of the domestic courts of Europe (such as Britain and Germany) to the European Court of Human Rights, and it proceeded to radiate from there to European legal orders. However, as is known, a revolution devours its children. In order to comply with the interpretive requirements of the European Court of Human Rights, European domestic courts can now be said to be trying to develop a dialogue between the Court's and their own jurisdictions.[119] Particularly in the United Kingdom, a reform has been made by enacting the Human Rights Act in 1998, which deeply affects its legal and judicial system[120].

However, it seems that unless domestic courts fully understand and engage with the conception of rights as well as the interpretive principles of the ECtHR, judges will unavoidably have to apologize to the applicants. Perhaps, two examples from very different geographical, political, and legal positions under the jurisdiction of the ECtHR, one from the west, United Kingdom, and one from the east, Turkey, could be enlightening for exemplifying my point.

The first example is *Squirrell Ltd. v. National Westminister Bank plc and HM Customs and Excise*, in 2006 from the United Kingdom Chancery Division of High Court. As to the facts of case, the Bank suspected that Squirrel Ltd's (the applicant) bank account contained the proceeds of crime and froze the account, in accordance with section 328 (1) of the Proceeds of Crime Act, without showing any reason. The applicant, *inter alia*, applied for an order to unblock the account on the basis that there was no evidence that it was guilty of any wrongdoing. Consequently, though the applicant did not commit any crime or wrongdoing, his company's account remained blocked for 16 days, which kept him making any necessary payments during that time, including payment to lawyers to appear before court on his behalf.

The interesting fact in this case is that the judge started his own judgment by stating that, "*I should say I have some sympathy for parties in Squirrel's position.*

119 Lord Kerr, 'The Need for Dialogue Between National Courts and the European Court of Human Rights' in (eds) Spyridon Flogaitis, Tom Zwart, Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength,* (Edward Elgar Publishing, 2013) 105.

120 For e.g. Roger Masterman, 'Aspiration or Foundation? The status of the Strasbourg Jurisprudence and the "Convention Rights" in domestic law', in Helen Fenwick, Gavin Phillipson, Roger Masterman, (eds.) *Judicial Reasoning under the Human Rights Act,* (Cambridge University Press, 2007) 57-60.

It is not proved or indeed alleged that it or any of its associates has committed any offence. …it cannot be suggested that either Natwest of HMCE are required to give a cross undertaking in damages. In the result, if Squirrell is entirely innocent, it may suffer severe damage for which it will not be compensated."[121] In the judge's view, "*the course adopted by Natwest was unimpeachable. It did precisely what this legislation intended it to do. In the circumstances, there can be no question of me ordering it to operate the account in accordance with Squirrell's instructions. To do so would be to require it to commit a criminal offence. …Sympathy for the position in which Squirrell finds itself do not override those considerations*."[122] At the end of the day, Squirell Ltd. gained the sympathy of the judge but not compensation even if there was a possibility that the bank transactions on his account would be arbitrary.

The second example is the *Emin Aydın* Case from the Turkish Constitutional Court in 2015. Emin Aydın is a newspaper columnist at a local journal in a small town called Çine in the Western region of Turkey. The town is so small that only four public prosecutors hold office. In one of his columns, the journalist used all four prosecutors' names in a way that could be insulting to each one of them. After all four prosecutors pressed charges against him, one of these prosecutors carried out the investigation and brought the charges before the Criminal Court. The Criminal Court convicted him, and the High Court of Appeal approved the conviction; thus, after all legal remedies had been exhausted, the case came before the Turkish Constitutional Court as an individual application (constitutional complaint).

The applicant's argument was that the public prosecutor must be impartial as well as judges for public prosecutors are under a legal obligation to carry out an impartial investigation and to collect evidence both in favour and against the suspect on the public's behalf. Otherwise, this would be breach of the right to a fair trial in Article 6 of the ECHR and Article 36 of the Constitution of Turkey. However, in neither instance did the courts nor did the Turkish Constitutional Court agree with this argument because there was not a legal provision which allowed the applicant to challenge the impartiality of a public prosecutor as there was under Turkish Criminal Code for recusation of judges.[123]

In its judgment, the Turkish Constitutional Court held that, "*Even if it is an undesirable occasion that a public prosecutor becomes both either victim or plaintiff and the investigator of any case, in the Turkish Penal Law system, there is no such provision giving room for a foundation of the "recusation of public prosecutor." It is legally possible for a public prosecutor to carry out and finalize an investigation in*

121 *Squirrell Ltd. v. National Westminister Bank plc and HM Customs and Excise, [2006] -1-W.L.R.-637,* para 7.

122 ibid para 21.

123 Turkish Constitutional Court, *Emin Aydın (2) Başvurusu,* App No: 2013/3178

which he/she is either victim or plaintiff."[124] Similar to Squirrel Ltd., the columnist gained the sympathy of the Constitutional Court, which states that such occasion is *undesirable;* however, quite like Squirrel, he could not persuade the judges to overturn the judgment of the criminal court.

The common point of the above two cases is that there is an implicit apology from judges to the applicants in each of them. Even if judges, as one can see, have sympathy for an applicant's situation, they feel restricted by the strict textuality and the intention of the legislation and fail to engage with hermeneutical context of human rights. Thus, today, a judicial protection of rights is to be understood and formulated under a *hermeneutical awareness*,[125] for, as Leyh points out, hermeneutics vigorously resists views of reason and rationality as historically disengaged, denies that truth is transcendent, and holds untenable the idea that language is a neutral instrument capable of impartially representing objects in the world.[126]

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124 *"Bir Cumhuriyet savcısının herhangi bir olayın hem mağduru veya müştekisi hem de soruşturmasını yürüten kişisi olması istenir bir durum olmamakla birlikte Türk Ceza Hukuku sisteminde "Cumhuriyet savcısının davaya bakamaması ve reddi" müessesesine yer verilmemiştir. Cumhuriyet savcısının kendisinin bizzat mağdur ya da müşteki durumda olduğu bir soruşturmayı yürütmesi ve sonuçlandırması yasal olarak mümkündür.* ibid para 28

125 Gadamer, *Truth and Method* (n 46) 534

126 Leyh, (n. 59) 855

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Drone Attacks and the Principle of Proportionality in the Law of Armed Conflict

Siha Saldırıları ve Silahlı Çatışma Hukukunda Orantılılık İlkesi

Yunus Emre Gül*

Abstract

Technology has developed significantly in the past few decades; obligations on belligerent parties, however, have not changed. One of these obligations is to respect the principle of proportionality while conducting attacks against lawful targets. For this reason, whilst military advantage can be gained through drone attacks, those attacks must not result in excessive harm inflicted upon civilian lives and properties. Also, belligerent parties should take all feasible precautions in order to minimize collateral damage and always take Human Rights Law into consideration even if the particular drone attack is lawful according to the Law of Armed Conflict.

Keywords

Law of Armed Conflict, principle of proportionality, drone attacks, excessive, collateral damage

Öz

Teknoloji, son birkaç on yılda önemli ölçüde gelişti, ancak savaşan tarafların yükümlülükleri değişmedi. Bu yükümlülüklerden biri de meşru hedeflere yönelik saldırılar düzenlerken orantılılık ilkesine riayet etmektir. Bu nedenle her ne kadar askeri avantajın SİHA saldırıları ile kazanılması mümkün olsa da bu saldırılar sonucu sivillerin canlarına ve mallarına yönelik aşırı zararlara yol açılmamalıdır. Ayrıca savaşan taraflar, tali zararı en aza indirebilmek için mümkün olan bütün önlemleri almalı ve belirli bir SİHA saldırısı her ne kadar Silahlı Çatışma Hukuku'na uygun olsa da İnsan Hakları Hukuku'nu da her zaman dikkate almalıdırlar.

Anahtar Kelimeler

Silahlı Çatışma Hukuku, orantılılık ilkesi, SİHA saldırıları, aşırı, tali hasar

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Drone Attacks and the Principle of Proportionality in the Law of Armed Conflict

Introduction

The root of remote-control machines dates back to Second World War. The 'Goliath', German remote-controlled vehicle was used during the war in order to destroy tanks, disrupt dense infantry formations, and demolish buildings and bridges.[1] Also, another type of remote-controlled vehicle, the Teletank, was used by the Soviet Union to destroy enemy fortifications and bunkers.[2] Although these remote technologies were in use in land combat, the idea of using armed drones in air warfare goes back to 1970s, but it became reality in 2001 through the use of drones by the USA against al-Qaida members in the eastern Afghan city of Jalalabad.[3]

Even though different terminologies are used in the doctrine such as unmanned aerial vehicle (UAV) or remotely piloted aircraft (RPA), these terms can be classified under the general term 'drone', or 'an aircraft that, whilst it does not carry a human operator, is flown remotely by a pilot, is normally recoverable, and can carry a lethal or non-lethal payload'.[4] Drones which carry lethal payloads can be called 'armed drones.' Alternatively, it is defined in the HPRC Manual on International Law Applicable to Air and Missile Warfare as 'unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target'.[5] In the scope of this essay, attacks carried out by those types of drones will be examined.

Military drones are currently used by ninety-five countries, and they have been used by at least twenty-eight countries outside of their borders since the 1980s.[6] However, armed drones started to catch international society's attention after al-Qaeda operative Ali Qaed Senyan al-Harithi was killed by a predator drone in Yemen by the CIA in 2002.[7] After that, use of drones by states was significantly boosted, and although 21,000 of them are confirmed officially, it is estimated that the actual

1 E. W. Powers, 'Developing and Integrating Unmanned Systems for Military Operations' in Ronan Doaré and others (eds), *Robots on the Battlefield Contemporary Perspectives and Implications for the Future* (Combat Studies Institute Press 2014) 201.

2 ibid.

3 Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' (Social Science Research Network 2009) 3 <https://papers.ssrn.com/abstract=1501144> accessed 5 May 2020."plainCitation":"Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' (Social Science Research Network 2009

4 UK Ministry of Defence, *Unmanned Aircraft Systems* (Development, Concepts and Doctrine Centre 2017) 12.

5 Program on Humanitarian Policy and Conflict Research at Harvard University, HPCR Manual on International Law Applicable to Air and Missile Warfare (Bern, 15 May 2009) ('HPRC Manual') art 1(ee).

6 Dan Gettinger, *The Drone Databook* (The Center for the Study of the Drone at Bard College 2019) XII.

7 Michael N Schmitt, 'Drone Attacks under the Jus Ad Bellum And Jus in Bello: Clearing the "Fog of Law"' in MN Schmitt, Louise Arimatsu and T McCormack (eds), *Yearbook of International Humanitarian Law - 2010*, vol 13 (T M C Asser Press 2011) 2.

number exceeds 30,000.[8] They are also used by non-state actors; however, this essay will only deal with state practices.

As stated in article 35(1) of Additional Protocol I (AP-I), '[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.'[9] In other words, which means of warfare can be used in combat by states and how to use them are subject to certain principles of the Law of Armed Conflict (LOAC). One of those principles is the proportionality which prohibits attacks that 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[10] Thus, the principle of proportionality balances two values, expected civilian damage and anticipated military advantage. This balance should also be protected when carrying out drone strikes in armed conflicts.

In the first part of this article the laws regulating drone attacks, which are Law of Armed Conflict (LOAC) and International Human Rights Law (IHRL), will be examined. Although the LOAC is applicable in times of armed conflicts as *lex specialis*, this does not preclude to fulfil human rights obligations of states. Since drones are especially used outside of the borders of attacking states, these states still must respect those obligations in the territory where they have control. In the second part, the regulation of the principle of proportionality in the LOAC and how it can be applied to drone attacks will be explained. Although drones promise a significant advantage to attacking parties, they also bring some problems regarding proportionality, a review of which will be determined in this article.

1. The Law Regulating Drone-Attacks in Armed Conflicts

1.1. The Legality of Using Armed Drones under the LOAC

After French military forces used the balloon 'Entreprenant' against Austrian forces at the Battle of Fleurus (1794), air warfare occurred as a new type of warfare.[11] However, regulating this new type of warfare succeeded more than a hundred years later at Hague Peace Conference (1899), and 'the launching of projectiles and explosives from balloons, or by other new methods of a similar nature' was prohibited for 5 years.[12] However, after World War I (WWI), the contribution of air power to

8 Gettinger (n 6) IX.

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('AP-I').

10 AP-I art. 51(5)(b). Also *see* AP-I art. 57(2)(a)(iii) and 57(2)(b).

11 Michael N Schmitt, 'Air Warfare' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Online 2014) 2.

12 'Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899.' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C372920FFD61039AC12563CD00516126> accessed 30 January 2020.

warfare was well-understood, and it is not wrong to say that the victory of World War II (WWII) was determined by air warfare.

International society always has an interest towards new technologies and using them during armed conflicts because of their advantages, such as harming enemies without risking the armed forces of states. However, as mentioned above, article 35 of the AP-I imposes two burdens upon the parties of an armed conflict. First, they need to check the legality of using new weapon, and second, even if it is legal, they need to use it in accordance with the principles of the LOAC.

Although the answer is obvious, it should be clarified whether drones are a new type of 'weapon' or not. The term 'weapon' is defined in the HPRC Manual as 'a means of warfare used in combat operations, including a gun, missile, bomb or other munitions, that is capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of, objects.'[13] There is no doubt that armed drones can cause such consequences, and if they are used during armed conflicts, they will be subject to rules regarding weapons regulated in the LOAC.

According to AP-I art. 36, '[i]n the study, development, acquisition or adoption of a new weapon, means, or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party'. For this reason, before using a new weapon or method, such as cyber means or drones, belligerent parties should review its legality under the LOAC. Hence, three principles of the LOAC are significant: the Principle of Distinction, the Principle of Proportionality, and the Principle of Precautions. As the ICJ stated in the *Nuclear Weapons* Advisory Opinion, these principles apply to 'al1 forms of warfare and to al1 kinds of weapons, those of the past, those of the present, and those of the future'.[14]

Two issues in the law of weapons should be distinguished from each other: first, weapons that are unlawful *per se* under customary international law because of their nature of causing superfluous injury or unnecessary suffering, such as chemical or biological weapons, or of being indiscriminate and second, using a lawful weapon system in an unlawful manner, such as the usage of SCUD missiles by the Iraqi army in the 1990-91 Gulf War against cities without taking civilian casualties into consideration.[15] From that perspective, although drones are not illegal *per se* due to their nature, it is possible to use them in an unlawful manner by violating principles which are stated above.

13 HPRC Manual Article 1(ff)

14 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] (hereinafter '*Nuclear Weapons*') ICJ Rep para. 86.

15 Michael N Schmitt and Jeffrey S Thurnher, 'Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harvard National Security Journal 231, 243 ff.

Two criticisms have been raised on the issue of conducting attacks via drones: attacking belligerents without 'human eyes on the target' and the causation of a 'PlayStation mentality to killing.'[16] Schmitt answers these in the following manner: First, drone attacks are based on high resolution imagery, and if it is necessary, monitoring a target for a long time is possible.[17] Therefore, from his perspective, conducting attacks without 'human eyes on the target' does not make any difference. On the 'PlayStation mentality to killing,' he states that the focal point is not the 'mental attitude of the attacker' but identifying lawful targets correctly and preventing collateral damage as much as possible.[18] Nevertheless, states still need to provide 'training programs for drone operators who have never been subjected to the risks and rigors of battle to instil respect for IHL and adequate safeguards for compliance with it' in order to prevent comfortable killings and excessive civilian damage.[19]

1.2. Drone attacks and the LOAC

Drone attacks which are conducted in an armed conflict will be subject to the LOAC as *lex specialis*. It is stated in the *Tadic* Case that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[20] In line with this definition, there are two types of armed conflicts: international and non-international, and the difference between these two types of armed conflicts is the status of the actors, which will be explained below.

An international armed conflict arises when there is a resort to armed force between two or more states as defined in the *Tadic* Case and Common Article 2 of the Geneva Conventions. Therefore, there must be at least one state on either side of the conflict or an armed group whose acts are attributable to a state. While the 'overall control' test is applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* Case in order to determine the relationship between a state and an armed group[21], the International Court of Justice (ICJ) rejects this notion and adopts a stricter criterion, namely 'effective control.'[22] Lastly, if the war is declared by one state against another, the LOAC applies even if they have not resorted to armed force yet.

16 Schmitt (n 7) 8–9.

17 ibid 8.

18 ibid 9.

19 UNHRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings*, UN Doc. A/HRC/ 14/24/Add.6, (May 28, 2010) (hereinafter 'UN Doc. A/HRC/ 14/24/Add.6') para. 84.

20 *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) para 70.

21 *Prosecutor v Dusko Tadic* (Appeal Judgement) ICTY-94-1-A (15 July 1999) para 145.

22 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment)* [1984] ICJ Rep para 115.

Common Article 3 regulates non-international armed conflicts by defining them as an armed conflict which is 'not of an international character occurring in the territory of one of the High Contracting Parties.' However, the occurrence of non-international armed conflict is dependent on two criteria according the *Tadic* Case, which are intensity and organization.[23] Protracted armed violence indicates a threshold of intensity which is higher than 'isolated or sporadic acts of violence.'[24] Also, an armed group which has 'a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population' and 'sufficient means to promote or encourage the attack,' meets the organization criterion.[25] However, both criteria should be determined on a case by case basis.

After the type of armed conflict is determined, all acts which are related to the armed conflict will be governed by the LOAC.[26] Hence, belligerent parties must always respect the principles of the LOAC while conducting drone attacks in both international and non-international armed conflicts. Although there is no clear regulation in either the Geneva Conventions nor the Additional Protocols on the application of proportionality to non-international armed conflicts, this issue will be clarified under 2.1. of this article.

1.3. Applicability of Human Rights Law to Extraterritorial Drone Attacks in War Times

The application of the LOAC as *lex specialis* does not prevent applying the Human Rights Law during armed conflicts. The nexus between these two branches of law is discussed in the *Nuclear Weapons* Advisory Opinion, and the ICJ argued that the International Covenant on Civil and Political Rights is applied in an armed conflict; however, the prohibition of the arbitrary deprivation of life is determined in accordance with the LOAC, which governs the armed conflict as *lex specialis*.[27] This approach is reiterated by the ICJ in *The Wall* Advisory Opinion[28] and the *Armed Activities* Judgement.[29] Nonetheless, the Court also added in the former decision that

23 *Prosecutor v Dusko Tadic* (Judgment) ICTY-94-1-T (7 May 1997) (*Tadic* Trial Judgement) para 562; *Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 620; Jean S Pictet (ed), *Commentary I Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 49–50.

24 *Tadic* Trial Judgement (n 13) para 562; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para 140.

25 *Prosecutor v Germain Katanga* (Judgement pursuant to article 74 of the Statute) ICC- 01/04-01/07 (7 March 2014) para 1119.

26 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgement) ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) para 57; Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (European Parliament 2013) 21.

27 *Nuclear Weapons* Advisory Opinion para. 25.

28 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] (hereinafter '*The Wall*') ICJ Rep para. 106.

29 Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) *(Judgment)* [2005] (hereinafter '*Armed Activities*') ICJ Rep para. 216 ff.

'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law' in armed conflicts.[30] Therefore, IHRL may be applied '*in parallel*' with the LOAC at the same time, and states, which conduct drone attacks specifically against non-state actors, must take human rights treaties, whose jurisdiction are recognized by them, into consideration in the case of armed conflict.[31]

The application of human rights treaties during an armed conflict can be claimed by all people who are under the jurisdiction of a state that is party to the treaty. However, the jurisdiction of a state should not be interpreted within national boundaries. As it is stated by the Inter-American Commission in the *Alejandre* Case, 'when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues.'[32] Hence, if the authority of a state is established over a person or territory, it will be possible to apply human rights treaties, and the applicable test provided by the European Court of Human Rights is 'effective control.'[33]

Human rights treaties apply extraterritorially not only when there is an effective control over a land but also in the case of control over facilities and persons. As stated in the *Al Sadoon* Case, after control is established over a detention facility, detainees will be under the jurisdiction of a controlling state.[34] Even if the facility is controlled by a state but another state implements control over a detainee, the jurisdiction of the latter is established. As decided in *Hassan v. UK*, while control over a facility, Camp Bucca, is implemented by the US, the jurisdiction of the UK was established because of its control over a particular person.[35]

Last but not least, an act can constitute the breach of the International Human Rights Law in spite of its legality under the LOAC, and it may create a responsibility of the state. As stated by the ICJ,

> 'There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus, it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it'.[36]

30 *The Wall* Advisory Opinion para. 106.

31 Silvia Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law-The Role of the Judiciary* (Springer 2015) 273; *Armed Activities* Judgement para 216; *Hassan v United Kingdom* App no 29750/09 (ECtHR 16 September 2014) (hereinafter '*Hassan v. UK*') para 77.

32 *Alejandre et al. v Cuba* Case No. 11.589 (IACiHR 29 September 1999) para 25.

33 *Bankovic and others v Belgium and 16 other Contracting States* App No. 52207/99 (ECtHR 12 December 2001) paras 74-82; *Loizidou v Turkey* App no. 15318/89 (ECtHR 23 March 1995) paras 59-64.

34 *Al-Saadoon and Mufdhi v The United Kingdom* App no. 61498/08 (ECtHR 30 June 2009) para 88.

35 *Hassan v. UK* para 80.

36 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Judgment)* [2015] ICJ Rep para 474.

Therefore, even if a military operation pursues a legitimate aim, it must be 'planned and executed with the requisite care for the lives of the civilian population.'[37] Hence, belligerent parties must conduct drone attacks by taking all feasible precautions in order to minimize civilian harm even if the attack is lawful according to the LOAC.

2. The Principle of Proportionality and Its Application to Drone Attacks

2.1. The Principle of Proportionality in the LOAC

In the Second World War, General Douglas MacArthur preferred a land attack rather than air bombardment in order to avoid a few thousand civilian casualties in Manila, but when the attack was over, it became apparent that while 16,000 Japanese and 1,000 American soldiers died in the conflict, 100,000 civilians were killed specifically because of the exchange of fire between American and Japanese forces.[38] The principle of proportionality in armed conflicts gained importance after such incidents occurred in WWII. Although war always carries risk to civilian lives and property, to inflict such risks on them must be determined carefully.

The principle of proportionality in the LOAC stipulates that collateral damage inflicted on civilian persons and properties must be proportionate, and the foreseeable damage to civilians must not be 'excessive' when compared to the expected military advantage of the attack. While proportionality could not be defined clearly until the preparation of the Additional Protocols to the Geneva Conventions, some footwork can be found much earlier. According to Article 15 of the Lieber Code (1863), 'all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war' were permitted within the context of military necessity.[39] Also, it was stated in the Hague Rules of Air Warfare (1923) that military concentration should be sufficiently important for the bombing of cities, settlements, and buildings in the immediate vicinity of military operations in order to justify the danger to which the civilian population will be exposed due to this.[40] Although both articles neither clearly define proportionality nor are binding, they are important clues to understand the current form of that principle.

The first binding articles on the principle of proportionality were brought by AP-I. According to article 51(5)(b) of the Protocol, 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects,

37 *Isayeva v Russia* App no 57950/00 (ECtHR 24 February 2005) para 200.

38 William J Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 Military Law Review 91, 91–92.

39 Instructions for the Government of Armies of the United States in the Field (24 April 1863) ('Lieber Code').

40 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (December 1922 - February 1923) ('1923 Hague Rules of Air Warfare')

or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' is accepted as 'indiscriminate' and, therefore, prohibited. Other important regulations are articles 57(2)(a)(iii) and 57(2)(b) of the same protocol.[41] While the former regulates those attacks at the planning stage, the latter governs the execution stage, yet both articles similarly prohibit those attacks which would cause excessive damage if this damage is obvious whether the attack is being planned or carried out. Consequently, there must be four cumulative factors in order to determine whether the specific attack is indiscriminate or not. First, there must be an 'attack.' Second, the attack must cause 'damage.' Third, this damage must reach a certain level of intensity which is defined as loss of civilian life, injury to civilians, and/or damage to civilian objects. Fourth, this damage must be 'excessive' when compared to the anticipated military advantage.

On the other hand, while AP-I, which is applicable to international armed conflicts, includes regulations on proportionality, Additional Protocol II (AP-II)[42], which is applicable to non-international armed conflicts, does not contain any explicit reference to it. First, however, it is stated in the work of the ICRC, which clarifies customary rules of armed conflicts, that the principle of proportionality is customary in nature for both international and non-international armed conflicts by referencing state practices.[43] Secondly, the principle of humanity expressed in the preamble of AP-II inherently includes the principle of proportionality, and belligerent parties must always respect it.[44] Third, Amended Protocol II to the Convention of Certain Conventional Weapons[45], which is applicable in non-international armed conflicts as a recent treaty, prohibits civilian damage 'which would be excessive in relation to the concrete and direct military advantage anticipated.'[46] Fourth, the applicability of the principle to this type of conflict is approved and applied by International Tribunals.[47]

41 It is stated in those provisions of Article 57(2) that
'(a) those who plan or decide upon an attack shall:
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

42 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ('AP-II').

43 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005) 48.

44 ibid. Also see *Prosecutor v Zoran Kupreskic and others* (Judgement) ICTY-95-16-T (14 January 2000) (*Kupreskic* Trial Judgement) para 524.

45 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (entered into force 2 December 1983) 1342 UNTS 168, 19 ILM 1529, as amended 3 May 1996, 35 ILM 1206 ('Amended Mines Protocol'), Article 1(3).

46 Amended Mines Protocol art 3(8)(c); Henckaerts and Doswald-Beck (n 43) 48.

47 *Kupreskic* Trial Judgement (n 30) para 524.

2.2. The Application of the Principle of Proportionality to Drone Attacks

2.2.1. Categories of Lawful Targets

The operator should always respect the principle of proportionality while conducting a drone strike. Although carrying out direct attacks against civilian persons or properties are strictly prohibited in the LOAC, the principle of proportionality regulates attacks that aim to hit lawful targets but causes unintentional damages to civilian people and property. Hence, it is not related to which things can be attacked but has relevance with how an attack can be conducted against lawful targets.[48]

There are different categories of people who are lawful targets according to the LOAC. The first category is combatants who are subject to direct attack of an enemy. Combatants are members of the armed forces who have a right to participate directly in hostilities.[49] While they are lawful targets, if they are captured by an enemy, they have a right to be a prisoner of war and do not bear any responsibility arising out of their lawful conduct.[50] The second category consists of civilians who directly participate in hostilities. A person is accepted as a lawful target if he/she meets three cumulative criteria which are threshold of harm, direct causation, and belligerent nexus.[51] They are lawful targets 'for such time as they take a direct part in hostilities,'[52] and if they are captured, they cannot be a prisoner of war. The third category, although there is a discussion on it, consists of members of an organized armed group which is a belligerent party in an armed conflict. They are 'individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.'[53] At first glance, the second and third category may seem identical, but the difference is that while civilians who fall in the former category 'directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis,' the latter category of people has continuous combat function which 'requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict.'[54] The result of this distinction is that

48 FJ Hampson, 'The Principle of Proportionality in the Law of Armed Conflict' in S Perrigo and J Whitman (eds), *The Geneva Conventions Under Assault* (Pluto Press 2010) 46.

49 AP-I art 43(2).

50 AP-I art 44(1).

51 These criteria are defined in Interpretive Guidance on the Notion of Direct Participation in Hostilities by ICRC as;
'1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).' See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009) 46.

52 AP-I art 51(3); AP-II art 13(3).

53 Melzer (n 51) 34.

54 ibid.

> 'Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function.'[55]

In other words, those who directly participate in hostilities lose their protected status only for a limited period of time, but the last category of persons loses it 'as long as they remain members,' and this membership results in rendering them as lawful targets 'even before he or she first carries out a hostile act.'[56] At this point, it is a well-known fact that some terrorist organisations deliberately mix their members within a civilian population to prevent being targeted by states.[57] Even though it is hard to distinguish those members from the civilian population, the responsibility of the attacker is limited to intelligence available to him/her at the time of an attack. However, if there is a difference in terms of intelligence reports between a drone operator and a commander on the ground, it is the duty of the pilot 'to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful and that the requirements of necessity, proportionality, and discrimination are met.'[58] Drones have a distinct advantage on that point since the pilot can observe details through high resolution cameras in order to check whether a target has some indicators such as weapons, explosive devices, etc. to be an object of attack.

Objects can be legitimate targets as well as people if they fulfil certain criteria. The first definition of military objectives dates back to the Hague Rules of Air Warfare, in which it is stated that 'an air bombardment is legitimate only when directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent.'[59] Nevertheless, the binding definition of military objectives was codified in article 52(2) of AP-I, which states that 'military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.' Thus, two cumulative criteria must be met in order to render an object as a military target: First, the object should make an effective contribution to military action. Secondly, total or partial destruction, capture, or neutralization of this object should offer military advantage to the belligerent party. However, the determination of military objectives in an armed conflict, which is between a state and a non-state actor, poses significant difficulty on the former, which has a capacity to conduct drone attacks. At this point, it is important to have

55 ibid 17.

56 ibid 34,71.

57 David Akerson, 'Applying Jus in Bello Proportionally to Drone Warfare' (2014) 16 Oregon Review of International Law 173, 206.

58 UN Doc. A/HRC/ 14/24/Add.6, p. 28-29.

59 1923 Hague Rules of Air Warfare art 24(1).

reliable information 'in the circumstances ruling at the time.' If a commander has such information or identifies that an armed group is currently attacking his/her forces through the cameras of a drone, objectives being used by a non-state group, such as barracks or homes, will be held as legitimate targets.

After it is clarified that the targeted object or person is a lawful target, the next step will be the proportionality review if collateral damage is expected. As the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia indicated, although there is no question on the existence of the principle, the main questions are what it means and how it will be applied to drone attacks.[60] For this reason, the focus will be on 'military advantage' and 'collateral damage' and how they can be applied to drone attacks in the following sections.

2.2.2. Gaining Military Advantage via Drone Attacks

As indicated above, if it is expected that directing attacks against lawful targets may cause collateral damage, anticipated military advantage must justify it. However, if there is no risk of collateral damage occurring, it is not necessary to determine whether to take the principle of proportionality into consideration. Consider a military base which is completely isolated from the civilian settlements; the attacking party does not need to make any proportionality calculation as the damage would exclusively be limited to lawful targets.

The advantage must be concrete and direct. In other words, it should not be hardly perceptible and be expected to be obtained in the long term. Rather, it should be substantial and relatively close.[61] Concreteness indicates that the advantage must be 'real or tangible, definable, and quantifiable,' and 'mere hope, speculation, and hypotheticals' or 'remote advantages to be gained at some unknown time in the future' must be disregarded.[62] Directness requires that the advantage should occur without 'intervening condition or agency.'[63]

60 William J Fenrick, 'Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives' (2009) 27 Windsor Yearbook of Access to Justice 271, 278; 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (hereinafter '*The NATO Bombing Report*') para 48 < https://www.icty.org/x/file/Press/nato061300.pdf> accessed 5 May 2020.278; \\uc0\\u8216{}Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia\\uc0\\u8217{} para 48 <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> accessed 20 December 2019.","plainCitation":"William J Fenrick, 'Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives' (2009

61 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 2209.

62 Laurent Gisel, 'The Rules Governing the Conduct of Hostilities under International Humanitarian Law' (ICRC and Université Laval 2016) International Expert Meeting Report 17; *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research at Harvard University 2010) 92 ('Commentary on the HPRC Manual'); International Law Association Study Group on the Conduct of Hostilities in the 21st Century, 'The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare' (2017) 93 International Law Studies 323, 365.

63 International Law Association Study Group on the Conduct of Hostilities in the 21st Century (n 62) 344.

The advantage should be military in nature, and merely political, psychological, economic, financial, social, or moral advantages cannot be included in proportionality calculations.[64] However, this should not be interpreted in neither a narrow nor broad way. As stated in the Commentary to Additional Protocols, anticipating military advantage just from 'ground gained' operations or via 'annihilating or weakening the enemy armed forces' cannot be applicable to today's conflicts while considering the changing nature of wars.[65] Drones are especially used against non-state actors, and those actors, such as terrorist organisations, generally do not aim to gain ground in their operations but only aim to cause panic among civilians. Nevertheless, accepting war-sustaining objects, such as the oil industry, as lawful targets since they contribute to the military effort of enemy in an indirect way is an important example of broad interpretation.[66] It has been criticized by Dinstein because 'almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort' owing to this approach.[67] According to him, while construing lawful targets, it is important to have a 'proximate nexus' between an object and military action.[68] Thus, from the perspective of this article, a military advantage should be understood as 'any consequence of an attack which directly enhances friendly military operations or hinders those of the enemy.'[69]

Andreson offers three variables that should be considered while assessing anticipated military advantage;

> 'First, the anticipated military advantage must be measured in terms of the value of eliminating the target in question. If, say, the target is Hitler and the data show that killing him will likely shorten the conflict considerably and save hundreds of thousands of lives, then killing him will have very significant military advantage. Second, the anticipated military advantage must be adjusted for likelihood of success. If the advantage of killing Hitler by aerial bombardment during WWII would have been great, but the likelihood of success miniscule, then the assessment of anticipated military advantage must be adjusted accordingly. That is, one cannot assess anticipated military advantage based on the unrealistic presupposition of 100% success rate for an operation. Third, the anticipated military advantage should be assessed on a scale of anticipated opportunity from unique, or very limited, to highly repeatable. Unique opportunities to strike a military target will have greater military advantage than strike opportunities that are standing or which are anticipated to recur frequently in the future'.[70]

64 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 45.

65 Sandoz, Swinarski and Zimmermann (n 61) para 2218.

66 Christopher Markham and Michael Schmitt, 'Precision Air Warfare and the Law of Armed Conflict' (2013) 89 International Law Studies 669, 677.

67 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 87.

68 ibid.

69 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 45.

70 Joshua Andreson, 'Challenging the Perplexity over Jus in Bello Proportionality' (2014) 7 European Journal of Legal Studies 19, 31–32.

Hence, those three variables, which are the value of target, the likelihood of success, and the uniqueness of the opportunity, should be considered by an attacker in the planning stage of a drone strike.

While assessing military advantage, an attack should be assessed as a whole and not be isolated nor should particular parts of it.[71] As stated by Fenrick and approved by declarations of numerous states, proportionality reviews cannot be made on neither a 'bullet-by-bullet basis' nor on 'the basis of attacks on individual military objectives.'[72] As emphasized in the Commentary on the HPRC Manual;

> 'Aerial attacks are often conducted by multiple military aircraft, in which case it would be improper to consider the impact of each single sortie in isolation. It is rather necessary to assess the overall mission. To consider military advantage in light of the "attack as a whole" has also other aspects. One example could be a contemplated series of attacks against a number of bridges across the same river when they are in proximity to each other. Although the first attack on one of these bridges might appear to yield only a limited military advantage, considering that the enemy can still use the remaining bridges, the military advantage will become apparent once subsequent attacks against the other bridges take place'.[73]

On the other hand, military advantage cannot be construed by linking it to the 'full context of a war strategy'[74] of a belligerent party since interpreting military

71 Henckaerts and Doswald-Beck (n 43) 49.

72 William J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia' (2001) 12 European Journal of International Law 489, 499; Henckaerts and others (n 50) 49.in particular to the requirement to limit incidental civilian casualties. There are no such things as error-free wars or casualty-free wars. It appears, however, that NATO classified a wider range of objects as military objectives than has traditionally been the case, in particular the RTS broadcasting station headquarters in Belgrade. It also appears that some earlier bombing campaigns (the 1972 'Linebacker 2' campaign against North Vietnam which was conducted at the dawn of the era of precision weapons is an example

73 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 93.

74 US Department of Defence, *Law of War Manual* (hereinafter '*DoD Manual*') 5.12.2.1; US Department of Army, *Insurgencies and Countering Insurgencies FM 3-24/MCWP 3-33.5* 13-28.the "Strategic and Operational Context," provides a framework for understanding the environment where a counterinsurgency exists. Part one consists of chapters one through three.Part two, "Insurgencies," provides a doctrinal framework for understanding an insurgency. Part two consists of chapters four and five. Part three, "Counterinsurgencies," describes how to plan and execute operations to enable a host nation to defeat an insurgency.Chapter 1, "Understanding the Strategic Context," answers the questions of how and why U.S. forces might get involved in a counterinsurgency. Chapter 1 highlights that there are many different ways U.S. forces could counter an insurgency and that there are a range of various contexts in which an insurgency can occur. Chapter 2, "Understanding an Operational Environment," provides context for an operational environment where an insurgency might be occurring. Chapter 3, "Culture," describes the role of culture in counterinsurgency operations. Understanding culture is essential in any effort to support a counterinsurgency effort. Culture is of unique importance in understanding an operational environment.Chapter 4, "Insurgency Prerequisites and Fundamentals," provides doctrine for understanding the prerequisites of an insurgency and the root causes that allow an insurgency to keep and gain legitimacy. Chapter 5, "Insurgency Threat Characteristics," provides doctrine for understanding the threat characteristics of an insurgency.Chapter 6, "Command and Control and Mission Command," provides doctrine for executing command and control under the philosophy of mission command. In a counterinsurgency effort, many units may perform many different tasks in decentralized operations. Understanding decentralized operations and ensuring these units are meeting the overall commander's intent is essential for successful counterinsurgency operations.Chapter 7, "Planning and Operational Considerations," provides guidance on how commanders and staffs can work from conceptual planning to detailed planning in counterinsurgency operations. Chapter 8, "Intelligence," provides considerations for intelligence in counterinsurgency. Because understanding the environment is essential in counterinsurgency, intelligence facilities successful operations. Chapter 9, "Direct Approaches to Counter an Insurgency," provides guidance on how the Army and the Marine Corps directly counter an insurgency at the operational and tactical level. The operational philosophy behind the direct approach is shape-clear-hold-build-transition. Chapter 10, "Indirect Methods for Countering Insurgencies," provides a framework for working with and through a host nation. While the U.S. may provide the primary counterinsurgent forces, it may also

advantage in such a way may lead to legitimizing all drone attacks, whether they cause 'excessive' damage or not. It must be foreseeable while a reasonable commander is planning the mission and is limited to the impact of attacks on the 'enemy's military tactical or operational level.'[75]

There is a discussion on whether accepting force protection is a part of military advantage or not. Some countries, such as the USA, Canada, Australia, and New Zealand, and some scholars accept the security of the attacking forces as a part of military advantage.[76] However, another approach defends not including it in proportionality calculations by taking articles 48 and 51(1) of AP-I, which regulate civilian protection, into consideration in order to abstain from undermining civilian protection.[77] From the perspective of the present author, first, this issue should be examined in a contextual basis in a general manner. If there is a threat from an imminent or ongoing attack to armed forces, it would be lawful to count force protection into the proportionality analysis.[78] Second, even if there is an imminent threat to one's own forces, feasible protections should be taken in order to reduce collateral damage.[79] Third, this scenario cannot occur in attacks conducted by armed drones. An attacking party who uses drones already refrains from risking their troops, and there is no direct threat against a person who remotely controls an armed drone. A party can use more drones in order to reduce risks imposed on their troops, but this should be evaluated under precautions, not proportionality. Even if operators are proximate to the battlefield, they cannot claim to protect themselves because the nature of remote warfare gives them a chance to conduct an attack away from the battlefield. While being proximate to the battlefield, they have already accepted the risks which they will face, and those risks should not be passed onto civilians. For this reason, a party who conducts drone attacks can never legitimize excessive collateral damage by claiming force protection as a military advantage.

work indirectly through the host nation. There are also important indirect enablers.Chapter 11, "Working with Host-Nation Forces," provides a foundation for understanding how security cooperation efforts are integrated into a counterinsurgency effort. Whether U.S. forces are, for a time, the primary counterinsurgent forces or they are working indirectly through a host nation, enabling the host nation through security cooperation activities is essential.Chapter 12, "Assessments," provides doctrine for understanding how a counterinsurgency environment changes and determining if counterinsurgent actions are having an effect on achieving the desired end state. Chapter 13, "Legal Considerations" provides some legal considerations that are important for commanders and staffs to consider in all counterinsurgency operations.","langua ge":"English","number-of-pages":"194","source":"Amazon","title":"Insurgencies and Countering Insurgencies FM 3-24/ MCWP 3-33.5","author":[{"family":"US Department of the Army","given":""}]}],"schema":"https://github.com/ citation-style-language/schema/raw/master/csl-citation.json"}

75 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 93; Ryan Christian Else, 'Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations' (2010) 5 University of St. Thomas Journal of Law and Public Policy 195, 211.

76 Henckaerts and others (n 50) 50; A. P. V. Rogers, *Law on the Battlefield* (Manchester University Press 1996) 17.

77 Gisel (n 62) 24.

78 ibid.

79 Rebecca J Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' (2010) 15 Journal of Conflict and Security Law 467, 484.

2.2.3. Avoiding 'Excessive' Collateral Damage via Drone Attacks

2.2.3.1. Collateral Damage

The term 'collateral' derives from the Latin col- (together with) and later- (side), and it is defined in the Oxford Dictionary as '[l]ying aside from the main subject, line of action, issue, purpose, etc.; side-; subordinate, indirect.'[80] In terms of the LOAC, collateral damage indicates an 'incidental loss of civilian life, injury to civilians, and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target.'[81] In other words, collateral damage, which is also known as incidental damage, unavoidably and unintentionally happens to civilian people and property while conducting an attack against a legitimate target.[82] However, it 'does not include inconvenience, irritation, stress, fear, or other intangible effects occurring on the civilian population.'.[83]

The extent of collateral damage depends on various factors which are stated in the Commentary to Additional Protocols as;

> 'the location of civilian population and objects (possibly within or in the vicinity of a military objective), the terrain (landslides, floods, etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used, etc.), weather conditions (visibility, wind, etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas, etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target)'.[84]

It also contains both direct and indirect effects of an attack. The former type of effects occurs immediately as a result of the attack, and they are not altered by intervening events or mechanisms.[85] However, the latter type of effects occurs as the delayed or displaced second, third, and higher order results of the attack, and they are consequences of intermediate events and mechanisms.[86] As stated in the UK Joint Service Manual, if it is expected for burning oil to leak into a civilian area after a remote attack and to cause excessive collateral damage, this will be regarded as an indiscriminate attack.[87] Although there is no agreement on what extent these indirect effects must be taken into consideration, it should be stated that indirect effects which

80 https://www.oed.com/view/Entry/36237?redirectedFrom=collateral#eid

81 HPRC Manual art 1(l).

82 The Judge Advocate General's Legal Center and School, *Operational Law Handbook* (2015) 14.

83 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 34.

84 Sandoz, Swinarski and Zimmermann (n 61) para 2212.

85 *Joint Targeting School Student Guide* (Joint Targeting School 2017) 15.

86 *ibid.*

87 UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (The Joint Doctrine and Concepts Centre 2004) 5.33.4.

are too remote or not reasonably foreseeable shall not be included in proportionality calculations.[88]

It is uncertain to render whether inflicting harm upon medical or religious personnel of armed forces as collateral damage or not. The opinion which does not count those harmed as collateral damage can be supported by two arguments. First, according to article 43(1) of the AP-I, '[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct or its subordinates.' Because those medical and religious personnel are part of the armed forces, it can be claimed that attacking them might not be accepted as collateral damage. Also, articles 51(5)(b), 57(2)(a)(iii), and 57(2)(b), which regulate the principle of proportionality, only include 'loss of civilian life, injury to civilians, and damage to civilian objects' within the ambit of collateral damage.[89] This idea can be supported by practices of some states. It is stated in the DoD Manual that the prohibition of excessive damage does not involve causing incidental harm against protected military personnel and objects even if they cannot be subject to direct attacks.[90] Because those personnel are proximate to combatant elements, they are rendered to have accepted the risks of war and cannot be included in a proportionality assessment, but an attacking party should take all feasible precautions to mitigate risks deriving from military operations towards those personnel.[91]

On the other hand, such an approach is not consistent with the purposes of the LOAC. First of all, even though military and religious personnel are part of the armed forces, article 43(2) of AP-I clearly states they are not 'combatants.' Secondly, in the *Nuclear Weapons* Advisory Opinion, the ICJ did not limit collateral damage to civilians but also included environmental considerations in the proportionality review.[92] Therefore, it is clear that collateral damage is not limited to civilian lives and objects in practice, but it also involves other considerations. As stated in the Explanation of the San Remo Manual, 'in practice the rule extends to damage or injury caused to all persons or objects that may not be directly attacked, and therefore this definition has included other protected persons (for example, the wounded, sick, shipwrecked), all objects that are not military objectives, and the natural environment' even though the articles only speak about civilians.[93] Lastly, the ICRC takes the same position in the updated commentary of the Geneva Conventions by arguing that the

88 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 92.

89 Ian Henderson, *The Contemporary Law of Targeting : Military Objectives, Proportionality, and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers 2009) 206.

90 US Department of Defence (n 74) para 5.10.1.2.

91 ibid 7.8.2.1.

92 *Nuclear Weapons* Advisory Opinion para. 30.

93 Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) 87.

duty to 'respect,' stated in article 24 of Geneva Convention I and article 36 of Geneva Convention II, obliges belligerent parties to comply with 'the duties of abstention, such as not to attack medical and religious personnel (be it directly, indiscriminately, or in violation of the principle of proportionality).'[94] Therefore, to ensure the respect of such personnel also requires considering them as a part of the proportionality review. Hence, the present author considers those personnel should be taken into account by not focusing on the wording of the article but by approaching the issue through teleological interpretation. Since inflicting harm on those people does not provide any military advantage, it is not rational to legitimize those adverse effects.

Dual-use objects are those used to serve both civilian and military purposes, such as bridges or GPS systems.[95] It is claimed that civilian objects as defined in Article 52(2) of AP-I are 'all objects which are not military objectives,' and the nature of dual-use object can lead to considering the dual-use object as a military objective, depending on whether it meets the two criteria of being an effective contribution and gaining military advantage by attacking this object.[96] In line with this opinion, if a drone attack is conducted against such an object, it will not be necessary to make a proportionality calculation. On the other hand, the principle of proportionality necessitates considering all foreseeable damages imposed on the civilian population.[97] The bridge can be attacked via armed drone if it makes an effective contribution to an enemy's military action. However, even if it is expected to cause small civilian harm through this attack, the damage should be accepted as collateral and taken into consideration. Also, if civilian harm cannot be estimated, the attack must not be initiated.

There is a discussion on whether harming voluntary human shields can be included in the proportionality equation or not. According to Dinstein, voluntary human shields aim to deter enemy attacks; that is why they should be regarded as direct participants and lawful targets.[98] In comparison to this opinion, it is argued that these people do not direct any violence against enemy combatants which is necessary for accepting someone as direct participant (threshold of harm), and they do not lose their protected status.[99] The working of the ICRC on the Interpretive Guidance on the Notion of

94 International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 1987; International Committee of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Cambridge University Press 2017) para 2462.

95 Maurice Cotter, 'Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar' (2018) 23 Journal of Conflict and Security Law 283, 297.

96 Françoise J Hampson and Yoram Dinstein, 'Proportionality and Necessity in the Gulf Conflict' (1992) 86 Proceedings of the Annual Meeting (American Society of International Law) 45, 50; Henderson (n 89) 207.

97 Schmitt (n 11) 140.

98 Dinstein (n 68) 130.

99 'Expert Meeting "Targeting Military Objectives"' (University Centre for International Humanitarian Law 2005) 20.

Direct Participation in Hostilities finds a compromise on this issue. According to the Guidance, if those people cause the prevention of an attack by positioning themselves as physical obstacles, they will be accepted as direct participants, but if their position does not have any detrimental effect on the capacity of the attacker because of the power of weapons used in the attack, such as air strikes, then those persons will not be regarded as direct participants. Thus, causing harm to them will be accepted as collateral damage.[100] On the other hand, there is no discussion on accepting involuntary human shields as protected persons.[101] Therefore, if civilians are forced to be human shields, the harms imposed upon them should be accepted as collateral damage. Consequently, drone attacks are air attacks in which powerful weapons are used; hence, causing harm on voluntary or involuntary human shields by using armed drones will be accepted as collateral damage, and if they result in excessive damages, they will be unlawful.

Lastly, if an attacker cannot predict the collateral damage resulting from a drone strike, it should be cancelled or suspended until having reasonable certainty. However, if the attacker took precautions and conducted an attack against a lawful target, he would not bear any responsibility despite the fact that the attack resulted in excessive harm because of an undetermined reason. Moreover, collateral damage should not be understood as a legal tool which legitimizes killing enemy civilians. Parties should 'value the lives of enemy civilians to the same extent that they value the lives of their own civilians and military personnel' because of their dignity as human beings.[102] However, if there is a reasonable expectation to gain military advantage by causing civilian damage, then collateral damage will come into the scene as an unintentional consequence of a strike which is not excessive in comparison to its advantage.

2.2.3.2. Determination of Excessiveness

The lexical meaning of excessive is '[m]ore than is necessary, normal, or desirable; immoderate'[103] or '[t]ransgressing the bounds of law, decency, or morality; outrageous, lawless, wrongful.'[104] Belligerent parties always need to calculate whether expected collateral damage is excessive compared to the anticipated military advantage or not.

The two terms 'extensive' and 'excessive' should be distinguished. These terms were used almost interchangeably in the Commentary to Additional Protocols by arguing that an attack shall not cause 'extensive destruction of civilian objects.'[105]

100 Melzer (n 51) 56–57.

101 ibid 57 n.141.

102 Andreson (n 64) 34.

103 https://www.lexico.com/en/definition/excessive

104 https://www.oed.com/view/Entry/65759?redirectedFrom=excessive#eid

105 Sandoz, Swinarski and Zimmermann (n 61) 2218.

However, AP-I clearly prohibits excessive damage, and the scale of destruction does not make the attack unlawful *per se*. If the anticipated military advantage is significant enough because of the military value of the lawful target, extensive collateral damage will be justified legally.[106] As stated by the Eritrean-Ethiopia Commission, although civilian casualties and losses are 'regrettable and tragic consequences of the war,' if it is not proven that they are disproportionate in comparison to their anticipated military advantage, 'they do not in themselves establish liability … under international law.'[107]

While there is no clear rule on how to determine whether the collateral damage is excessive or not, it is stated in the *Galic* Case that

> 'In determining whether an attack was proportionate, it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack'.[108]

However, rather than the assessment of every reasonably well-informed person, the NATO Bombing Report suggests determining it by the 'reasonable military commander' criterion by arguing that

> 'It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander." Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.'[109]

On the other hand, Henderson offers to use both of these criteria in a way that assesses the proportionality of an attack by depending it on 'the circumstances of the commander and the information available to him or her' (subjective aspect), but 'the conclusions to be reached on whether collateral damage is expected and whether it is proportional is then based on what a reasonable person would have concluded from that information' (objective aspect).[110] However, placing a double standard on proportionality makes the principle more relative, which is already unclear enough. Moreover, his suggestion misses the point that the principle of proportionality is 'prospective in nature, so an attacker is obligated to estimate and compare military

106 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 62) 92.

107 Eritrea-Ethiopia Claims Commission, *Western Front, Aerial Bombardment and Related Claims-Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26* (Partial Award of 2005) para 97.

108 *Prosecutor v Stanislav Galic* (Trial Judgement) ICTY-98-29-T (5 December 2003) para 58.

109 The NATO Bombing Report para. 50.

110 Henderson (n 89) 222.

advantage and civilian harm at the time the attack is contemplated.'[111] Therefore, the proportionality calculation requires *ex ante* determination, not *ex post*. In the targeting process of a person, drone pilots keep two considerations in mind: 'The first would be the likelihood of the particular attack in achieving the goal of elimination. The second would be the military advantage of eliminating that person.'[112] At this point, even though the remoteness of the perpetrator of a drone attack from the battlefield already allows him/her to determine the principle of proportionality in a more realistic way than those in the theather and allows him/her to render the legality of the decision more reliably, the anticipated result by attackers cannot be certain at all times, and objective criterion cannot be applicable because of the risk of vagueness of the expected result of an attack. Hence, the reasonable commander criterion should be used while assessing the proportionality of drone attacks, and *ex ante* determination should be made in order to decide its legality.

An important factor when making the determination of the excessiveness of an attack is the urgency to engage a target. While arguing two different types of attacks, Akerson explains that

> 'Attacks subject to a proportionality review can be broken down into two categories. The first type consists of attacks that are premeditated in nature, decided only after careful consideration of the circumstances. The second type consists of attacks that, given the circumstances, are conducted under exigent circumstances and thus without the same contemplative ability. The second type would include attacks required to eliminate an immediate and serious threat, for example when UAV operators identify a suspected suicide bomber in or heading toward a civilian area'.[113]

At this point, the second type of attack would require a more flexible approach in the determination of excessiveness.

There is no difference among civilians while examining the 'excessiveness' of the attack. Therefore, claiming to take 'friendly' and 'neutral' civilians into consideration when deciding on an attack is not applicable in the LOAC.[114] There is not any difference between civilians who have either friendly or hostile intentions toward the attacking party when deciding the strike and considering the results of it whether they are excessive or not. Moreover, even if a belligerent party does not expect to cause excessive damage by a drone attack against those people but the change of a weapon or a tactic might decrease the level of collateral damage, the attacking party should apply that alternative by considering the benefit to civilians.

111 Akerson (n 57) 185.

112 ibid 195. However, as admitted by Akerson, it is harder to estimate military value of a target in drone attacks comparing with conventional warfare since '[c]onventional warfare involves clear rank and hierarchy; UAV warfare attempts to identify the leadership of irregular fighters that are hiding as and amongst civilians'. *See* ibid 196.

113 Akerson (n 57) 211.

114 Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials' (2013) 46 Israel Law Review 271, 303.

If it becomes obvious that excessive damage will occur and the attack is suspended, this does not change the military status of the target, and the attack might be conducted later when the damage is not disproportionate. As stated by Henderson,

> 'Whether or not an object is a military objective is assessed against the test in article 52(2) API. Whether an attack on that object in a certain way (eg, by a 2000 lb bomb) will cause disproportionate collateral damage does not affect the object's status as a military objective. Rather, and in accordance with the wording of article 57(2)(a)(iii) API, a party must refrain from deciding to launch the attack if the expected collateral damage would be excessive. For example, the status of a military air traffic control tower in close proximity to civilian hous- ing does not change from not being a military objective if attacked using a 2000 lb unguided bomb to being a military objective if attacked using a 500 lb laser-guided bomb. Rather, the tower's status as a military objective is solely dependant upon the article 52(2) API test. What does change is whether in any given scenario it is lawful to launch a potential attack against the tower'.[115]

Therefore, the reason behind the suspension of an attack should not be confused with the status of an object, and it does not preclude destroying the legitimate target later.

The principle of proportionality and the determination of excessiveness should not be held as a mathematical formula.[116] Although it is stated that '[f]ifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle,'[117] excessiveness cannot be construed as counting the number of civilian and combatant casualties and comparing them with each other.[118] As stated in the NATO Bombing Report,

> 'It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.'[119]

Hence, excessiveness should be evaluated based on the comparison between two values which are collateral damage and military advantage. The determination of it should be on the basis of the context in which the decision is given, a reasonable military commander criterion, and good faith.

115 Henderson (n 89) 198.

116 Laurie R Blank, 'A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities' (2010) 43 Case W. Res. J. Int'l L. 707, 716; Michael Wells-Greco, 'Operation "Cast Lead": Jus in Bello Proportionality' (2010) 57 Netherlands International Law Review 397, 416.

117 O'Connell (n 3) 24.Barack Obama authorized the CIA to continue President Bush's policy of attacks using unmanned aerial vehicles (UAVs or drones

118 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (n 44) 92.

119 The NATO Bombing Report para. 48.

Conclusion

While new technologies pose significant challenges to international law, they do not preclude the application of the relevant rules. At this point, the use of armed drones and conducting remote attacks has led to many debates in the LOAC. However, those debates do not have a significant impact on how the principles of conduct of hostilities can be applied to those attacks.

In this article, first, the legality of using armed drones was explained. Although there is no clear article in either Geneva Conventions or the Additional Protocols to permit or prohibit the use of drones, they are not illegal *per se* as weapons. However, it is important to comply with targeting rules to carry out attacks by them. Although the remoteness of the perpetrator might cause him/her to act in a more flexible manner when engaging in lawful targets, this can be prevented by appropriate training programs. Also, it should be stated that both the LOAC and the Human Rights Law govern armed conflicts in parallel to each other, and not only the former but also latter places responsibility on parties. However, the human rights obligations of states are limited to the jurisdictions recognized by belligerent parties.

In the second part, it was clarified that the principle of proportionality obliges belligerent parties to conduct their attacks against lawful targets in a way that it will not result in excessive civilian harm by trying to gain military advantage. Although a weaker side of an armed conflict might try to hide their members by mixing them within a civilian population, the responsibility of an attacking party does not go beyond what is known by it at the relevant time. At this point, drones give an opportunity to operators to get better intelligence than those on the ground. After the best intelligence is obtained, the attacking party can initiate an attack against a target. However, it cannot be concluded that any civilian harm is unlawful under the LOAC even if the best intelligence is obtained. Whilst a perpetrator conducts a drone strike by being aware of the fact that some civilians will be harmed as a result of the attack, he/she expects a certain level of military advantage from it. Although some factors such as the urgency of an attack or the value of a target have an impact on the level of the balance between military advantage and collateral damage, this two-sided evaluation cannot be disproportionate. For this reason, the calculation of excessiveness should be considered by a reasonable military commander while planning, approving, or executing an attack, and it should be assessed in good faith.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Concordat Procedure as a Way to Escape Bankruptcy and the Evaluation of the Temporary Respite Decision Following the Amendment to the Law no. 7101: Current Developments and Experiences in Turkey

7101 sayılı Kanun Değişikliğinden Sonra İflastan Kurtulma Yolu Olarak Konkordato Prosedürü ve Geçici Mühlet Kararının Değerlendirilmesi: Güncel Gelişmeler ve Türkiye'deki Deneyim

Serpil Işık*

Abstract
Concordat is a restructuring law which enables the debtor whose business does not go well and economic situation has deteriorated due to reasons beyond his control to pay their offer under proper conditions after the offer is accepted by the number of creditors provided in the law and ratified by the authorities. The legislator has opened the way for the debtors to terminate their debts by paying only a certain amount of them or at certain maturities by an agreement between the debtor and the creditor under the court supervision with the arrangement of bankruptcy. The significant legal amendments to the Law no. 7101 add another dimension to the concordat which is regulated by the provisions 285 and 309/I in Enforcement and Bankruptcy Law. The amendments in the Law no. 7101 regarding the provisions of concordat was affected by Swiss Enforcement and Bankruptcy Law. In these amendments, many provisions which prevented the concordat in the previous term were revised or revoked. The provisions on the postponement of bankruptcy that are in the favor of debtor were included into the concordat and temporary respite decision was accepted. Therefore, the follow-ups that the creditors commenced will stop and new follow-ups will not start during the respite thanks to the opportunity to decide on temporary respite within the provisions on the concordat. Our study aims to make explanations and evaluations regarding the temporary respite decision which had not been included in Enforcement and Bankruptcy Law with the concordat procedure in Turkish Law until the significant amendments in the Law no. 7101. In this regard, general information will be provided about the concordat in Turkish Law, the concordat procedure will be explained and we will continue with the temporary respite following the request to arrange bankruptcy. Lastly, our study will be concluded with the evaluation of the concordat experience in Turkey within the current developments and implementation on the arrangement of bankruptcy.

Keywords
Concordat, Amendment to the Law no. 7101, Non-bankruptcy concordat, Concordat procedure, Temporary respite decision, Current developments on the concordat and experiences in Turkey

Öz
Konkordato, elinde olmayan nedenlerle işleri iyi gitmeyen ve ekonomik durumu bozulmuş olan borçlunun, yaptığı teklifin kanunda öngörülen çoğunluğu karşılayan sayıdaki alacaklıları tarafından kabul edilerek yetkili makamlarca tasdik

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edilmesi sonucunda ileri sürdüğü teklif doğrultusunda ve uygun koşullar çerçevesinde ödenmesini sağlayan bir iyileştirme hukuku (*Sanierungsrecht*) müessesesidir. Kanun koyucu, konkordato ile mahkeme denetimi altında borçlu ile alacaklının anlaşarak alacaklıların sadece belirli bir miktarını ya da belli vadelerde ödeyerek borçlarını sona ermesinin yolunu açmıştır. İcra ve İflas Kanunu'nun 285 ilâ 309 hükümlerinde düzenlenmekte olan konkordato kurumunda, 7101 sayılı Kanun ile önemli yasal değişiklikler gerçekleştirilerek kuruma bambaşka bir çehre kazandırılmıştır. 7101 sayılı Kanunla konkordato hükümlerinde gerçekleştirilen değişikliklerde, İsviçre İcra ve İflas Kanunu'ndan etkilenilmiştir. Gerçekleştirilen değişikliklerle önceki dönemde konkordatonun işlememesinin sebebi olan pek çok hüküm revize edilmiş ya da yürürlükten kaldırılmıştır. İflasın ertelenmesi kurumunun borçlu menfaatine olan hükümlerinin konkordatoya dâhil edilmesi sağlanarak bu kapsamda geçici mühlet kararının kabul edilmesi söz konusu olmuştur. Böylelikle, konkordato hükümlerine geçici mühlet kararı alınabilme imkanının getirilmesi sayesinde, mühlet içerisinde alacaklıların borçluya başlattıkları takipler duracak ve yeni takiplere başlanamayacaktır. Çalışmamızda, 7101 sayılı Kanun değişikliği çerçevesinde gerçekleştirilen önemli değişiklikler sonrasında Türk Hukukunda konkordato prosedürü ile daha önce İcra ve İflas Kanunu'nda söz konusu olmayan geçici mühlet kararı hakkında açıklamalar ve değerlendirmelerde bulunulması amaçlanmaktadır. Bu amaç doğrultusunda, genel olarak, Türk Hukukunda konkordato hakkında genel bilgiler verilecek sonrasında konkordato prosedürü ifade edilecek ve konkordato talebi açıklandıktan sonra geçici mühletin ortaya konulması yoluna gidilecektir. Son olarak, konkordatoya ilişkin güncel gelişmeler ve uygulamada Türkiye'nin konkordato konusundaki deneyiminin değerlendirilmesi ile çalışmamız sonlandırılacaktır.

Anahtar Kelimeler
Konkordato, 7101 sayılı Kanun değişikliği, İflas dışı (adi) konkordato, Konkordato prosedürü, Geçici mühlet kararı, Konkordato konusunda güncel gelişmeler ve Türkiye'deki deneyim

Concordat Procedure as a Way to Escape Bankruptcy and the Evaluation of the Temporary Respite Decision Following the Amendment to the Law no. 7101: Current Developments and Experiences in Turkey

I. Introduction

Concordat is one of the institutions of the remedial law whereby the well-intentioned and honest debtor whose business derails and the economic condition deteriorates due to any reason beyond control makes an agreement with majority of the creditors and this agreement is validated by ratification of the competent authorities allowing the debtor to pay the debt in line with the proposal stipulated in this agreement and within the framework of favorable conditions[5].

Concordat is also a regime that aims to prevent the bankruptcy of the debtor who fails to pay its debt by postponing the legal proceedings that may be filed against the debtor by the creditors[6]. Owing to the Concordat regime; the legislator has paved the way for the debtor and the creditor to agree under court supervision and allowed the debtor to make an arrangement with the creditors either by paying back only a certain amount of the debt or all of the debt in certain installments[7].

Concordat is nearly the most important institution in Swiss law (SchKG[8] Art. 293-336)[9] in terms of improving the economic situation of the debtor and ensuring the

5 Hakan Pekcanıtez, Oğuz Atalay, Meral Sungurtekin Özkan and Muhammet Özekes, *İcra ve İflâs Hukuku Ders Kitabı* (7. Bs, On İki Levha 2020) 477; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *İcra ve İflas Hukuku* (3. Bs, Yetkin 2020) 617; Selçuk Öztek, Ali Cem Budak, Müjgan Tunç Yücel, Serdar Kale and Bilgehan Yeşilova, *Yeni Konkordato Hukuku, 7101 sayılı Kanunla Değişik İcra ve İflas Kanunu m. 285-309 Şerhi* (Editör: Selçuk Öztek), (1. Bs, Adalet 2018) Madde 285, N. 7. For the similar definitions of concordat, *see*: İlhan E. Postacıoğlu, *Konkordato (538 Sayılı Kanun Hükümleri Göz Önünde Tutularak Yazılmıştır)*, (Banka ve Ticaret Hukuku Araştırma Enstitüsü, Fakülteler Matbaası 1965) 12; Saim Üstündağ, *İflas Hukuku (İflas-Konkordato-İptal Davaları)* (8. Bs., Fakülteler Matbaası 2002) 227; Baki Kuru, *İcra ve İflas Hukuku El Kitabı* (Tamamen Yeniden Yazılmış ve Genişletilmiş İkinci Baskı Adalet 2013) 1443; Ramazan Arslan, Ejder Yılmaz and Sema Taşpınar Ayvaz, *İcra ve İflas Hukuku* (3. Bs, Yetkin 2017) 625; Süha Tanrıver and Adnan Deynekli, *Konkordatonun Tasdiki* (Yetkin 1996) 29; Timuçin Muşul, *İcra ve İflas Hukuku* C II (Gözden Geçirilmiş ve Genişletilmiş 6. Bs, Adalet 2013) 1672; M Serhat Sarısözen, *Konkordato* (Yetkin 2020) 75; Timuçin Muşul: İflas ve Konkordato Hukuku Uzlaşma Yoluyla Yeniden Yapılandırma, Güncellenmiş ve Gözden Geçirilmiş 2. Baskı, Ankara, Adalet Yayınevi, 2019, § 16, s. 375; Şakir Balcı, *Türk Hukukunda Konkordato* (Güncel 2007) 21; İbrahim Kaplan, 'İsviçre İcra ve İflas Hukukunun Borçların Ertelenmesine (Konkordatoya) İlişkin Malvarlığı Yönetimi Sözleşmesi Hükümleriyle Mukayeseli Olarak Yeni Türk Konkordato Hukuku' (Yetkin 2019) 17; Sümer Altay and Ali Eskiocak, *Konkordato ve Yeniden Yapılandırma Hukuku* (5. Bs Vedat 2019) N. 21 p. 15; Talih Uyar, *Yeni Konkordato Hukukumuzun Temel İlkeleri* (Güncellenmiş 2. Bs, Bilge 2019) 3; Mert Namlı, 'Türk ve İsviçre Hukuku'nda Gerçekleştirilen Reformların Konkordato Hukuku Bakımından Getirdiği Değişiklikler' (2018) 44 (4) Yargıtay Dergisi 1494; Kurt Amonn and Fridolin Walter, *Grundriss des Schuldbetreibungs- und Konkursrechts* (9. vollständig aktualisierte Auflage, Stämpfli Verlag AG Bern 2013), N. 2, p. 515.

6 M Serhat Sarısözen, *7101 sayılı Kanun Kapsamında İcra, İflas ve Konkordato Hukukundaki Yenilikler* (Yetkin 2018) 45.

7 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 477.

8 Bundesgesetz vom 11. April 1889 über Schuldbetreibung und Konurs (SchKG; SR 281. 1).

9 For the concordat stipulated between Art. 293-336 of Swiss Debt Enforcement and Bankruptcy Law, *see*: Daniel Hunkeler, *Kurzkommentar, SchKG Schuldbetreibungs- und Konkursgesetz,* (2. Aufl., Helbing Lichtenhahn 2014) 1317 ff.; Jolanta Kren Kostkiewicz and Dominik Vock, *Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs SchKG* (4. Auflage, basierend auf der 1911 erschienenen 3. Auflage von Carl Jaeger, Schulthess Kommentar, Schulthess Verlag 2017) 1641 ff.; Basler Kommentar-Adrian Staehelin and Alexander Vollmar, *Bundesgesetz über Schuldbetreibung und Konkurs II, Art. 159-352 SchKG Art. 1-47 GSchG, Art. 51-58 AVIG* (Basler Kommentar) in Adrian Staehelin, Thomas Bauer, Daniel Staehelin (Hersgeber) (2. Auflage, Helbing Lichtenhahn 2010), Art. 293-336, p. 2555-2831; Carl Jaeger, Hans Ulrich Walder, Thomas M. Kull and Martin Kottmann, *Das Bundesgesetz über Schuldbetreibung und Konkurs (SchKG): Erläutert für den praktischen Gebrauch, Band III Art. 293-352 Schlussbestimmungen Anhange Sachregister* (4. Auflage,

debtor to settle this difficult situation by restructuring the debts, however it has until recently lost its significance in Turkish Law[10]. The main reason why concordat lost its significance in Turkish Law is that it has become inapplicable in practice on the grounds of Law No. 4949[11] which was enacted on 17.07.2003 and entered into force as of 2004[12]. On the other hand, new provisions on the bankruptcy postponement were introduced by Law No. 4949[13]. Thus, bankruptcy postponement has gained immense popularity for *"equity companies and cooperatives"* which are on the verge of bankruptcy or already deep in debt[14]. The bankruptcy postponement has frequently been criticized in the *doctrine*[15] for not responding to the needs and for leading to unfair consequences[16]. For this reason; concordat, *which may be requested by all debtors in difficult situations unlike the bankruptcy postponement*, could not actually be put into practice although Law No. 6728[17] entitled *"Law Regarding the Amendment of Certain Laws Aiming the Improvement of the Investment Environment"* introduced some amendments in the provisions of the bankruptcy agreement[18].

By Decree Law No. 669[19], the opportunity to apply to the bankruptcy postponement regime was suspended in 2016[20]. Thereupon, the need for a mechanism that allows

Schulthess 1997/2001) 1 ff.; Bettina Kopta-Stutz, 'Gerichtliche Sanierungsverfahren für Schweizer Aktiengesellschaften Unter Berücksichtigung des aktienrechtlichen Konzepts zur Auslösung von Sanierungsmassnahmen' in *ZStP -Zürcher Studien zum Privatrecht Band/Nr. 295* (Schulthess 2019) 34 ff.

10 Mehmet Kâmil Yıldırım/Nevhis Deren-Yıldırım: İcra ve İflas Hukuku, Genişletilmiş ve Gözden Geçirilmiş 7. Baskı, İstanbul, Beta Basım, 2016, s. 517.

11 Official Gazette 17.7.2003, Number 25184.

12 Hakan Pekcanıtez and Güray Erdönmez, *7101 sayılı Kanun Çerçevesinde Konkordato* (Vedat 2018) 3. For the amendments introduced by Law No. 4949 regarding concordat, *see*: Hakan Pekcanıtez, '4949 Sayılı Kanun'la, İcra Hukukunda Yapılan Değişikliklerin Değerlendirilmesi' (2003) 49 Türkiye Barolar Birliği Dergisi 137; Sema Taşpınar, 'Adi Konkordato Hakkında İcra ve İflas Kanunu'nda Yapılan Değişiklikler' (2003) 22(2) Banka ve Ticaret Hukuku Dergisi 49 ff.

13 M Kâmil Yıldırım, '4949 Sayılı Kanunun Getirdiği Değişikliklerle İcra İflas Kanunu'nda Yer Alan İptal Davalarına ve İflasın Ertelenmesine İlişkin Yeni Hükümler' in *İcra ve İflas Kanunu'nda 4949 Sayılı Kanunla Yapılan Değişiklikler Sempozyumu* (2004) 1(2) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi 480; Namlı, 'Değişiklikler' (n 1) 14489. Significant changes have occurred in the Article 179 of the Debt Enforcement and Bankruptcy Law regarding the bankruptcy of capital companies and cooperatives due to insolvency with the Law No. 4949 (Law No. 4949 Art. 50) (Ahmet Türk, 'Sermaye Şirketleri ile Kooperatiflerin Barca Batık Olmaları Nedeniyle İflası ve iflasın Ertelenmesi Konusunda İcra ve İflas Kanunu'nda Yapılan Son Değişikliklerin Değerlendirilmesi ve Öneriler' 2004 6 (1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 295). Also, *see*: Mustafa Göksu, 'Concordat and Restructuring in Turkish Insolvency Law (Areview from ADR Perspective)' (2020) 24(4) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 124.

14 Serpil Işık, 'Sermaye Şirketleri ile Kooperatiflerin Borca Batık Olmaları Sebebiyle Doğrudan İflaslarının Söz konusu Olması Durumunda İflasın Ertelemesi Kurumuna Başvuru Şartlarının Kanuni Değişiklikler Çerçevesinde Değerlendirilmesi' (2016) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (*Prof. Dr. Fevzi Şahlanan'a Armağan Özel Sayı, Cilt: II*) 1296.

15 For the criticism of the institutions of bankruptcy postponement in the doctrine, *see*: Sümer Altay, 'İflasın Ertelenmesi Hakkındaki Yeni Hükümlerin Yeniden Yapılandırma Kurumları Üzerindeki Olumsuz Etkisi ve Çözüm Yolları' in *Prof. Dr. Ergun Özsunay'a Armağan* (Vedat 2004) 625 ff.; Abdurrahim Karslı, 'İflasın Ertelenmesinde Bazı Problemler' *Haluk Konuralp Anısına Armağan C. 2* (Yetkin 2009) 263 ff.

16 Sarısözen, *7101 sayılı Kanun* (n 2) 39; Sarısözen, *Konkordato* (n 1) 63.

17 Official Gazette 15.7.2016, Number 29796.

18 Pekcanıtez and Erdönmez (n 8) 3.

19 Official Gazette 31.7.2016, Number 29787. In our study, *the "Decree Law on Taking Certain Measures Under the State of Emergency and the Establishment of a National Defense University and Making Amendments to Certain Laws"* has been used by abbreviating as "*Decree Law No. 669*".

20 Serdar Kale, '7101 Sayılı İcra ve İflas Kanununda Değişiklik Yapılmasına Dair Kanun Çerçevesinde İflas Dışı Konkordato' (Bahar 2018) 5(1) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 213; Hakan Albayrak, *İflas Dışı Adi Konkordatoda Konkordato Mühletinin Sözleşmeler Bakımından Sonuçları* (Yetkin 2020) 29.

debtors with difficulty in repaying their debts to restructure their debts came to light again[21]. Following the suspension of bankruptcy postponement within the period of state of emergency, significant amendments to the provisions of concordat were introduced and the provisions on the bankruptcy postponement were repealed on the grounds of Law No. 7101 on *"The Amendments In Execution And Bankruptcy Law And Certain Laws On The Institution Of Concordat"* published in the Official Gazette dated 15 March 2018 and numbered 30361[22].

With the amendment to the Law No. 7101; significant legal amendments were introduced to the concordat institution which is regulated within the framework of the provisions 285 to 309 para 1 of the Execution and Bankruptcy Law (=EBL) and the regime has acquired a completely different scheme[23]. The revision of the Swiss Federal Execution and Bankruptcy Law, which entered into force on January 1, 2014 in Switzerland, significantly expanded the function of the concordat moratorium[24]. The amendments to the provisions of concordat on the grounds of Law No. 7101 were affected by the Swiss Execution and Bankruptcy Law (SchKG Art. 293-336) which was revised on 1 January 2014[25]. Based on these amendments, many provisions that previously caused the disruption of concordat were either revised or abolished[26]. The provisions of the bankruptcy postponement to the benefit of the debtor are included

21 Pekcanıtez and Erdönmez (n 8) 4-6.

22 Kale, 'Konkordato' (n 16) 213-214; Oğuz Atalay, 'Konkordato Reformu Hakkında Değerlendirmeler' in Muhammet Özekes (eds), *7101 sayılı Kanunla Konkordato ve Elektronik Tebligat Konularında Getirilen Yenilikler* (On İki Levha 2018) 112; Namlı, 'Değişiklikler' (n 1) 1486; Cenk Akil, 'Konkordato Prosedürü Çerçevesinde Sürekli Borç İlişkisinin Feshi (İİK m. 296, II)' (2019) 143 Türkiye Barolar Birliği Dergisi 222. According to the Government Justification of the Law No. 7101*, "When the exclusion of creditors from the processes in the bankruptcy institution, carrying out these processes between the debtor and the court, and the trial problems are evaluated together, it has been deemed as a necessity to completely abolish this institution, and instead to more effectively and actively use the concordat institution, in which the creditors and the debtor agree after a negotiation and this agreement is approved by the court."* (General Justification of Law No. 7101).

23 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 478; Kale, 'Konkordato' (n 16) 214.

24 Oliver Kälin, 'Die Sanierung der Aktiengesellschaft Ein Rechtshandbuch für Verwaltungsräte' (Schulthess 2016) N. 682, p. 270. The restructuring law, which entered into force on 1 January 2014, originates from reasons such as the Swissair crisis and the restructuring of companies experiencing financial difficulties (Lukas Müller and Ronja Lind, 'Fünf Jahre neues Sanierungsrecht: Erfahrungen, Befunde und Entwicklungen – Die Schweiz auf dem Weg zum "Swiss Chapter 11"?' (2019) Expert Focus, EXPERTsuisse 637). In other words, the concordat procedure is the result of a revision project initiated in response to the collapse of the Swissair company (Daniel Oehri, **'**Der Sachwalter im Nachlassverfahren: Ein Diener zweier Herren' (Herausgeber: Peter Gauch) in *AISUF – Arbeiten aus dem Iuristischen Seminar der Universitat Freiburg Schweiz Band/Nr 380* (Schulthess 2018) N. 46, p. 17). An important goal of the restructuring law revision as of 1 January 2014 was to encourage and facilitate company restructuring (Daniel Hunkeler and Zeno Schönmann, 'Grundriss des prepacks' (Thomas Sprecher Herausgeber) *Sanierung und Insolvenz von Unternehmen IX Neue Entwicklungen*, (EIZ – Europa Institut Zürich Band/Nr. 192), (Schulthess 2019) 45).

25 Pekcanıtez and Erdönmez (n 8) 5; Kale, 'Konkordato' (n 16) 214; Cenk Akil, 'Konkordato Mühletinin Alacaklılar Bakımından Sonuçları (28.02.2018 Tarih ve 7101 Sayılı Kanunla Yapılan Değişikliklere Göre)' (2019) 141 Türkiye Barolar Birliği Dergisi 228. It should be noted that there have also been changes in the Swiss law recently. Accordingly, with the new concordat provisions that entered into force on 1 January 2014, significant changes have occurred in the Swiss Federal Debt Enforcement and Bankruptcy Law in the regulations regarding concordat (Oliver Kälin, 'Chancen und Risiken der aktienrechtlichen Sanierung – ein Überblick' (Thomas Sprecher Herausgeber) *Sanierung und Insolvenz Unternehmen X* (EIZ – Europa Institut Zürich Band/Nr. 198, 2020) 9). As a result of these changes, the conditions for the approval of the concordat have been facilitated, and at the same time, it has been aimed to improve the financial situation of the debtor (Serdar Kale, 'İsviçre İcra İflas Kanununun Adi Konkordato Hükümlerine Genel Bir Bakış' (Güz 2017) 4(2) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 154).

26 Kale, 'Konkordato' (n 16) 214.

in the concordat regime and in this context, the decision regarding temporary relief was accepted[27] (EBL Art. 287; SchKG Art. 293 (a)). Thus, the opportunity to take a temporary relief decision has been included within the concordat provisions through which legal proceedings initiated by creditors against the debtor within the temporary relief will be suspended and new proceedings will be prevented[28] (EBL Art. 288 para 1; EBL Art. 294 para 1).

This study aims to make explanations and evaluations about the Concordat procedures in Turkish Law following the major changes realized within the framework of the amendments to the Law No. 7101 and the temporary relief decision which was not previously mentioned in the Execution and Bankruptcy Law. In line with this purpose we aim to put forward general information about the Concordat procedures and principles in Turkish law and within this context we shall reveal the concept of concordat, the purpose and types of concordat. Further we shall refer to the court commissioned and authorized in the application of concordat and we shall explain the procedures and principles of Concordat mechanism shaped within the framework of the amendments to Law No. 7101. After explaining the stages of Concordat in Turkish Law, we shall respectively refer to the persons who can apply for concordat, the documents to be attached to the concordat application and the assessment and approval of the concordat application. Thus, we shall clarify the *"temporary relief"* included in our legislation as per Law No. 7101 which is one of the aims of this study (EBL Art. 287; SchKG Art. 293 (a)). In this context, we shall specify the measures to be taken regarding the temporary relief decision introduced as a new mechanism, the announcement of the temporary relief, whether there is a possibility to apply to legal remedies against the temporary relief, the duration of the temporary relief and the consequences of the temporary relief. Our study will be concluded with the recent developments and current practices and experiences in Turkey related to Concordat.

II. General Information About the Concordat in Turkish Law as An Alternative to Suspension of Bankruptcy

A. The Concept and Purpose of Concordat

Concordat is an institution that, conceptually, enables the debtors whose financial situation has been deteriorated to get rid of the pressure of the possible creditors

27 Kale, 'Konkordato' (n 16) 214; Müjgan Tunç Yücel: Konkordato Mühletinin Alacaklılar Bakımından Sonuçları, On İki Levha, İstanbul, 2020, § 1, s. 6.

28 Pekcanıtez and Erdönmez (n 8) 32; Kale, 'Konkordato' (n 16) 214; Sarısözen, *7101 sayılı Kanun* (n 2) 56-57; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487. As can be seen, the result of the temporary respite decision for concordat is not the cancellation of the execution proceedings initiated. Accordingly, the result that will occur upon the decision of temporary respite in terms of concordat is that the proceedings are suspended. Therefore, proceedings will continue from where they left off in order for the creditors to collect their receivables as soon as the respite comes to an end (Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487).

who may undertake legal proceedings against them, to restructure their debts and at the same time to avoid coming to the brink of bankruptcy[29].

The purpose of the Concordat is to make an agreement between the debtor who have difficulty in repaying the debt and the creditors[30]. Thus, owing to Concordat, the debtor will be relieved of the enforcement proceedings filed against him/her, the creditor shall be able to collect an amount higher than the amount that he/she would in case he/she had applied for enforcement proceedings and finally the public interest will be protected via preventing unemployment by ensuring the continuity of the activities of the enterprises[31]. As is seen Concordat basically aims to secure the interests of the *"debtor"*, the *"creditor"* and the *"public"*[32].

It is not necessary for the debtor to be a person subject to bankruptcy in order to conclude a concordat with his/her creditors[33]. Likewise concordat can be concluded by the debtor whose bankruptcy can be claimed and a debtor who is not subject to bankruptcy can also apply for concordat[34]. In this context, it is possible for all real or legal persons - *joint stock companies, limited companies, ordinary partnerships, limited partnerships, associations and foundations* - to apply for non-bankruptcy (ordinary) concordat, regardless of whether the applicant is subject to bankruptcy or not[35]. The same rule applies in Swiss Law, however, it is foreseen in the *doctrine* that the "*estate"* can take the advantage of concordat in the liquidation of the inheritance and the "*the board of property owners*" can take the advantage of concordat in the property ownership[36]. On the other hand, it is stipulated that the ordinary partnership without legal personality cannot benefit from concordat, considering that it would not be subject to execution proceedings[37].

29 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 477; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 617. For the similar definitions of concordat, *see*: Postacıoğlu (n 1) 12; Üstündağ (n 1) 227; Yıldırım and Deren-Yıldırım (n 6) 517; Kuru, El Kitabı (n 1) 1443; Arslan, Yılmaz and Taşpınar Ayvaz, *İcra* (n 1) 625; Tanrıver and Deynekli (n 1) 29; Muşul, *C. II* (n 1) 1672; Muşul, *İflas ve Konkordato* (n 1) 375; Altay and Eskiocak (n 1) N. 21, p. 15; Sarısözen, *Konkordato* (n 1) 84; Balcı, Konkordato (n 1) 21; Kaplan (n 1) 17; Uyar, *Yeni Konkordato* (n 1) 3; Baki Kuru, Ramazan Arslan and Ejder Yılmaz, *İcra ve İflas Hukuku Ders Kitabı* (Gözden Geçirilmiş, 6352 sayılı Kanunla Getirilen Yenilikler ve Yapılan Değişiklikler İşlenip Değerlendirilmiş 28. Bs, Yetkin 2014) 625; Namlı, 'Değişiklikler' (n 1) 1494; Mert Namlı, 'Concordat as a Way of Restructiıng in Turkish Insolvency Law after the 2018 Reform' (2019) 30 (8) International Company and Commercial Law Review 443; Amonn and Walter (n 1) N. 2.

30 Yıldırım and Deren-Yıldırım (n 6) 517.

31 Yıldırım and Deren-Yıldırım (n 6) 517.

32 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 619. As a matter of fact, as stated in the justification of the Law No. 7101, improvement of the investment environment in Turkey was one of the intended purposes with the amendments made in the concordat provisions of Debt Enforcement and Bankruptcy Law No. 2004. An indicator revealing the aspect of the concordat institution that protects the interests of the public is that this institution provides a great support to the State in terms of fulfilling its public obligations by ensuring the continuity in tax resources and providing employment with the continuation of the enterprises. Thus, it will be possible to prevent economic turmoil in times of crisis by means of the existence of law improvement institutions such as concordat (Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 620).

33 Yıldırım and Deren-Yıldırım (n 6) 520; Muşul, *C. II* (n 1) 1673; Levent Börü and Şafak Parlak Börü, 'Konkordatonun Kefalet Sözleşmesine Etkileri' (2020) 78(3) İstanbul Hukuk Mecmuası 1243; Uyar, *Yeni Konkordato* (n 1) 20.

34 Muşul, *C. II* (n 1) 1673.

35 Michel Kähr, 'Ein Sanierungsrecht für Versicherungen' (Thomas Sprecher Herausgeber) *Sanierungd und Insolvenz von Unternehmen IX Neue Entwicklıngen* (EIZ – Europa Institut Zürich Band/Nr. 192, 2019) 77.

36 KUKO SchKG-Hunkeler, Art 293 (n 5) N 10-11.

37 KUKO SchKG-Hunkeler, Art 293 (n 5) N 10-11.

However, the opportunity to apply to the abolished bankruptcy postponement mechanism was only available to "*equity companies and cooperatives*"[38] [EBL Art. 179 ff.; Turkish Commercial Code (= TCC) Art. 376 para 3]. In this respect, it was not possible for real person merchants and sole proprietorships other than equity companies and cooperatives over-indebtedness to apply for bankruptcy postponement[39]. For this reason, the fact in the ***doctrine*** of Turkish Law stipulating that *non-bankruptcy ordinary concordat, which is one of the types of concordat* is an opportunity that every debtor can benefit from, whether it is subject to bankruptcy or not causes it to be considered as a mechanism that is distinguished from other restructuring institutions and ensures equality among debtors[40]. In our opinion, it was an appropriate decision to introduce such amendments to the Law No. 7101 as well as the Execution and Bankruptcy Law and to improve the functionality of the concordat mechanism.

B. Types of Concordat in Turkish Law

Concordat is discussed in different types within the framework of various criteria[41]. As a matter of fact, concordat is subjected to examination by categorizing into types according to (1) the time it is concluded, (2) the way it is concluded, (3) the content (or the purpose)[42]. Types of concordat in accordance with its content are; "*deferred concordat*", "*acquitted concordat*", "*combined concordat*" and "*concordat through asset abandonment*"[43]. Types of concordat is divided into two in accordance with the

38 Selçuk Öztek, *İflasın Ertelenmesi* (Arıkan 2007) 26; İsmet Sayhan, 'Anonim Şirketlerde Aktiflerin Pasifleri Karşılayamamasının Sonucu Olarak İflas ve İflasın Ertelenmesi' (2005) XXIII (1) Banka ve Ticaret Hukuku Araştırma Dergisi 98. In other words, the legislator did not introduce the possibility of requesting the postponement of bankruptcy to all persons subject to bankruptcy but only to *"capital companies and cooperatives"* that are deeply in debt. Furthermore, the banks could not request the postponement of bankruptcy despite having a stock company status (Hakan Pekcanıtez, 'İflasın Ertelenmesi' İstanbul Barosu Dergisi (2005) 79(2) 323 ff.).

39 At this point, postponement of bankruptcy institution differs from the (non-bankruptcy) concordat, which is a type of concordat (SchKG Art. 293 ff.), which we can express as another institution that temporarily prevents the immediate adjudication of bankruptcy. Because, postponement of bankruptcy institution can only be in question in terms of capital companies and cooperatives that are deeply in debt, while the concordat (non-bankruptcy) may be in question for all kinds of debtors (Schönenberger v B, 'Der Konkursaufshub nach Art. 725a OR' (BlSchk, 2002-Heft 5, s. 161-189). (Çev Üstündağ, S), "İsviçre Borçlar Kanunu (OR) madde 725a'ya göre İflasın Ertelenmesi' (Mart 2005) 111 Yargı Dünyası 25; Yıldırım and Deren-Yıldırım (n 6) 503; Evren Kılıçoğlu, 'İflasın Ertelenmesinin Konkordato ve Uzlaşma Yoluyla Yeniden Yapılandırma Kurumuyla Karşılaştırılması' *Prof. Dr. Yavuz Alangoya İçin Armağan* (Beta 2007) 456). Although the legislator has granted capital companies the opportunity to postpone bankruptcy; as stated in the Supreme Court decisions and doctrine, it is not possible for banks to be established as capital companies to request a postponement of bankruptcy (**In doctrine** *see*: Schönenberger, *Art. 725a* (n 35) 15; Pekcanıtez, 'İflasın Ertelenmesi' (n 34) 334; Abdurrahim Karslı, *İcra ve İflas Hukuku* (Yenilenmiş ve Gözden Geçirilmiş 3. Bs., Alternatif 2014) 495; Karslı, 'İflasın Ertelenmesi' (n 11) 264; Şakir Balcı, *İflasın Ertelenmesi Usul ve Esaslar* (Gözden Geçirilmiş Yenilenmiş 3. Bs., Seçkin 2010) 247; Kılıçoğlu (n 35) 456; Also *see*: Supreme Court 19. CD, 17.11.1995, M. 7299, D. 9852. For the decision *see:* https://lib.kazanci.com.tr/kho3/ibb/anaindex.html). It must be stated that in EBL (Enforcement and Bankruptcy Law) Art. 179, the legislator has not explicitly stated the banks as one of the capital companies that cannot demand postponement of bankruptcy (*See*: EBL Art. 179). On the other hand, the legislator explicitly states that the provisions restructured through reconciliation cannot be applied to banks (*See*: EBL Art. 309t para 2).

40 Yıldırım and Deren-Yıldırım (n 6) 517.

41 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 479; Uyar, *Yeni Konkordato* (n 1) 19.

42 Yıldırım and Deren-Yıldırım (n 6) 518; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621.

43 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621-622; Muşul, *C. II* (n 1) 1674; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 3; Uyar, *Yeni Konkordato* (n 1) 20.

time of execution of bankruptcy proceedings[44]. Accordingly, the types of concordat in terms of the time of execution are "*non-bankruptcy concordat*" and "*concordat after bankruptcy*"[45]. The types of concordat in terms of the means of execution are "*judicial (official) concordat*" and "*private (special) concordat*"[46].

The concordat regulated as per Article 285 of the Execution and Bankruptcy Law is a judicial (official) concordat[47]. Accordingly, in order for the judicial (official) concordat to take place, it is necessary to follow the legal procedure stipulated in the law (EBL Art. 285 ff.)[48]. In this way the debtor, by applying to judicial (official) concordat, ensures the settlement of its debts in full by making an agreement upon the approval of all creditors and under the supervision of the court[49]. The private (special) concordat, on the other hand, is the concordat realized under the conditions agreed upon by the debtor and the creditor, without the involvement of the court[50]. This type of concordat only binds the creditor and the debtor who have mutually agreed upon and is also subject to the provisions of the Code of Obligations instead of the Execution and Bankruptcy Law[51].

Execution and Bankruptcy Law incorporates provisions governing *"ordinary concordat (non-bankruptcy concordat)"* (EBL Art. 285-308/h), *"concordat after bankruptcy"* (Art. 309) as "*concordat through asset abandonment*" (EBL Art. 309/a-309 para 1)[52]. Ordinary concordat refers to a situation governed within the scope of Art. 285 ff. of Execution and Bankruptcy Law out of concordat through asset abandonment and non-judicial (private) concordat[53].

This study shall focus comprehensively on *"judicial (official) concordat"* governed within the scope of Art. 285 ff. of Execution and Bankruptcy Law and

44 Yıldırım and Deren-Yıldırım (n 6) 519.

45 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 622; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N. 2.

46 Tanrıver and Deynekli (n 1) 42; Muşul, *C. II* (n 1) 1673; Muşul, *İflas ve Konkordato* (n 1) 376; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 622; Yıldırım and Deren-Yıldırım (n 6) 518; Kuru, El Kitabı (n 1) 1444; Sarısözen, *Konkordato* (n 1) 86; Kaplan (n 1) 18; Uyar, *Yeni Konkordato* (n 1) 20.

47 Kuru, El Kitabı (n 1) 1444; Yıldırım and Deren-Yıldırım (n 6) 518.

48 Yıldırım and Deren-Yıldırım (n 6) 518.

49 Yıldırım and Deren-Yıldırım (n 6) 518.

50 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N. 1; Uyar, *Yeni Konkordato* (n 1) 20.

51 Kuru, El Kitabı (n 1) 1445; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 1; Yıldırım and Deren-Yıldırım (n 6) 518; Muşul, *C. II* (n 1) 1673; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 478; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621; Uyar, *Yeni Konkordato* (n 1) 20.

52 Muşul, *İflas ve Konkordato* (n 1) 376; Levent Börü 'Adi konkordatoda Alacaklıların Alacaklarını Bildirmesi" (2019) 10(1) İnönü Üniversitesi Hukuk Fakültesi Dergisi 174; Börü and Parlak Börü (n 29) 1243; Göksu (n 9) 130. Concordat through asset abandonment that were not previously available in Turkish law, entered our Enforcement and Bankruptcy Law with the amendment of Law No. 4949. In terms of types of concordat, the distinction between non-bankruptcy (ordinary) concordat and concordat after bankruptcy was accepted in the law. Ordinary concordat is a type of concordat that is commonly used in *practice* (Ejder Yılmaz, *İcra ve İflas Kanunu Şerhi* (Yetkin 2016) 1257).

53 Süha Tanrıver, '4949 sayılı İcra ve İflas Kanunu'nda Değişiklik Yapılmasına Dair Kanun'un Adi Konkordato ile İlgili Hükümlerde Getirmiş Olduğu Değişikliklerin Tespiti ve Değerlendirilmesi' (2004) 51 Türkiye Barolar Birliği Dergisi 67-68.

shall make explanations about the temporary relief decision included in the non-bankruptcy (ordinary) concordat. Below, the procedure to be followed in non-bankruptcy (ordinary) concordat will be outlined first.

III. An Overview of the Concordato Procedure Following the Amendment to the Law No 7101

A. The Court Commissioned and Authorized as per Turkish Law for the Application of Concordat

In order to be able to request concordat, the relevant debtor/creditor party should initially apply to the Court commissioned and authorized in this regard. In Turkish law, the Court commissioned and authorized by Execution and Bankruptcy Law Art. 285 para 3 against the creditor or the debtor who wants to apply for concordat is the *"commercial court of first instance"*[54]. One of the major changes introduced by Law No. 7101 for the regulations regarding concordat in Turkish law is related to the Court where the concordat application will be submitted[55]. Thus, the duties of the enforcement court in the concordat procedure were terminated following the amendments of Law No. 7101[56].

With the amendments of Law No. 7101, the legislator has introduced a regulation parallel to Swiss law by designating the commissioned Court for Concordat procedures in Turkish law as the *"commercial court of first instance"*[57]. ***In our opinion***, it is an appropriate decision to terminate the assignment of enforcement courts for the concordat proceedings and to assign solely the commercial courts of first instance, as thereby only a single court will be responsible for the same procedure.

In brief, the duty of the enforcement court in the concordat procedure has been terminated with the amendments of Law No. 7101[58]. The fact that the Court solely

54 Kale, 'Konkordato' (n 16) 217; Pekcanıtez and Erdönmez (n 8) 13; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 635, Namlı, 'Değişiklikler' (n 1) 1502. Pursuant to the decision of the High Council of Judges and Prosecutors, in regions with three or fewer commercial courts of first instance, the first commercial court is authorized; and in places where there are more than three commercial courts of first instance, the first, second and third commercial courts are authorized in this matter (Altay and Eskiocak (n 1) N. 41, p. 34-35). For the decision of the Council of Judges and Prosecutors (Official Gazette 05.04.2018, Number 30282), *see*: https://www.resmigazete.gov.tr/eskiler/2018/04/20180405-1.pdf. As can be seen, after this decision of the Council of Judges and Prosecutors, the relationship between the commercial courts of first instance has been turned into a duty relationship in terms of the applications regarding concordat. Moreover, a decision was made in this direction by the Istanbul Regional Court of Justice. The aforementioned decision includes the following statements: *"The duty of the courts is regulated in the article 1 and in the following articles of the Civil Procedure Law numbered 6100 and is related to the public order. Therefore, it is taken into consideration by the Court ex officio and at every stage of the trial. Thus, Therefore, the relationship between the Istanbul 1-2-3rd Commercial Courts of First Instance and the other commercial courts in the same courthouse has turned into a duty relationship in terms of the disputes and cases determined by the Council of Judges and Prosecutors…"*(Istanbul Regional Court of Justice, 17th Civil Department, 7.2.2019, M. 2018/3154, D. 2019/230; For the decision *see:* https://lib.kazanci.com.tr/kho3/ibb/anaindex.html). For the same decision, *see*: Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636.

55 Pekcanıtez and Erdönmez (n 8) 13; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 36.

56 Kale, 'Konkordato' (n 16) 217; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636.

57 Pekcanıtez and Erdönmez (n 8) 13-14.

58 Sarısözen, *7101 sayılı Kanun* (n 2) 48-49; Kale, 'Konkordato' (n 16) 217; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636; Pekcanıtez and Erdönmez (n 8) 13-14.

assigned for Concordat procedures has been designated as the "*commercial court of first instance*" with Law No. 7101 will prevent making contradictory decisions, so it has become an appropriate arrangement for procedural economy[59]. In addition, the fact that only a *"commercial court of first instance"* is appointed to deal with Concordat proceedings instead of different courts with this amendment and that the procedures will be carried out by a single court commissioned for the concordat procedure has become an appropriate arrangement as it will ensure that the procedure to be carried out faster and healthier[60].

The competent court in terms of Concordat procedures is designated as per the third paragraph of Article 285 of the Execution and Bankruptcy Law[61]. The legislator has designated a dual distinction in Turkish law as per Article 285 para 3 of the Execution and Bankruptcy Law according to whether the debtor who will apply for concordat is subject to bankruptcy or not[62]. The competent court in terms of concordat proceeding of debtors subject to bankruptcy as per Art. 154 of the Execution and Bankruptcy Law is *"the commercial court of first instance in the jurisdiction where the debtors resides"*[63] (EBL Art. 154 para 1-2; EBL Art. 285 para 3). The commercial court of first instance authorized for concordat proceedings of trade companies whose headquarters are located abroad is "*the Commercial Court of First Instance where the company's Turkey branch is located and is the Commercial Court of First Instance where the main branch is located in case the company has more than one branches in Turkey*"[64] (EBL Art. 154 para 2). In the event that the debtor on behalf of which the Concordat procedures are executed is not subject to bankruptcy, the competent court is *"the Commercial Court of First Instance in the debtor's settlement"* in accordance with paragraph 3 of Article 285 of the Execution and Bankruptcy Law[65] (EBL Art. 285 para 3).

59 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636.

60 Sarısözen, *7101 sayılı Kanun* (n 2) 49.

61 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 39. *In accordance with* third paragraph of Article 285 of the Enforcement and Bankruptcy Law*, "Authorized and competent court for the debtor subject to bankruptcy is the commercial court of first instance in the region mentioned in the first or second paragraphs of article 154 and for the debtor who is not subject to bankruptcy is the commercial court of first instance in the residence place of the debtor."*

62 Pekcanıtez and Erdönmez (n 8) 14; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636; Namlı, 'Değişiklikler' (n 1) 1502.

63 Postacıoğlu (n 1) N. 10, p. 17-18; Sümer Altay, *Türk İflâs Hukuku, 1. Cilt* (Vedat 2004) 76; Sarısözen, *7101 sayılı Kanun* (n 2) 49; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 636; Kale, 'Konkordato' (n 16) 217; Pekcanıtez and Erdönmez (n 8) 14; Kaplan (n 1) 58; Uyar, *Yeni Konkordato* (n 1) 28; Namlı, 'Değişiklikler' (n 1) 1502. The authority rule stipulated by the legislator here is related to the public order and it is the absolute authority. Therefore, an authorization agreement contrary to this rule cannot be signed with the creditors (Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 39). Changing the procedure center after the debtor has requested a concordat will not change the jurisdiction of the court (Uyar, *Yeni Konkordato* (n 1) 29).

64 Postacıoğlu (n 1) N. 10, p. 18; Kale, 'Konkordato' (n 16) 217; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 42; Namlı, 'Değişiklikler' (n 1) 1502.

65 Pekcanıtez and Erdönmez (n 8) 14; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 43; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 637; Kale, 'Konkordato' (n 16) 217; Sarısözen, *7101 sayılı Kanun* (n 2) 49; Namlı, 'Değişiklikler' (n 1) 1502.

B. Concordat Procedures in Turkish Law Following the Amendments of Law No. 7101

Although the general understanding regarding the concordat procedure has been preserved in Turkish law following the amendments introduced by Law No. 7101, various significant amendments have occurred in the functioning and proceedings of the concordat procedure[66].

After the new regulations introduced by Law No. 7101, the concordat proceedings will be initiated by the application of either the debtor or creditors to the commercial court of first instance with a preliminary concordat project[67]. It has been stipulated that the debtor or creditors who wish to request concordat should submit their petitions along with some documents and financial statements specified in the law (EBL Art. 286) to the assigned commercial court of first instance[68]. The amendment introduced a new regulation stipulating that not only the debtor but also each creditor who can claim bankruptcy can also apply for concordat proceedings[69] (EBL Art. 285 para 2).

The old regulation stipulating that enforcement courts are in charge in the first place when applying for concordat has been repealed[70]. Instead, with the amendments of Law No. 7101, it was stipulated that the court responsible for receiving the concordat application would be the *"commercial court of first instance"*[71].

In accordance with the concordat procedure; following the application to be filed to the commercial court of first instance with a petition and the documents specified in EBL Art. 286, the commercial court of first instance will evaluate whether it is compulsory to give a temporary relief decision[72]. The court receiving the concordat application will immediately decide a temporary respite upon determining that the documents specified as per Article 286 of the Execution and Bankruptcy Law have been duly, completely and properly submitted[73] (EBL Art. 287 para 1).

66 Muhammet Özekes, 'Konkordatoya Başvuru ve Geçici Mühlet Kararı' in Muhammet Özekes (eds), *7101 sayılı Kanunla Konkordato ve Elektronik Tebligat Konularında Getirilen Yenilikler* (On İki Levha 2018) 44.

67 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 483; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 647; Pekcanıtez and Erdönmez (n 8) 13; Özekes, 'Geçici Mühlet Kararı' (n 62) 44; Kale, 'Konkordato' (n 16) 214; Altay and Eskiocak (n 1) N. 41, p. 34.

68 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 483; Altay and Eskiocak (n 1) N. 49, p. 44. In Swiss law, according to the Art. 293 (a) provision of SchKG, the application must include a provisional restructuring plan, current balance sheet, income statement and liquidity plan, or relevant documents demonstrating current and future assets (Bettina Kopta-Stutz, 'Gerichtliche Sanierungsverfahren für Schweizer Aktiengesellschaften Unter Berücksichtigung des aktienrechtlichen Konzepts zur Auslösung von Sanierungsmassnahmen' in *ZStP -Zürcher Studien zum Privatrecht Band/ Nr. 295* (Schulthess 2019) 35).

69 Kale, 'Konkordato' (n 16) 214; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485; Sarısözen, *7101 sayılı Kanun* (n 2) 48.

70 Sarısözen, *7101 sayılı Kanun* (n 2) 48. Also *see:* section III, A above.

71 Sarısözen, *7101 sayılı Kanun* (n 2) 48; Sarısözen, *Konkordato* (n 1) 89; Namlı, 'Değişiklikler' (n 1) 1502.

72 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485.

73 Kale, 'Konkordato' (n 16) 214-215; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485; Özekes, 'Geçici Mühlet Kararı' (n 62) 45; Altay and Eskiocak (n 1) N. 49, p. 44; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 287 (n 1) N 4; Uyar, *Yeni Konkordato* (n 1) 39; Namlı, 'Değişiklikler' (n 1) 1504. This issue is also stated in the first paragraph of

The temporary respite is *"three months"*[74]. However, the court may extend the temporary respite by no more than two months upon the request of the debtor or temporary commissioner (trustee) before the expiry of this period of three months[75]. The court receiving the concordat application shall appoint a temporary concordat commissioner (trustee) together with the temporary respite[76].

In the event it appears that it is possible to reach the success within the temporary relief period, the Court may grant a "*peremptory (definitive) respite*" upon the request of the creditor or the debtor who applies for the concordat[77] (EBL Art. 289 para 3). The period stipulated by the legislator for the peremptory (definitive) respite is *"one year"*[78]. In exceptional circumstances where it appears that the one year period ruled by the court will not be enough, the peremptory (definitive) respite may be extended by the court to six months upon a request by the debtor or the commissioner (trustee)[79] (EBL Art. 289 para 6 sentence 1). The court, which takes the peremptory (definitive) respite decision, will also appoint a peremptory (definitive) respite commissioner (trustee)[80].

The Court may compose a "*creditors council*", if required, at a time deemed appropriate within the peremptory (definitive) respite[81]. In fact, an important novelty introduced by Law No. 7101 regarding the concordat proceedings is the opportunity to compose a "*creditors council*" upon the peremptory (definitive) respite or within the peremptory (definitive) respite period[82]. In exceptional cases stipulated by the law, it is obligatory to compose a creditors council[83].

Article 287 of the Enforcement and Bankruptcy Law as follows: *"Upon the request of concordat, the court decides upon a temporary respite after determining that the documents specified in Article 286 are presented in complete, and takes all measures deemed necessary to protect the assets of the debtor, including the situations in the second paragraph of Article 297."*

74 Kale, 'Konkordato' (n 16) 215; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Uyar, *Yeni Konkordato* (n 1) 44.

75 Kale, 'Konkordato' (n 16) 215; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Altay and Eskiocak (n 1) N. 49, p. 44-45; Uyar, *Yeni Konkordato* (n 1) 44.

76 Özekes, 'Geçici Mühlet Kararı' (n 62) 46; Kale, 'Konkordato' (n 16) 215; Altay and Eskiocak (n 1) N. 49, p. 44. The temporary concordat commissioner must "*immediately*" start his/her duty upon receiving the notice of the court decision from the court registry (Ali Cem Budak and Serdar Kale, *Konkordato Komiserinin Kontrol Listesi* (Adalet 2019) 13).

77 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 491; Kale, 'Konkordato' (n 16) 215; Altay and Eskiocak (n 1) N. 50, p. 45. Hence, in the third paragraph of Article 289 of the Enforcement and Bankruptcy Law, this issue is stated as follows: *"Upon understanding that the concordat is possible to succeed, the debtor is given a one-year peremptory respite. Together with these decisions, the court decides that the temporary commissioner or commissioners will continue to work unless there is a situation that requires a new assignment and submits the file to the commissioner*."

78 Kale, 'Konkordato' (n 16) 215.

79 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 491; Kale, 'Konkordato' (n 16) 215; Altay and Eskiocak (n 1) N. 50, p. 45. In the first clause of sixth paragraph of Article 289 of the Enforcement and Bankruptcy Law, this issue is regulated by the legislator exactly as follows: *In special cases that pose difficulties, the peremptory respite may be extended up to six months by the court upon request and the justified report of the commissioner."*

80 Kale, 'Konkordato' (n 16) 215.

81 Özekes, 'Geçici Mühlet Kararı' (n 62) 46; Kale, 'Konkordato' (n 16) 215.

82 Sarısözen, *7101 sayılı Kanun* (n 2) 62.

83 Kale, 'Konkordato' (n 16) 215.

The commissioner (trustee) appointed by the Court during the concordat proceedings invites the creditors to declare their receivables[84]. Based upon the amendments introduced by Law No. 7101, the commissioner (trustee) will give the creditors a period of "*fifteen days*" to determine who the creditors are and invite them to declare their receivables[85]. As can be seen, the legislator shortened the "*twenty day*" period stipulated in the former law and decreased it to "*fifteen days*"[86].

Having completed the stages of preparing the concordat project and the creditors' declaration of their receivables, the concordat commissioner (trustee) invites the creditors to convene and negotiate the concordat project, with a new announcement[87]. The purpose of the creditors meeting is to inform the creditors about the assets of the debtor and at the same time to receive their approval to the concordat[88]. Creditors who have declared their receivables within the required period or those who are proven to be creditors as per the detailed balance sheet -*although they have not declared their receivables on time*- may attend the creditors meeting[89]. In addition, the debtor him/herself is obliged to participate in the creditors meeting in order to provide the necessary information[90] (EBL Art. 302 para 2).

The next stage following the creditors meeting is *"the submission of the concordat project to the Court for approval"*. In this context, the concordat commissioner (trustee) will prepare a report specifying whether the concordat project is accepted by the creditors and whether the project is appropriate to be approved together with its justifications and will submit them to the commercial court of first instance together with all the documents regarding concordat[91] (EBL Art. 302 para 8).

The commercial court of first instance examines the concordat plan and initiates a judicial process in order to evaluate whether it can be approved or not[92] (EBL Art. 304-308b). The finalized decision on whether the concordat plan shall be approved or not should be made within the peremptory (definitive) respite period[93]. However, if the court realizes that it cannot make a decision within the peremptory (definitive)

84 Sarısözen, *7101 sayılı Kanun* (n 2) 75; Kale, 'Konkordato' (n 16) 215.

85 Kale, 'Konkordato' (n 16) 215; Sarısözen, *7101 sayılı Kanun* (n 2) 76.

86 Sarısözen, *7101 sayılı Kanun* (n 2) 76.

87 Kale, 'Konkordato' (n 16) 215; Sarısözen, *7101 sayılı Kanun* (n 2) 76; Altay and Eskiocak (n 1) N. 51, p. 45.

88 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 507.

89 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 507; Altay and Eskiocak (n 1) N. 52, p. 45-46.

90 In the second paragraph of Article 302 of the Enforcement and Bankruptcy Law, this issue is stated exactly as follows: *"The debtor is obliged to be present at the meeting to make the necessary explanations*".

91 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 508. This issue is stated in the eighth paragraph of Article 302 of the Enforcement and Bankruptcy Law exactly as follows: *"The Commissioner shall submit all documents regarding concordat and the justified report regarding whether the concordat project is accepted and the approval is appropriate within seven days at the latest after the end of the adherence period*".

92 Kale, 'Konkordato' (n 16) 215.

93 Sarısözen, *7101 sayılı Kanun* (n 2) 81; Kale, 'Konkordato' (n 16) 215.

respite period, it will be able to order the extension of the peremptory (definitive) respite period until the decision is taken[94]. In any case, this period to be ruled by the court will not exceed six months[95].

If, as a result of the examination, the court finds out that the necessary conditions for the approval of the concordat are met, it may decide on either to approve the concordat or to reject the request for approval[96].

IV. Concordat Application and Assessment of the Concordat Application

A. Principles Regarding the Concordat Application

1. Persons Who Can Apply for Concordat

As a general rule, every debtor has the right to benefit from the concordat procedure regardless of the title[97]. It is possible for the non-merchant debtors to apply for concordat[98]. The persons who can apply for concordat and the situations that may be found appropriate to apply for concordat are regulated in the first paragraph of Article 285 of the Execution and Bankruptcy Law[99]. As per EBL Art. 285 para 1, *"any debtor who cannot pay his/her debts on due date or who is in danger of not being able to pay his/her debts on due date"* may apply to concordat proceedings[100]. The regulation preceding the amendments of Law No. 7101 included the expression *"any debtor who wants to benefit from concordat provisions"*[101]. As is seen, Law No. 7101 as well as Article 285 governing concordat application introduced significant amendments[102]. In addition, all creditors who can claim bankruptcy are also entitled

94 Kale, 'Konkordato' (n 16) 215; Sarısözen, *7101 sayılı Kanun* (n 2) 81-82.

95 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 511; Sarısözen, *7101 sayılı Kanun* (n 2) 82; Kale, 'Konkordato' (n 16) 216.

96 Sarısözen, *7101 sayılı Kanun* (n 2) 82.

97 Postacıoğlu (n 1) N. 11, p. 18.

98 Postacıoğlu (n 1) N. 11, p. 18; Altay and Eskiocak (n 1) N. 21, p. 15; Muşul, *C. II* (n 1) 1673; Uyar, *Yeni Konkordato* (n 1) 23. Moreover, whether the heirs can request a concordat or not is a controversial issue in the doctrine (Altay and Eskiocak (n 1) N. 104, p. 143). In this context, *in the* ***doctrine***, it is a matter of debate whether the heirs can make a concordat agreement with the creditors of the inheritor by claiming the inadequacy of the properties in the inheritance (Postacıoğlu (n 1) N. 12, p. 19; Uyar, *Yeni Konkordato* (n 1) 24). At this point, another discussion emerges about whether it is possible for the debtor to conclude a concordat agreement with his/her creditors who have certificate of insolvency (Postacıoğlu (n 1) N. 13, p. 20-21; Altay and Eskiocak (n 1) N. 103, p. 142).

99 In the first paragraph of Article 285 of the Enforcement and Bankruptcy Law, there is a regulation as follows: *"Any debtor who is unable to pay his/her debts when due or is in danger of not being able to pay the debts in due time, can request a concordat in order to be able to pay the debts by receiving more time or abatement; or in order to avoid a possible bankruptcy"*.

100 Pekcanıtez and Erdönmez (n 8) 14; Sarısözen, *7101 sayılı Kanun* (n 2) 49; Namlı, 'Değişiklikler' (n 1) 1494; Namlı, 'Concordat' (n 25) 444.

101 Yıldırım and Deren-Yıldırım (n 6) 520; Sarısözen, *7101 sayılı Kanun* (n 2) 46; Kuru, El Kitabı (n 1) 1446; Muşul, *C. II* (n 1) 1674; Arslan, Yılmaz and Taşpınar Ayvaz, *İcra* (n 1) 629.

102 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 12; Sarısözen, *7101 sayılı Kanun* (n 2) 46. Hence, this issue is regulated exactly as follows in Article 13 of Law No 7101:
Article 285 of Law No. 2004 has been amended as follows:

to request concordat[103] (EBL Art. 285 para 2).

2. Situations Appropriate to Apply for Concordat

As per amended Article 285 para 1 of Law No. 7101, situations appropriate to apply for concordat are stipulated as *"the debtor's inability to pay its debts that are due"* and *"where the debtor is in danger of being unable to repay the debts that are due"*[104]. On the other hand, another situation appropriate to apply for concordat is the regulation stipulated in the amended Article 377 of Turkish Commercial Code (TCC) No. 6102 as a result of Law No. 7101[105]. In fact, the first paragraph of the amended Article 377 of Turkish Commercial Code (TCC) stipulated that "*The administrative board or any creditor can request a concordat together with the bankruptcy claim to be filed pursuant to the third paragraph of Article 376 or during the bankruptcy proceedings executed in this context in accordance with Article 285 and following articles of the Law No. 2004"*[106]. The first paragraph of the amended Article 377 of Turkish Commercial Code (TCC) and Article 376 para 3 regulates[107] the "*over-indebtedness*" (*die Überschuldung*) situation and foresees that a concordat can be requested in such a case[108]. Upon all these statements, we would like to state that:

"*Any debtor who is unable to pay his/her debts when due or is in danger of not being able to pay the debts in due time, can request a concordat in order to be able to pay the debts by receiving more time or abatement; or in order to avoid a possible bankruptcy.*
Any creditor, who can request bankruptcy, may request, with a justified petition, concordat procedures to be initiated against the debtor.
Authorized and competent court for the debtor subject to bankruptcy is the commercial court of first instance in the region mentioned in the first or second paragraphs of article 154 and for the debtor who is not subject to bankruptcy is the commercial court of first instance in the residence place of the debtor.
The person requesting concordat is obliged to pay the concordat expense advance specified in the tariff that was implemented by the Ministry of Justice. In this case, Articles 114 and 115 of the Civil Procedure Law dated 12/1/2011 and numbered 6100 are applied by comparing. "

103 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 19. It should be noted that, as a result of the amendment of Law No. 4949, a regulation that the creditors can also request concordat has been accepted in our Enforcement and Bankruptcy Law. The justification for this amendment adopted with Law No. 4949 can be expressed as follows*: "With the paragraph added to the article, the creditors have been given the opportunity to request the initiation of concordat procedures with a justified petition about the debtor and thus to ensure equality between the creditors"* (Justification of the article of Law No. 4949).

104 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 24; Namlı, 'Değişiklikler' (n 1) 1496; Namlı, 'Concordat' (n 25) 444.

105 Pekcanıtez and Erdönmez (n 8) 9.

106 Öztek (n 34) N. 25. For detailed explanations on this issue, *see*: Arslan Kaya, *Notlu Türk Ticaret Kanunu* (Güncellenmiş 8. Bs, Beta Basım 2020) 131.

107 Thus, the third paragraph of Article 376 of the Turkish Commercial Code is regulated as follows: *"In the event that there are signs of suspicion that the company is in debt, the board of directors shall issue an interim balance sheet on the basis of both the continuity of the business and the possible sales prices of the assets. Provided that it is understood from this balance sheet that the assets are not sufficient to meet the receivables of the creditors of the company, the board of directors notifies this situation to the commercial court of the place where the company headquarters is located and requests the bankruptcy of the company. This situation is valid unless the creditors of the company debts that could meet the deficit and avoid insolvency of the company agree upon the order change in terms of privileges in written form and that the validity and reliability of this declaration or agreement is confirmed by the experts appointed by the court to be applied for bankruptcy. Otherwise, the application made to the court for expert examination is deemed as a bankruptcy notification."*

108 Oruç Hami Şener, *Teorik ve Uygulamalı Ortaklıklar Hukuku Ders Kitabı* (Gözden Geçirilmiş 4. Bs, Seçkin 2019) 388; Fatih Bilgili and Ertan Demirkapı, *Şirketler Hukuku Dersleri* (7. Bs., Dora 2020) 286; Şaban Kayıhan, *Şirketler Hukuku* (Gözden Geçirilmiş 4. Bs., Seçkin 2020) 196. Furthermore, bankruptcy could be postponed before the amendment of the regulation in Art. 377 of TCC with the Law No. 7101. For detailed explanations on this issue, *see:* Hasan Pulaşlı*, Şirketler*

considering TCC Art. 376 para 3 and TCC Art. 377 together, the *over-indebtedness* of the equity companies and cooperatives is one of the conditions stipulated in the law as an appropriate situation to apply for a concordat[109]. In accordance with Article 377 of Turkish Commercial Code (TCC) No. 6102, *the administrative board or any creditor can request a concordat together with the bankruptcy claim to be filed pursuant to "over-indebtedness" stipulated in the third paragraph of Article 376 or during the bankruptcy proceedings executed in this context in accordance with Article 285 and following articles of Execution And Bankruptcy Law*[110].

In brief, the situations appropriate to apply for Concordat can be summarized as; (1) the debtor's inability to pay its debts that are due; (2) where the debtor is in danger of being unable to repay the debts that are due; and (3) "*over-indebtedness*" of the equity companies and the cooperatives.

The situation where the debtor is in danger of being unable to repay the debts that are due is stipulated as one of the situations appropriate to apply for Concordat however, it refers to a conceptually abstract situation[111].

The over-indebtedness (*Überschuldung*) of equity companies and cooperatives, in the most general terms, is defined as the inability of the company's assets to meet its liabilities, i.e. its debts[112]. In Turkish law and ***doctrine***, over-indebtedness is referred to as the inability of the company to meet its debts with its assets and receivables[113].

Hukuku Genel Esaslar (Güncellenmiş ve Genişletilmiş 4. Bs, Adalet 2016) N. 262; Soner Altaş, *Türk Ticaret Kanununa Göre Anonim Şirketler* (Güncellenmiş ve Genişletilmiş 8. Bs, Seçkin 2017) 345; İsmail Kırca, Feyzan Hayal Şehirali Çelik and Çağlar Manavgat, *Anonim Şirketler Hukuku, C. 1, Temel Kavram ve İlkeler, Kuruluş, Yönetim Kurulu* (Banka ve Ticaret Hukuku Araştırma Enstitüsü Türkiye İş Bankası A.Ş. Vakfı, Sözkesen 2013) 590-591.

109 Pekcanıtez and Erdönmez (n 8) 10; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 644; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 483; Sarısözen, *Konkordato* (n 1) 94. It should be noted that, the regulations stipulated in the provision of Article 376 of TCC titled *"Capital loss and over-indebtedness"*, do not completely allow the request for concordat because it is stated in the Art. 376 para 1 of TCC that *"In the event that it is understood from the last annual balance sheet that half of the total of the capital and legal reserves are unrequited due to loss, the board of directors shall immediately call the general assembly to a meeting and present the remedial measures it deems appropriate"*. In this context, for detailed explanations regarding Art. 376 para 1 of TCC, which is crucial for our subject and differs from Art. 376 para 3 of TCC, *see:* İbrahim Çağrı Zengin, *Türk Ticaret Kanunu'na Göre Anonim Ortaklık Genel Kurulunda Yeter Sayılar* (On İki Levha 2020) 42.

110 İsmail Cem Soykan, *Türk Ticaret Kanununa Göre Anonim Ortaklıklarda Sermaye Taahhüdü Yoluyla Sermaye Arttırımı* (On İki Levha 2019) 335.

111 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 644. On the other hand, financial difficulties, payment delays, liquidity crises (*Liquidiätskrise*) and capital loss (*Kapitalverlust*) and over-indebtedness (*Überschuldung*) are concrete situations that threaten the existence of the company (Marina Schwizer, 'Arbeitsrechtliche Fragen bei der Sanierung des Arbeitgebers' in SGRW – St Galler Schriften zur Rechtswissenschaft Band/Nr. 40 (Dike 2020) 4).

112 Basler Kommentar-Wüstiner H, *Obligationenrecht II, Art. 530-1186 OR, 3. Abschnitt: Organistaion der Aktiengesellschaft* (3. Aufl., Helbing Lichtenhahn 2008), Art. 725, N. 29; Alexander Dubach, 'Der Konkursaufschub nach Art. 725a OR: Zweck, Voraussetzungen und Inhalt' (1998) 94 Schweizerishe Juristen-Zeitung 154; Roger Giroud, *Die Konkurseröffnung und ihr Aufschub bei der Aktiengesellschaft* (2. Aufl., Schultess 1986) N. 75 ff.; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 645; Muhammet Özekes: "İflasın Ertelenmesi (İİK m. 179-179b; TTK m. 324)", Legal Hukuk Dergisi, 2005, (s. 3249-3283), s. 3261. In Switzerland, if the assets are not sufficient to cover the company's debts, the board of directors will inform the court (Yaşar Karayalçın, 'İsviçre Borçlar Kanununda Anonim Şirketler Hukuku Alanında Yapılan Değişiklikler' (1993) 17(1) Banka ve Ticaret Hukuku Araştırma Dergisi 30). When the assets are not sufficient to cover the debts of the company in Switzerland, the board of directors reports this to the court. In Switzerland, significant changes have been made to the provisions of OR Art. 725 and OR Art. 725a with the 1991 Act. (Karayalçın (n 108) 29).

113 Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (Değişiklikler ve İkincil Düzenlemelerle Güncelleştirilmiş 5. Bs

In the decisions of the Supreme Court, over-indebtedness is referred to as the situation where the assets of any equity company or the cooperative fails to meet its liabilities[114]. As is seen, in order to be able to talk about the over-indebtedness of equity companies and cooperatives, the company's assets and receivables should not be sufficient to cover their debts[115]. In this regard; in case the assets of the company or cooperative are sufficient to cover its debts however the payments are due for other reasons whatsoever, it is not possible to speak of over-indebtedness [116] therefore it is not even a matter of discussion to directly claim for the bankruptcy of the company or to apply for the bankruptcy postponement[117] (EBL Art. 179; SchKG Art. 192).

Vedat 2020) N. 12-132, p. 295; Reha Poroy, Ünal Tekinalp, Ersin Çamoğlu, *Ortaklıklar Hukuku I [Giriş, Adi Ortaklık, Ticaret Ortaklıklarına İlişkin Genel Hükümler, (Perdenin Kaldırılması, Birleşme, Bölünme, Tür Değiştirme) Kollektif, Komandit, Anonim, Halka Açık Anonim Ortaklıklar, Sermaye Piyasası Hukukunun Esasları]* (Güncellenmiş, Yeniden Yazılmış 14. Bası, Vedat 2019) N. 144e; Öztek (n 34) 57; Oğuz Atalay, *Borca Batıklık ve İflasın Ertelenmesi* (Gözden Geçirilmiş ve Yenilenmiş 2. Bs., Güncel Yayınevi 2007) 20 et seq; Pulaşlı, *Şirketler Hukuku* (n 104) N. 262; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 378; Arslan Kaya, 'Borca Batık Anonim Şirketlerin İflasının Ertelenmesi' *Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı* (Beta 2001) 283; Altay, İflasın Ertelenmesi, s. 628; Kuru, El Kitabı (n 1) 1159; Özekes, 'İflasın Ertelenmesi' (n 108) 3261; Manavgat (Kırca and Şehirali Çelik) (n 104) 585; İsmail Kayar, 'Limited Ortaklıkta Mali Durumun Bozulması ve Alınacak Tedbirler' *Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı* (Beta 2001) 313; Sayhan (n 34) 83-84; Mustafa Can Toplu, *İflasın Ertelenmesinin Türkiye'de Uygulama Süreçleri İyileştirme Projelerinde Mali Değerlendirme ve Analizin Önemi* (Kazancı Hukuk 2010) 52; Timuçin Muşul, *İflasın Ertelenmesi* (Gözden Geçirilmiş 2. Bs., On İki Levha 2010) 89; Karslı, 'İflasın Ertelenmesi' (n 11) 272; Şener (n 104) 385; Hasan Pulaşlı, *6102 Sayılı Türk Ticaret Kanununa Göre Şirketler Hukuku Şerhi Cilt 1* (Adalet 2011), N. 612; Talih Uyar, 'İİK.'nun 179. Maddesi Üzerine Bir İnceleme' *Prof. Dr. Ejder Yılmaz'a Armağan (2. Cilt)* (Yetkin 2014) 1979.

114 A decision of the Supreme Court in this direction is as follows: *"… Avoiding over-indebtedness does not mean the payment of all debts, but means that there are more assets than liabilities according to the current values. In this case, it is inappropriate to declare bankruptcy even though it is determined in the expert report that the petitioner company is not in over-indebtedness…"* (19. Civil Department, 23.12.2010, M. 5860, D. 14737 For the decision *see*: https://lib.kazanci.com.tr/kho3/ibb/anaindex.html, Last Online Accesses: 4.3.2021). Another decision of the Supreme Court regarding over-indebtedness is as follows: "… *In determining the indebtedness, not only the records of the plaintiff, but also the current values of their assets should be examined, and at this point, the opinions of experts in their respective fields should be consulted. The Court should declare in accordance with the Article 166/2 of EBL and determine the indebtedness with the current values of the assets pursuant to Article 376 of TCC and with the amount of the debts shown in the list of creditors and other debts that can be determined in real terms pursuant to the Article 178/1 of EBL. In order to do so, the decisions must be made after an expert examination is carried out on the balance sheet submitted by the debtor company to the court and on the project reported by the company in order to improve the financial situation, and the company balance sheet (over-indebtedness sheet) is reconstructed by the experts according to the current values and the realistic data obtained as a result of the research and examination. The purpose of postponing over-indebtedness is to improve the financial position of the over-indebtedness capital company and to avoid insolvency. Avoiding insolvency does not mean the payment of all debts, but means that there are more assets than liabilities*…" (Supreme Court. 23. CD, 12.3.2018, M. 2017/1911, D. 2018/2138, For the decision *see*: https://lib.kazanci.com.tr/kho3/ibb/anaindex.html, Last Online Accesses: 4.3.2021).

115 Atalay, *Borca Batıklık* (n 109) 20. At this point, an issue needs to be stated separately. Accordingly, under the usual conditions of life, there may be difficulties in paying the debts of the partnership. Because, partnerships may have difficulties to make payments in certain months. On the contrary, the company may have no trouble making its payments in the following months. In such cases, it cannot be said that there are more liabilities than the assets, in other words, the company is in insolvency (Gönen Eriş, *Uygulamalı İçtihatlı Anonim Şirketler Hukuku* (Seçkin 1995) 249).

116 Kaya, 'Borca Batık' (n 109) 290. Therefore, it is not possible to talk about insolvency if significant receivables are not collected or collected late, or the current production cannot be sold due to strikes or lockouts, or unjust lien foreclosures and other temporary reasons and does not occur due to the unbalance between the assets and liabilities of the company or the cooperative (Kaya, 'Borca Batık' (n 109) 290; In the same direction *see*: Nisim Franko, 'Sermaye Şirketlerinde-Özellikle Anonim Şirketlerde İflas ve Tehiri (TTK 324/3 ve İİK. 179. Maddeleri Hakkında Bir Tetkik)' *Prof. Dr. Haluk Tandoğan'a Armağan* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1990) 412-413; Hayri Domaniç, *Anonim Şirketler Hukuku ve Uygulaması TTK. Şerhi – II* (Temel 1988) 539).

117 Oğuz Atalay, 'İflas Hukukundaki Yenilikler' (2004) 1(2) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, 492. As a matter of fact, in order to be able to request a postponement of bankruptcy - *although it is not available at the moment* - it was stated as an obligation for capital companies and cooperatives to directly request bankruptcy by notifying the commercial court that they are in debt by the authorized persons or their creditors (Atalay, *Borca Batıklık* (n 109) 76). The judge is obliged to give a bankruptcy decision upon notification of insolvency (Ulrich Haas and Yael Strub, *Die Aktiengesellschaft, Generalversammlung und Verwaltungsrat, Mangel in der Organisation, Art. 698-726 und 731b OR, ZK – Zürcher Kommentar* (Lukas Handschin Herausgeber) (3., neu bearbeitete Auflage, Schulthess 2018) 1237-1273 N. 1, p. 1240).

Over-indebtedness is a direct cause of bankruptcy in accordance with article 179 of our Execution and Bankruptcy Law[118]. The legislator has enabled over-indebtedness companies and cooperatives to apply for concordat in order to avoid bankruptcy in accordance with the regulation stipulated in Article 377 of TCC[119]. In such a case, *the administrative board* of the over-indebtedness company or cooperative should take a board of directors' resolution confirming that the company is insolvent[120]. In addition, for the equity company or the cooperative to apply for concordat on the grounds of being deep in debt, the assets declared in the interim balance sheet to be issued should certify the status of insolvency both on the basis of the going concern principle and on the possible sales prices[121] (TCC Art. 376 para 3; OR Art. 725 para II).

B. The Documents to be Attached to the Concordat Application

1. General Rules

The debtor should attach some documents to the petition to be submitted to the Court while applying for a concordat[122]. The documents to be annexed to the

118 Uyar, *İİK'nun 179. Maddesi* (n 109) 1973. Atalay, *Borca Batıklık* (n 109) 40; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 375; Kaya, 'Borca Batık' (n 109) 282; Şener (n 104) 385; Muşul, *C. II* (n 1) 1405; Güray Erdönmez, 'Muamele Merkezinin Değiştirilmesinin İflasın Ertelenmesi Talebini İnceleyen Mahkemenin Yetkisine Etkisi' *Prof. Dr. Ejder Yılmaz'a Armağan, Cilt 1* (Yetkin 2014) 867. In the event that a capital company is insolvent, a direct bankruptcy case can be filed against the company (Baki Kuru, 'İflasın Ertelenmesi Kararından Önce İcra Takiplerinin Durdurulması Hakkında İhtiyati Tedbir Kararı Verilebilir Mi?' in *Haluk Konuralp Anısına Armağan, Cilt: 2* (Yetkin 2009) 304). The reason why the law regulates the state of over-indebtedness for capital companies as a separate bankruptcy reason in the Art. 179 of EBL is that the liability in capital companies is based on the principle of limited liability with capital (Baki Kuru, 'Pasifi Aktifinden Fazla Olan Sermaye Şirketlerinin İflası' 1970 (10) Adalet Dergisi 622-623).

119 Thus, Article 377 of the Turkish Commercial Code numbered 6102 clearly states that *"The Board of Directors or any creditor shall be able to request a concordat with the bankruptcy request made pursuant to the third paragraph of Article 376 or can also request concordat during the bankruptcy proceedings made in this context, pursuant to the 285th and following articles of the Law No. 2004.* The mentioned Article 377 of TCC was amended on 28.02.2018 with Article 62 of the Law No. 7101. Before it was amended by Law No. 7101, the old version of the Art. 377 of TCC was as follows: *"b) Postponement of Bankruptcy Article 377 (1) The board of directors or any creditor may request a postponement of bankruptcy by submitting to the court an improvement project showing objective and real resources and measures, including the introduction of new cash capital. In this case, articles 179 to 179/b of the Enforcement and Bankruptcy Law are applied."* (Kaya, *Türk Ticaret Kanunu* (n 102) 131).

120 Pekcanıtez and Erdönmez (n 8) 10.

121 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 645; Bilgili and Demirkapı (n 104) 285; Pulaşlı, *Şirketler Hukuku* (n 104) N. 269; Yıldırım and Deren-Yıldırım (n 6) 386-387; Schönenberger, *Art. 725a* (n 35) 11; Alihan Aydın, 'Türk Ticaret Kanunu'nun Anonim Ortaklıkta Sermaye Kaybı ve Borca Batıklığa İlişkin Düzenlemesine (TK M. 376) Eleştirel Bir Bakış' (2012) 70(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 109, 110; Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu, Değişiklikler, Yenilikler ve İlk Tespitler* (Güncellenmiş 2. Basıdan 3. (Tıpkı) Bs, On İki Levha 2016) 268; Manavgat (Kırca and Şehirali Çelik) (n 104) 586. According to *Kendigelen*, in Turkish Law doctrine, the purpose of issuing an interim balance sheet on the basis of continuity of the business other than the interim balance sheet to be deducted from the possible sales prices of the assets is to obtain a preliminary opinion on whether the company has a hope to survive (Kendigelen (n 117) 268, fn. 98). (*Compare*: BaK-Wüstiner, Art. 725 (n 108) N. 35 ff.; Thomas Meister – OR, *Handkommentar zum Schweizerischen Obligationenrecht* (Hrsg. von Jolanta Kren Kostkiewicz, Urs Bertschinger, Peter Breitschmid, Ivo Schwander) (Orell Füssli 2002) N. 6; Peter Forstmoser, Arthur Meier-Hayoz and Peter Nobel, *Schweizerisches Aktienrecht* (Stämpfli 1996) N. 205, 208). It should be noted that the interim balance sheet to be prepared on the basis of going concern is also a product of the principle of *going concern* (Reha Poroy, Ünal Tekinalp, Ersin Çamoğlu, *Ortaklıklar Hukuku II [Anonim Ortaklık (Malvarlığı, Katılma, Aydınlanma Hakları, Menkul Kıymetler, Esas Sözleşme Değişiklikleri, Finansal Raporlama, Yedek Akçeler, Sona Erme ve Tasfiye), Sermayesi Paylara Bölünmüş Komandit Ortaklık, Limited Ortaklık, Kooperatif Ortaklık, Ortaklıklar Topluluğu]* (Güncellenmiş, Yeniden Yazılmış 14. Bs, Vedat 2019) N. 1464, s. 283-284).

122 Pekcanıtez and Erdönmez (n 8) 14; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Kale, 'Konkordato' (n 16) 218.

Concordat application are listed separately in Article 286 of the Execution and Bankruptcy Law and their contents are explained respectively to a certain extent[123]. The legislator has deemed it appropriate for the Court to order a temporary respite period in case the documents listed in Article 286 of the Execution and Bankruptcy Law are duly submitted[124]. Submitting the documents listed in Article 286 of the Law annexed to the application petition, as regulated in the provision, is a prerequisite for the Court to examine the concordat application[125]. For this reason, it is essential to clearly specify the documents to be annexed to the concordat petition to be submitted to the court and their content[126].

With the enactment of Law No. 7101, major changes have been made in the documents that should be submitted when applying for concordat[127]. As a matter of fact, the documents to be annexed to the concordat application were insufficiently expressed in Article 285 of the former Law in a single paragraph under the subheading of "*Requirements for the Acceptance of the Concordat Application"*[128]. The regulation stipulated in the former Art. 285 of EBL has been completely amended, including its title[129] (Law No. 7101 Art. 14). The following regulation was introduced as per

123 Özekes, 'Geçici Mühlet Kararı' (n 62) 61; Namlı, 'Değişiklikler' (n 1) 1497; Namlı, 'Concordat' (n 25) 444.

124 Pekcanıtez and Erdönmez (n 8) 14; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Altay and Eskiocak (n 1) N. 59, p. 51.

125 Özekes, 'Geçici Mühlet Kararı' (n 62) 61; Namlı, 'Concordat' (n 25) 445. *"The documents to be added to the concordat request are limited and insufficiently regulated in the current Law. Considering the practice and experience of the postponement of bankruptcy institution and the importance of addressing this issue in a more strict manner, it is requested that the documents and statements that clearly show the fiscal and financial status of the requesting debtor company should be submitted to the court with the request for concordat. Within this framework, an ordinary (non-merchant) debtor shall submit documents showing the status of their assets; the debtors subject to bankruptcy, on the other hand, shall submit the documents and tables listed as clauses in the first paragraph. These are the minimum documents and tables that must be submitted to the court together with the concordat request. In this regard, the explanations in the justification of Article 1 of the Law Regarding the Amendment of Certain Laws Aiming the Improvement of the Investment Environment dated 15/72016 and numbered 6728 are partially valid here."* (Law No. 7101, Government Justification Art. 13).

126 Pekcanıtez and Erdönmez (n 8) 14; Özekes, 'Geçici Mühlet Kararı' (n 62) 61.

127 Sarısözen, *7101 sayılı Kanun* (n 2) 50.

128 Sarısözen, *Konkordato* (n 1) 119. For more information about the abolished EBL Art. 285, *see*: Üstündağ (n 1) 231; Muşul, *C. II* (n 1) 1675; Arslan, Yılmaz and Taşpınar Ayvaz, *İcra* (n 1) 629; Kuru, El Kitabı (n 1) 1448-1449; Yıldırım and Deren-Yıldırım (n 6) 520. In the old version of Art. 285 of Enforcement and Bankruptcy Law, it was regulated that any debtor who wants to apply for concordat must submit a petition to the execution court together with the concordat project and add the income statement in the petition. In the doctrine after the amendment of the Law No. 4949, it was suggested by ***Tanrıver*** that it would be beneficial for the following documents to be added when requesting concordat *"foundation certificate, status, executive board and general assembly meeting minutes, activity reports and audit body reports, as well as share ledger and shareholder list in trading partnerships"* (Süha Tanrıver, *Konkordato Komiseri* (Yetkin 1993) 35).

129 Sarısözen, *7101 sayılı Kanun* (n 2) 50; Sarısözen, *Konkordato* (n 1) 119. Hence, Art. 14 of Law No. 7101 is exactly as follows:
"*Documents to be attached to the concordat request:*
Article 286- The debtor adds the following documents to the concordat request.
a) A preliminary project of concordat showing that at what rate or maturity the debtor will pay the debts, to what extent the creditors will give up their receivables in this context, whether the debtor will sell the existing assets to make payments, and whether the debtor find the necessary financial resources to continue the activities and make the payments to the creditors through capital increase or loan provision or any other method.
b) Documents showing the status of the assets of the debtor; the last balance sheet, income statement, cash flow statement prepared in accordance with the Turkish Commercial Code, interim balance sheets prepared on the basis of the going concern principle and the probable sales prices of the assets, opening and closing ratifications of commercial books and e-book certificate information, other information and documents explaining the financial situation of the debtor, lists of tangible and intangible fixed assets and including their book values, lists and documents displaying all receivables and payables together with their due dates.

the provisions of Article 285 of the Execution and Bankruptcy Law, as amended by the legislator: *"Any debtor wishing to be eligible for the concordat (composition) provisions will submit to the execution court a reasoned petition and a concordat project. A detailed balance sheet, income statement and a schedule of accounting books (if the applicant is liable to keep books) will be annexed to the concordat project. This schedule will indicate whether all of the books required to be kept pursuant to article 66 of the Turkish Commercial Code are duly kept or not"*[130]. Following the amendment introduced by Article 14 of Law No. 7101, new EBL Art. 286 provisions outline the documents that should be annexed to the concordat application petition as follows under the sub-heading *"Documents to be annexed to the Concordat Application Petition"*[131]:

(a) Preliminary concordat project (EBL Art. 286 para 1(a)),

(b) documents certifying the assets and financial status of the debtor; i.e. income statement, cash flow statement, finalized balance sheets and interim balance sheets (EBL Art. 286 para 1(b)),

(c) The schedule confirming the list of creditors, receivable amounts and the list of the receivable's privileged status (EBL Art. 286 para 1(c)),

(d) A comparative schedule displaying the amount to be received by creditors in case of concordat and the bankruptcy of the debtor (EBL Art. 286 para 1(d)),

(e) Financial analysis reports prepared by independent audit firms (EBL Art. 286 para 1(e)).

Following the amendment introduced by Law No. 7101, the documents to be annexed to the Concordat application of the debtor are listed separately in a different (EBL Art. 286) article[132]. With the new regulation, a new amendment was introduced in terms of whether the person applying for concordat is the debtor or the creditor. Furthermore; in the event that the applicant to the concordat is the *debtor*, the

c) The list of the creditors, their receivables and the privilege status of the creditors.
d) The table showing the amount foreseen to be received by the creditors according to the proposal in the preliminary concordat project and the probable amount that can be received by the creditors in case of bankruptcy of the debtor.
e) Financial analysis reports prepared by the Capital Markets Board or an independent auditing firm authorized by The Public Oversight, Accounting and Auditing Standards Authority and included in the concordat preliminary project, showing the possibility of realization of the proposal and its basis. However, this requirement does not apply to small businesses within the scope of Article 28 of the Decree Law on the Organization and Duties of the Ministry of Science, Industry and Technology dated 3/6/2011 and numbered 635.
The date of the financial statements submitted pursuant to this article may be at most forty-five days before the application date.
The debtor must also submit other documents and records that may be requested by the court or commissioner during the concordat process."

130 For more information about, *see*: Üstündağ (n 1) 231; Muşul, *C. II* (n 1) 1675; Arslan, Yılmaz and Taşpınar Ayvaz, *İcra* (n 1) 629; Kuru, El Kitabı (n 1) 1448-1449; Yıldırım and Deren-Yıldırım (n 6) 520.

131 For more information about *see:* Pekcanıtez and Erdönmez (n 8) 14-21; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484-485; Sarısözen, *7101 sayılı Kanun* (n 2) 50-51; Özekes, 'Geçici Mühlet Kararı' (n 62) 62-65; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 648-649; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 1 ff.; Namlı, 'Concordat' (n 25) 445.

132 Sarısözen, *7101 sayılı Kanun* (n 2) 50.

documents to be annexed to the petition submitted to the court will differ depending on whether the debtor is a *"merchant"* or not and, if it is a merchant, whether it is a real person or a legal person[133]. In the event that the debtor or the creditor who will apply for concordat duly submit to the Court the documents stipulated in Article 286 of the Execution and Bankruptcy Law as amended by Law No. 7101, the Court will take a temporary respite decision without the parties having to assume any further burden of proof[134] (EBL Art. 287 para 1).

2. Explanation and Examination of the Documents to be annexed to the Concordat Application

The first document to be annexed to the concordat application petition of the debtor is the ***"preliminary concordat project"***[135]. In this context, the regulation stipulated in the provisions of Art. 286 para 1 (a) of Execution and Bankruptcy Law is as follows: *"a) The preliminary concordat project specifying at which rate or maturity the debtor will pay its debts, the rate of the remission of the creditors regarding their receivables, whether the debtor will sell its assets to make the payments due, whether the debtor will provide the necessary financial resources to continue its activities and make its payments to the creditors by means of capital increase, loan provision or another method"*. As is seen, the issues which should be included in the preliminary concordat project are stipulated in the provisions of Art. 286 para 1 (a) of the EBL; however, it is seen that the documents mentioned here are not limited in number *(numerus clauses)*[136]. For this reason, the documents specified as per EBL Art. 286 para 1 (a) are the compulsory documents that should be annexed to the preliminary concordat project; however the debtor will be able to submit additional documents[137]. In other words, Art. 286 para 1 (a) of the EBL regulates the "*least compulsory"* documents that should be annexed to the concordat application[138]. The preliminary concordat project is generally described as a project that regulates the implementation method of concordat procedures, the financial resources needed and the required method to liquidate the outstanding debt[139].

133 Pekcanıtez and Erdönmez (n 8) 14.

134 Özekes, 'Geçici Mühlet Kararı' (n 62) 61. Thus, it is clearly stated in the first paragraph of Article 287 of the Enforcement and Bankruptcy Law: *"Upon the request of concordat, the court decides upon a temporary respite after determining that the documents specified in Article 286 are presented in complete, and takes all measures deemed necessary to protect the assets of the debtor, including the situations in the second paragraph of Article 297."*

135 Kale, 'Konkordato' (n 16) 218; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Pekcanıtez and Erdönmez (n 8) 14; Altay and Eskiocak (n 1) N. 59, p. 51; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 285 (n 1) N 1 ff.; Namlı, 'Değişiklikler' (n 1) 1499.

136 Kale, 'Konkordato' (n 16) 218.

137 Kale, 'Konkordato' (n 16) 218. *"Clause (a) of the first paragraph of the article includes the issues that the concordat project (proposal) should contain at a minimum. This is a preliminary project that can be changed and clarified within the temporary and peremptory respite, and thus a concordat project different from the initial preliminary project can be submitted to the creditors meeting…"* (Government Justification of Art. 13 of Law No. 7101).

138 Sarısözen, *7101 sayılı Kanun* (n 2) 52.

139 Özekes, 'Geçici Mühlet Kararı' (n 62) 62.

It should be noted that the concept of preliminary concordat project was introduced into Turkish Law by Law No. 7101[140]. The preliminary concordat project should have a clear and understandable content as it reveals the debtor's recovery plan[141]. The debtors applying for concordat should express without hesitation in the preliminary project to be submitted to the court which of the "*deferred*", "*acquitted*" or *"combined"* concordat types[142] it prefers[143].

The preliminary project is a *"temporary"* project submitted by the debtor at the beginning of the process while applying for the concordat[144]. For this reason, the preliminary project may be amended either automatically or upon the request of one of the creditors within the temporary or peremptory (definitive) respite period[145]. In the latter stages of the concordat, the debtor will be able to express the improvement efforts and detail the improvement project[146]. Thus, the preliminary project initially presented to the court may end up with a completely different one at the end of the process[147].

Functionally, the preliminary concordat project is of great importance in terms of allowing the debtor to be granted a temporary respite period[148]. For this reason, ***we are of the opinion*** **that** the content of the preliminary concordat project should be prepared in accordance with the regulation stipulated in Art. 286 para 1 (a) of the Execution and Bankruptcy Law. ***Kale*** has concluded in the doctrine that the debtor should put forward in the preliminary project how the repayment rate offered will be met through the existing assets[149]. ***Özekes*** states that *"the conditions of the repayment offer"* and *"from which sources and how the repayment will be covered"* is very important in this regard[150]. In this context **Swiss law** stipulates that the preliminary project should, at first glance, cover *"the concordat expenses"* as well as "*the collaterals/guarantees to cover the receivables of the privileged creditors"*[151].

140 Pekcanıtez and Erdönmez (n 8) 14.

141 Kale, 'Konkordato' (n 16) 218.

142 Concordat is subjected to examination by categorizing into types according to (1) the time it is concluded, (2) the way it is concluded, (3) the content (or the purpose) (Yıldırım and Deren-Yıldırım (n 6) 518; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621). Types of concordat in accordance with its content are; "*deferred concordat*", "*acquitted concordat*", "*combined concordat*" and "*concordat through asset abandonment*" (Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 621-622; Muşul, *C. II* (n 1) 1674). Types of concordat is divided into two in accordance with the time of execution of bankruptcy proceedings (Yıldırım and Deren-Yıldırım (n 6) 519). Accordingly, the types of concordat in terms of the time of execution are "*non-bankruptcy concordat*" and "*concordat after bankruptcy*" (Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 622). The types of concordat in terms of the means of execution are examined by dividing into two as "*judicial (official) concordat*" and "*private (special) concordat*" (Muşul, *C. II* (n 1) 1673; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 622; Yıldırım and Deren-Yıldırım (n 6) 518; Kuru, El Kitabı (n 1) 1444). For our explanations about concordat types, also *see*: section II, B above.

143 Özekes, 'Geçici Mühlet Kararı' (n 62) 62; Kale, 'Konkordato' (n 16) 218.

144 Pekcanıtez and Erdönmez (n 8) 15; Sarısözen, *7101 sayılı Kanun* (n 2) 52.

145 Sarısözen, *7101 sayılı Kanun* (n 2) 52; Pekcanıtez and Erdönmez (n 8) 15.

146 Kale, 'Konkordato' (n 16) 218.

147 Sarısözen, *7101 sayılı Kanun* (n 2) 52.

148 Pekcanıtez and Erdönmez (n 8) 15.

149 Kale, 'Konkordato' (n 16) 219.

150 Özekes, 'Geçici Mühlet Kararı' (n 62) 62.

151 KUKO SchKG-Hunkeler, Art 293 (n 5) N 20.

In accordance with Law No. 7101; **"documents confirming the financial status"** of the debtor, in addition to the preliminary concordat project, should be submitted to the Court together with the concordat application petition[152]. Documents to be annexed to the concordat application petition and confirming the financial status of the debtor is explained in detail in the provisions of Article 286 para 1 (b) of EBL[153]. Accordingly, the documents stipulated by the legislator in Art. 286 para 1 (b) are as follows: *"b) In the event the debtor is obliged to keep accounting books; the recent balance sheet, income statement, cash flow statement prepared in accordance with the Turkish Commercial Code and the interim balance sheets prepared on the basis of the going concern principle and the probable sales prices of the assets, opening and closing ratifications of commercial books and e-book certificate information regarding the books kept electronically, other information and documents certifying the financial status of the debtor, lists displaying the values of tangible and intangible assets, lists and documents displaying all receivables and payables together with their due dates*"[154] [EBL Art. 286 para 1 (b)]. Documents enumerated in EBL Art. 286 para 1 (b) and obliged to be submitted to the Court during the concordat application can solely be requested by the related debtor[155]. As a novelty introduced by Law No. 7101 preparing a *"cash flow statement"* is not practically preferred in Turkey except for the companies listed on the stock exchange[156]. A debtor who is not a merchant and is not obliged to keep accounting books for this reason will not be asked to submit the opening and closing ratifications of commercial books[157]. In accordance with TCC Art. 376 para 3, interim balance sheets to be submitted to the Court by the debtor will be prepared both on the basis of going concern principle and over the probable sales prices of assets[158] (TCC Art. 376 para 3; OR Art. 725 para II). The interim balance sheet foreseen by the legislator as per EBL 286 para 1 (b) has the same features as stated in the Turkish Commercial Code No. 6102, which entered into force on 01.07.2012 as well as the article of bankruptcy postponement included by third paragraph of Article 376 and was further repealed[159].

152 Kale, 'Konkordato' (n 16) 219; Pekcanıtez and Erdönmez (n 8) 16; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Altay and Eskiocak (n 1) N. 59, p. 51; Namlı, 'Değişiklikler' (n 1) 1499.

153 Kale, 'Konkordato' (n 16) 219.

154 Özekes, 'Geçici Mühlet Kararı' (n 62) 63; Sarısözen, *7101 sayılı Kanun* (n 2) 51; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484.

155 Pekcanıtez and Erdönmez (n 8) 16.

156 *"As a change, cash flow statement is not included in the concordat. Although this statement is not often prepared in Turkish practice except for companies listed on the stock exchange, it is of great importance for the accurate identification of the fiscal and financial situation of the merchant…"* (Government Justification of Art. 13 of Law No. 7101).

157 Pekcanıtez and Erdönmez (n 8) 16.

158 Bilgili and Demirkapı (n 104) 285; Pulaşlı, *Şirketler Hukuku* (n 104) N. 269; Yıldırım and Deren-Yıldırım (n 6) 374-375; Schönenberger, *Art. 725a* (n 35) 11; Aydın (n 117) 109, 110; Kendigelen (n 117) 268; Manavgat (Kırca and Şehirali Çelik) (n 104) 586. *Compare*: BaK-Wüstiner, Art. 725 (n 108) N. 35 ff.; Handkomm-Meister, OR Art. 725 (n 117) N. 6; Forstmoser, Meier-Hayoz and Nobel (n 117) N. 205, 208. In terms of concordat, *see*: Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 645; Pekcanıtez and Erdönmez (n 8) 16; Özekes, 'Geçici Mühlet Kararı' (n 62) 63.

159 For the various explanations on the regulation stipulated for bankruptcy postponement in Art. 376 para 3 of TCC numbered 6102, *see*: Bilgili and Demirkapı (n 104) 285; Pulaşlı, *Şirketler Hukuku* (n 104) N. 269; Yıldırım and Deren-Yıldırım (n 6) 386-387; Schönenberger, *Art. 725a* (n 35) 11; Aydın (n 117) 109, 110; Kendigelen (n 117) 268. Compare: BaK-Wüstiner, Art. 725 (n 108) N. 35 ff.; Handkomm-Meister, OR Art. 725 (n 117) N. 6; Forstmoser, Meier-Hayoz and Nobel (n 117) N. 205, 208.

Documents enumerated in EBL Art. 286 para 1 (b) should be annexed to the petition to be submitted to the court during the concordat application[160]. The legislator obliges the applicant to submit the documents specified in EBL 286 para 1 (b) annexed to the concordat petition, however the documents listed in this article are not limited in number[161]. In this regard, the debtor will be able to annex other documents confirming its financial status to the concordat petition[162]. It should be noted that the financial documents and tables to be submitted to the court by the debtor should be prepared no more than *"forty five"* days ago[163] (EBL Art. 286 para 2).

Another document to be annexed to the concordat petition by the debtor in accordance with in EBL Art. 286 para 1 (c) ***"the schedule displaying the creditors, their amount of receivables and the privilege status of the creditors"***[164]. Documents displaying the creditors and their receivables as foreseen in EBL Art. 286 para 1 (c) is the result of concordat being a complete legal proceeding[165]. In accordance with the regulation stipulated in the Turkish Enforcement and Bankruptcy Law, the schedule specified in EBL Art. 286 para 1 (c) should clearly reveal the creditors as well as the privileged ones among the creditors[166]. It should be noted that the content of the schedule submitted by the debtor to the court may be amended during the concordat procedures[167]. In the doctrine, ***Pekcanıtez/Erdönmez*** states that the share table prepared at the end of the bankruptcy liquidation as per EBL Art. 247[168] and tables foreseen in EBL Art. 286 para 1 (c) are similar[169]. As per Art. 286 para 1 (c) of the Execution and Bankruptcy Law, the schedule to be submitted by the debtor to the commercial court of first instance while applying for concordat will indicate who the creditors are, the order of their receivables and how much will be paid to each creditor[170].

Another important document foreseen in EBL Art. 286 para 1 (d) and should be annexed to concordat petition is, ***"comparative table presenting the amount foreseen to be received by creditors in accordance with the recovery plan proposed in the preliminary concordat project and the possible amount that can be received by***

160 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Özekes, 'Geçici Mühlet Kararı' (n 62) 63; Pekcanıtez and Erdönmez (n 8) 16.

161 Özekes, 'Geçici Mühlet Kararı' (n 62) 63.

162 Özekes, 'Geçici Mühlet Kararı' (n 62) 63.

163 Kale, 'Konkordato' (n 16) 219; Sarısözen, *7101 sayılı Kanun* (n 2) 54.

164 Sarısözen, *7101 sayılı Kanun* (n 2) 51; Kale, 'Konkordato' (n 16) 219; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Pekcanıtez and Erdönmez (n 8) 16; Altay and Eskiocak (n 1) N. 59, p. 52; Namlı, 'Değişiklikler' (n 1) 1500.

165 Özekes, 'Geçici Mühlet Kararı' (n 62) 63-64.

166 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Pekcanıtez and Erdönmez (n 8) 17.

167 Pekcanıtez and Erdönmez (n 8) 17.

168 As a matter of fact, in Art. 247 of Enforcement and Bankruptcy Law, there is a statement under the heading of "*Share table and final account*" as follows: *"When the price of the goods sold is collected and the order table of the creditors is solidified, the bankruptcy administration issues the share table and calculates the money in the final account".*

169 Pekcanıtez and Erdönmez (n 8) 17.

170 Pekcanıtez and Erdönmez (n 8) 17.

the creditors in case of bankruptcy of the debtors"[171]. As is understood; the table stipulated in the provisions of EBL Art. 286 para 1 (d) shall only apply to debtors who are subject to bankruptcy and apply for concordat[172]. On the other hand, concordat can also be requested by debtors who are not subject to bankruptcy[173]. Accordingly, it will not be possible to ask a debtor who is not subject to bankruptcy to prepare the schedule stipulated in EBL Art. 286 para 1 (c)[174].

With the schedule foreseen in EBL Art. 286 para 1 (d) and certifying the success of the concordat plan, it is aimed to demonstrate that a concordat plan will be more beneficial for creditors than claiming bankruptcy[175]. In this context, it is important to ensure the creditors to understand that they may in fact collect a higher amount of their receivables at the beginning of the concordat process rather than they claim the bankruptcy of the debtor[176].

Another important document foreseen in the regulations of EBL Art. 286 para 1 (e) and should be annexed to concordat petition is, ***"financial analysis reports to be prepared by independent audit institutions"***[177]. The purpose of the aforementioned regulation is to prevent the debtor from requesting concordat as a result of subjective evaluations[178]. For this reason, financial analysis reports prepared by independent audit companies are very important[179]. However; it would not be appropriate for the debtor to ex-officio request this report stipulated in EBL Art. 286 para 1 (e) and to cover the expenses therein[180]. In the *doctrine*, ***Atalı/Ermenek/Erdoğan*** states that it would be appropriate if the Court requests the audit company to prepare a financial analysis report on behalf of the debtor in order to ensure objectivity in terms of Turkish law[181].

171 Kale, 'Konkordato' (n 16) 219; Özekes, 'Geçici Mühlet Kararı' (n 62) 64; Altay and Eskiocak (n 1) N. 59, p. 52; Namlı, 'Değişiklikler' (n 1) 1500.

172 Özekes, 'Geçici Mühlet Kararı' (n 62) 64.

173 Yıldırım and Deren-Yıldırım (n 6) 520. In this context, it is possible for all real or legal persons - *joint stock companies, limited companies, unlimited companies, limited partnerships, associations and foundations* - to apply for non-bankruptcy (ordinary) concordat, regardless of whether the applicant is subject to bankruptcy or not (Yıldırım and Deren-Yıldırım (n 6) 520). The same rule applies in Swiss Law, however, it is foreseen in the doctrine that the "*estate*" can take the advantage of concordat in the liquidation of the inheritance and the "*the board of property owners*" can take the advantage of concordat in the property ownership (KUKO SchKG-Hunkeler, Art 293 (n 5) N 10-11). On the other hand, it is stipulated that the ordinary partnership without legal personality cannot benefit from concordat, considering that it would not be subject to execution proceedings (KUKO SchKG-Hunkeler, Art 293 (n 5) N 10-11).

174 Özekes, 'Geçici Mühlet Kararı' (n 62) 64.

175 Kale, 'Konkordato' (n 16) 219.

176 Kale, 'Konkordato' (n 16) 219.

177 Özekes, 'Geçici Mühlet Kararı' (n 62) 65; Kale, 'Konkordato' (n 16) 219; Pekcanıtez and Erdönmez (n 8) 18; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Altay and Eskiocak (n 1) N. 59, p. 52; Namlı, 'Değişiklikler' (n 1) 1501. "*The article also requires the financial analysis reports prepared by the Capital Markets Board or the independent audit firm authorized by the Public Oversight, Accounting and Auditing Standards Authority and showing that the proposal included in the preliminary concordat project is highly likely to be submitted to the court together with the concordat request, thus preventing the unlikely concordat requests. However, small enterprises are excluded from the requirement to submit a financial analysis report."* (Government Justification of Art. 13 of Law No. 7101).

178 Pekcanıtez and Erdönmez (n 8) 19.

179 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 649.

180 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 649.

181 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 649.

It should be noted that, small business enterprises are not obliged to submit to the Court the financial analysis reports prepared by independent audit institutions authorized by *the Capital Markets Board or The Public Oversight*, Accounting and Auditing Standards Authority and certifying that the recovery proposal included in the preliminary concordat project is highly likely to succeed along with the concordat petition[182]. In other words, medium scale and big enterprises are required to submit the documents to be annexed in accordance with EBL Art. 286 para 1 (e)[183].

As we have stated above, there are five basic documents that should be annexed to the concordat application petition; however pursuant to EBL Art. 286 para 3, the debtor shall be liable to present additional documents and records that may be requested by the Court or concordat commissioner (trustee) throughout the concordat process[184].

In the event that the applicant of the concordat is the creditor other than the debtor, the debtor will be granted an appropriate period to submit the documents stipulated as per EBL Art. 286 para 1 (a-e)[185] (EBL Art. 287 para 2 sentence 1). In such a case, the expenses required for preparing the documents foreseen for the concordat application will be borne by the creditor[186] (EBL Art. 287 para 2 sentence 2).

One should refer to the *"Regulation Governing the Documents to be Annexed to the Concordat Application"*[187] published in the Official Gazette dated January 30, 2019 within the context of the documents to be annexed to the concordat petition[188]. As a matter of fact, the documents to be annexed to the concordat petition should be prepared by taking into account the provisions of this regulation published by the Ministry of Justice[189].

C. Assessment of the Concordat Application

After the debtor or the creditor applies for the concordat together with the documents foreseen in EBL Art. 286 para 1 (a-e), the commercial court of first instance will assess whether it is possible to accept the request and give a temporary respite[190].

182 Özekes, 'Geçici Mühlet Kararı' (n 62) 65.

183 Kale, 'Konkordato' (n 16) 220; Pekcanıtez and Erdönmez (n 8) 19.

184 Özekes, 'Geçici Mühlet Kararı' (n 62) 66.

185 Kale, 'Konkordato' (n 16) 220; Özekes, 'Geçici Mühlet Kararı' (n 62) 66; Namlı, 'Değişiklikler' (n 1) 1501; Namlı, 'Concordat' (n 25) 445. As a matter of fact, it is stated in the first clause of second paragraph of Article 287 of the Enforcement and Bankruptcy Law that: *"A temporary respite is decided upon the request by one of the creditors to initiate concordat proceedings, and if the debtor submits the documents and records specified in Article 286 within a reasonable time and in full by the court"*.

186 Özekes, 'Geçici Mühlet Kararı' (n 62) 66. Hence, in the second clause of the second paragraph of Article 287 of the Enforcement and Bankruptcy Law, it is clearly stated that *"In this case, the necessary expenses for the preparation of the documents and records are covered by the creditor."*

187 Official Gazette 30.01.2019, Number 30671.

188 Sarısözen, *Konkordato* (n 1) 90; Altay and Eskiocak (n 1) N. 59, p. 52. For the text of the regulation, *see* also: https://app.e-uyar.com/makale/index/781b7b5b-f030-46ea-9efa-0c21d205ef3b

189 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 484; Sarısözen, *Konkordato* (n 1) 90.

190 Pekcanıtez and Erdönmez (n 8) 21; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485.

Does the commercial court of first instance receiving the concordat application evaluate the request with or without a hearing? According to the *doctrine*, Swiss law states that the court, as a rule, should decide on the temporary respite without holding a hearing[191]. However, in some exceptional cases, it is possible to receive the brief opinions of the relevant parties in a short hearing[192]. According to the *doctrine*, ***Özekes*** emphasizes that Turkish law allows the court to decide on the temporary respite without holding a hearing[193]. ***In our opinion***, Turkish law should allow the Court to decide on the temporary respite without a hearing in order to save time.

Whether the commercial court of first instance can immediately give a temporary respite decision if as a result of the assessment on the concordat application it is understood that the submitted documents are whole and complete, is an issue that can be discussed in the doctrine[194]. Turkish law reveals that the Court shall not focus on the content but shall examine whether the documents stipulated as per EBL Art. 286 para 1 (a-e) are duly submitted in full[195]. Before the adoption of Law No. 7101, there was no distinction in Turkish law between temporary and a peremptory (definitive) respite[196]. Accordingly, the provisions of EBL Art. 287 para 2, and 6, as amended by the former Law No. 4949 stipulated that the enforcement court, which received the concordat application of the debtor would be able to decide on a three-month temporary respite and, if necessary, would be able to extend this period for two more months[197]. Following the amendments introduced to Turkish Law by Law No. 7101, the examination liability of the Court is limited to the documents stipulated in EBL Art. 286 provisions[198] (EBL Art. 287 para 2 sentence 1). Thus, there is currently no

191 SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293a (n 5) N 7.

192 SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293a (n 5) N. 7.

193 Özekes, 'Geçici Mühlet Kararı' (n 62) 71.

194 It should be noted that in Swiss Law, under the provision of Art. 293a para 1 of SchKG, it was accepted that the court would *"immediately give a temporary respite decision"*. In contrast, it is stated in the provision of Art. 293a para 3 of SchKG that *"In cases where there is no obvious hope of improvement or the possibility of approving the concordat, the concordat court decides to open the bankruptcy ex officio"*. As can be seen, as a result of evaluating the provisions of Art. 293a para 1 to Art. 293a para 3 of Swiss SchKG together, it can be concluded that the court in Switzerland receiving the concordat request does not immediately give a temporary respite decision if the hope of improvement is not clearly understood and can make an investigation in order to decide on a temporary respite (KUKO SchKG-Hunkeler, Art 293a (n 5) N. 3, 4).

195 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485.

196 Pekcanıtez and Erdönmez (n 8) 21. As a matter of fact, before the amendment of Law No. 7101, the issue of giving a concordat respite was regulated within the scope of the previous concordat provisions (See: Muşul, *C. II* (n 1) 1681). In the previous provision of Art. 286 of EBL regulating this issue, it was mentioned that a period of concordat was given without making a distinction between a peremptory and temporary period in terms of concordat. Moreover, two conditions were sought together in order to give a concordat deadline. The two conditions stated by the legislator in the regulation of Article 286 of the Enforcement and Bankruptcy Law No. 7101 were "*the possibility of success of concordat*" and "*the concordat project being free from the intention of damaging the creditors of the debtor*". Before the amendment of the Law No. 7101, for the explanations about the concordat period stipulated in the Art. 286 of Enforcement and Bankruptcy Law, *see* also: Yıldırım and Deren-Yıldırım (n 6) 523 et seq.

197 Yıldırım and Deren-Yıldırım (n 6) 525; Kuru, El Kitabı (n 1) 1454; Arslan, Yılmaz and Taşpınar Ayvaz, *İcra* (n 1) 631; Muşul, *C. II* (n 1) 1682; Üstündağ (n 1) 232. As a matter of fact, with the amendment of Law No. 4949 (Art. 69), as a result of the amendment made in Article 287 of the Enforcement and Bankruptcy Law, the limit of the period to be given to the debtor was increased from two months to three months. Thus, the upper limit of the concordat respite was increased to 5 months in total with an extension (Tanrıver, 'Adi Konkordato' (n 49) 73).

198 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 485-486.

hesitation that the court may decide on a temporary respite if the conditions required by the Law exist[199].

In accordance with the Civil Procedure Law, deciding on the temporary respite within the context of concordat proceedings is subject to the non-contentious jurisdiction[200] [Code of Civil Procedure (=CCP) Art. 382 para 2, 6)]. Since it is an issue that should be evaluated within the scope of non-contentious judiciary, simple trial procedure (CCP Art. 316-322) shall apply[201] [CCP Art. 385 para 1; CCP Art. 316 para 1 (e)].

What happens in case of missing documents are identified while evaluating the concordat request? The problem of the possible consequences when missing documents are identified while evaluating the concordat application is not regulated in the Execution and Bankruptcy Law of Turkish Law[202]. ***Kale***[203] and ***Özekes***[204] stipulates that a short period of time can be granted to the debtor in such a case to complete the missing documents[205]. In the event that the party applying for concordat is the creditor; if the debtor fails to duly submit the relevant documents, the concordat application will be rejected[206]. As a matter of fact, *the decisions of the Supreme Court* also confirms that in case the documents foreseen in accordance with the provisions of EBL Art. 286 are missing, the court should grant a certain time to complete the missing documents[207].

199 In the *doctrine* of Turkish law, *Atalı* states that the debtor adds documents to his/her request while applying for temporary respite; that the court examines these attached documents formally and decide whether to give a temporary respite or to deny the request (Murat Atalı, 'Konkordatoda Kesin Mühlet ve Sonuçları' in Muhammet Özekes (eds), *7101 sayılı Kanunla Konkordato ve Elektronik Tebligat Konularında Getirilen Yenilikler* (On İki Levha 2018) 87).

200 Uyar, *Yeni Konkordato* (n 1) 41; Pekcanıtez and Erdönmez (n 8) 22; Özekes, 'Geçici Mühlet Kararı' (n 62) 68.

201 For how to apply simple trial procedure in terms of non-contentious jurisdiction, *see*: Baki Kuru and Burak Aydın, *İstinaf Sistemine Göre Yazılmış Medeni Usul Hukuku Ders Kitabı* (7251 sayılı Kanun Değişiklikleri İşlenmiş 4. Bs, Yetkin 2020) 687; Ramazan Arslan, Ejder Yılmaz, Sema Taşpınar Ayvaz and Emel Hanağası, *Medenî Usul Hukuku* (Güncellenmiş ve 7251 sayılı Kanun Değişiklikleri İşlenmiş 6. Bs, Yetkin 2020) 751; Şanal L Görgün, Levent Börü, Barış Toraman and Mehmet Kodakoğlu, *Medenî Usûl Hukuku* **(**28.7.2020 tarih ve 7251 sayılı Kanunla Değiştirilmiş, Güncellenmiş, 9. Bs., Yetkin 2020) 70; Ali Cem Budak and Varol Karaaslan, *Medenî Usul Hukuku* (Genişletilmiş ve Gözden Geçirilmiş 4. Bs., Adalet 2020) N. 30, p. 358; Murat Atalı, *Pekcanıtez Usul Medeni Usul Hukuku, C. III* (15. Bs., On İki Levha 2017) 2136; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *Medenî Usul Hukuku Ders Kitabı* (3. Bs., Yetkin 2020) 594. Hence, this issue is regulated in the Art. 385 of Civil Procedure Law No. 6100 as *"In non-contentious judicial matters, the simple trial procedure is applied to the extent appropriate to the nature."* Furthermore, it is clearly stated in the (e) clause of Art. 316 para 1 of CCP that the simple trial procedure is applied in terms of *"the cases to be filed regarding concordat, restructuring of capital companies or cooperatives through reconciliation"*. For explanations about this regulation, *see:* Kuru and Aydın (n 197) 635; Arslan, Yılmaz, Taşpınar Ayvaz and Hanağası, *Usul* (n 197) 746; Abdurrahim Karslı, *Medeni Muhakeme Hukuku* (Yenilenmiş ve Gözden Geçirilmiş 5. Bs., Alternatif 2020) 710.

202 Özekes, 'Geçici Mühlet Kararı' (n 62) 66.

203 Kale, 'Konkordato' (n 16) 220.

204 Özekes, 'Geçici Mühlet Kararı' (n 62) 67.

205 Kale, 'Konkordato' (n 16) 220; Özekes, 'Geçici Mühlet Kararı' (n 62) 67.

206 Özekes, 'Geçici Mühlet Kararı' (n 62) 67.

207 *"... It is understood that the documents submitted by the plaintiffs were not whole and complete. Since the submission of the documents listed in Article 286 of the EBL is considered as a case condition, the process was supposed to be carried out by giving additional time to the plaintiffs pursuant to the Article 115/2 of CCP, instead, a written decision was inappropriately made on the grounds that the concordat project is abstract and not based on concrete data. As a result, in the light of the explanations above; it was decided to the partial acceptance of the appeal requests of the plaintiffs and the attorney of the plaintiff company and the annulment of the first instance court decision..."* (Istanbul Regional Court of Justice 17 CD, 13.12.2918, M. 2018/2680, D. 2018/2187. For the decision *see:* Muşul, *İflas ve Konkordato* (n 1) 413, fn. 385).

According to Turkish Law, in case the documents enlisted in Art. 286 para 1 (a-e) of the Execution and Bankruptcy Law are duly and fully submitted to the court, the court shall *"immediately"* give a temporary respite[208].

V. Temporary Respite (Relief)

A. General Rules for Temporary Respite (Relief)

Article 287 of the Execution and Bankruptcy Law has been amended with the amendments introduced by Law No. 7101 and the concept of *"temporary respite"* has been included in our Execution and Bankruptcy Law[209]. The temporary respite decision introduced to the Turkish Law within the framework of the amendments to the Law No. 7101 has been regulated in Article 287 para 1 of the Execution and Bankruptcy Law as follows:

> *"The court, receiving the petition for the application for concordat proceedings, shall immediately decide on a temporary respite in case it determines that the documents specified in article 286 have been submitted in full and thereupon shall take all the measures it deems necessary for the protection and safeguarding of the debtor's assets, including the cases stipulated in the second paragraph of article 297."*

With the temporary respite decision, it is aimed to provide legal protection to the debtor suffering payment difficulties for a temporary period[210]. In this regard, the court receiving the petition for the application for concordat proceedings, shall immediately decide on a temporary respite in case it determines that the documents specified in EBL Article 286 have been submitted in full and thereupon shall take all the measures it deems necessary for the protection and safeguarding of the debtor's assets[211] (EBL Art. 287 para 1). The temporary respite decision is important as it will serve not only to protect the interests of the creditor but also to protect the debtor's assets[212].

The temporary respite decision -*as we have stated above*- is discussed within the framework of *"non-contentious jurisdiction"* due to its legal nature[213]. Although

208 Pekcanıtez and Erdönmez (n 8) 23; Sarısözen, *Konkordato* (n 1) 167; Muşul, *İflas ve Konkordato* (n 1) 423; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 287 (n 1) N 4; Namlı, 'Değişiklikler' (n 1) 1504; Namlı, 'Concordat' (n 25) 446.

209 Sarısözen, *7101 sayılı Kanun* (n 2) 54; Sarısözen, *Konkordato* (n 1) 156; Altay and Eskiocak (n 1) N. 57, p. 50. In Swiss law, the temporary respite decision was implemented with the Art. 293a-293d of SchKG as a result of the Swiss Enforcement and Bankruptcy Law amendment. (https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/11/529_488_529/20190101/de/pdf-a/fedlex-data-admin-ch-eli-cc-11-529_488_529-20190101-de-pdf-a.pdf) (Last Online Access: 01.02.2020); KUKO SchKG-Hunkeler, Art 293a-293d (n 5) 1317-1375; SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293a-293d (n 5) 1650-1671. Compare with the previous version of the regulation stipulated in Swiss Law: BSK-SchKG II-Vollmar (n 5) Art. 293, p. 2555-2568; Jaeger, Walder, Kull and Kottmann, Art. 293 (n 5) 1-20.

210 Sarısözen, *7101 sayılı Kanun* (n 2) 54.

211 Kale, 'Konkordato' (n 16) 220; Sarısözen, *Konkordato* (n 1) 167; Altay and Eskiocak (n 1) N. 49, p. 44.

212 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651.

213 Özekes, 'Geçici Mühlet Kararı' (n 62) 68; Kale, 'Konkordato' (n 16) 223; Sarısözen, *Konkordato* (n 1) 158.

the temporary respite is generally the subject of non-contentious jurisdiction, it can also be referred to as a *"temporary legal protection"*[214]. For this reason *"ex-officio examination principle"* shall apply when deciding on temporary respite, which is the subject of non-contentious jurisdiction[215].

Within the framework of the amendments to the Law No. 7101, the legislator has regulated to appoint a temporary concordat commissioner (trustee) together with the temporary relief decision[216]. The concordat commissioner (trustee) committee may consist of one or three persons, taking into account the scope of the concordat request[217]. As is seen, although the regulation includes a statement stipulating that only one temporary concordat commissioner (trustee) will be appointed, it is possible to assign up to three people in accordance with the amount of the receivables due[218]. The concordat commissioner (trustee) appointed together with the temporary respite decision may prepare a preliminary report on whether the preliminary project has a chance to succeed[219].

B. Additional Measures to be taken Together with the Temporary Respite Decision

The court may take additional measures it deems necessary together with the temporary respite decision[220] (EBL Art. 287 para 1). As per EBL Art. 288 para 1, "*The temporary respite will have the consequences of the peremptory (definitive) respite*"[221]. For this reason, enforcement proceedings will not be initiated against the debtor following the temporary respite and the pending proceedings will also be suspended[222] (EBL Art. 294 para 1).

214 Özekes, 'Geçici Mühlet Kararı' (n 62) 69; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651.

215 Kale, 'Konkordato' (n 16) 223; Sarısözen, *Konkordato* (n 1) 158. For the validity of the ex-officio investigation principle in terms of non-contentious judicial matters, *see:* Arslan, Yılmaz, Taşpınar Ayvaz and Hanağası, *Usul* (n 197) 751; Görgün, Börü, Toraman and Kodakoğlu (n 197) 70; Budak, Karaaslan (n 197) N 37, p. 359. As a matter of fact, it is explicitly stated in the Art. 385 para 2 of the Civil Procedure Law No. 6100 that *"The principle of ex-officio investigation is valid in non-contentious judicial matters, unless there is a contrary provision."*

216 Sarısözen, *7101 sayılı Kanun* (n 2) 56.

217 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651; Sarısözen, *7101 sayılı Kanun* (n 2) 57.

218 Sarısözen, *7101 sayılı Kanun* (n 2) 57.

219 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486. In the event that the concordat agreement is not likely to be successful, the temporary respite decision will not be issued (Dominik Vock and Danièle Meister-Müller, *SchKG-Klagen nach der Schweizerischen ZPO* (2., überarbeitete Auflage, Schulthess 2018) 379).

220 Kale, 'Konkordato' (n 16) 223; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652; Altay and Eskiocak (n 1) N. 114, p. 148.

221 Tunç Yücel, § 1, s. 6; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 288 (n 1) N 1; Altay and Eskiocak (n 1) N. 115, p. 149; Uyar, *Yeni Konkordato* (n 1) 42. Also, *see*: EBL Art. 288 para 1.

222 Kale, 'Konkordato' (n 16) 222; Özekes, 'Geçici Mühlet Kararı' (n 62) 79. As a matter of fact, the first paragraph of Article 294 of the Enforcement and Bankruptcy Law contains a regulation exactly as follows: *"No follow-up can be carried out against the debtor within the respite period, including the follow-ups made in accordance with the Law No. 6183 dated 21/7/1953 on the Procedure for the Collection of Public Creditors, and previously initiated proceedings are suspended, provisional injunction and attachment decisions are not implemented, a statute of limitations and the periods that cause the foreclosure of rights that can be interrupted by a follow-up procedure are not valid."*

The court will determine the scope and nature of the measures that can be taken during the temporary respite[223]. In this direction, the deptor's power of disposition may be restricted by the Court in accordance with the temporary respite decision and the deptor may be urged to perform transactions above a certain amount upon the approval of the temporary concordat commissioner (trustee)[224]. On the other hand, the temporary respite will not prevent the privileged creditors listed in the first rank in article 206 of the Execution and Bankruptcy Law hereof[225] to carry out legal proceedings for the realization of pledge[226].

The creditors meeting cannot be held within the temporary respite[227]. Because as per EBL Art. 289 para 4, the creditors meeting will be held earliest upon peremptory (definitive) respite[228]. It is possible to expand or amend the measures taken by the Court to protect the assets during the temporary respite[229].

C. Announcement of Temporary Respite Decision, Notification to Related Institutions and Objection

When the authorized and commissioned commercial court of first instance gives a temporary respite, the decree will be announced in the trade registry gazette as well as on the official portal of "*Press Advertising Institution*"[230] (EBL Art. 288 para 2). With this announcement, the legislator enables the creditors to be aware of the concordat application[231]. In addition, it is stipulated in the law that the temporary respite will be notified to the relevant institutions and organizations[232]. As can be seen, it is not sufficient to solely announce the decisions regarding concordat; it is further foreseen

223 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652.

224 Kale, 'Konkordato' (n 16) 222.

225 The privileged creditors, which are stipulated in Article 206 of the Enforcement and Bankruptcy Law, are as follows: *"A) Receivables of the workers, including notice and severance payments based on the business relationship and accrued within one year prior to the opening of bankruptcy, and the notice and severance payments that they deserve due to the termination of the business relationship due to bankruptcy, B) Debts of the employers to the facilities or associations that have occurred for the purpose of establishing or maintaining aid funds or other aid organizations for workers, C) All kinds of alimony arising from the family law, which must be paid in cash, and accrued within the last year before the opening of the bankruptcy."*

226 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652.

227 Kale, 'Konkordato' (n 16) 223.

228 Kale, 'Konkordato' (n 16) 223.

229 Özekes, 'Geçici Mühlet Kararı' (n 62) 79.

230 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 288 (n 1) N 3; Özekes, 'Geçici Mühlet Kararı' (n 62) 75; Sarısözen, *7101 sayılı Kanun* (n 2) 58; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Pekcanıtez and Erdönmez (n 8) 29; Kale, 'Konkordato' (n 16) 223-224. As a matter of fact, it is stated in the first clause of the second paragraph of Art. 288 of the Enforcement and Bankruptcy Law that: *"The temporary respite decision by the court is announced in the trade registry gazette and the official announcement portal of the Press Advertisement Agency and it is immediately announced to the postal administrations, the Banks Association of Turkey, the Participation Banks Association of Turkey, local chambers of commerce, chambers of industry, movable exchanges, Capital Markets Board and the other related places."*

231 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Pekcanıtez and Erdönmez (n 8) 29; Kale, 'Konkordato' (n 16) 223.

232 Sarısözen, *7101 sayılı Kanun* (n 2) 58; Pekcanıtez and Erdönmez (n 8) 29; Kale, 'Konkordato' (n 16) 223.

to notify these decisions to significant institutions and organizations within the business life[233]. For this reason, the temporary respite decision will further have to be notified to relevant institutions such as "*The Registry of Commerce*", "*Land Registry Offices*", "*Customs and Postal Administrations*", "*The Banks Association of Turkey*", "*Chambers of Commerce and Industry*" immediately after it has been announced as per EBL Art. 288 para 2[234].

The legislator did not only regulate the announcement and notification of the temporary respite decision regarding the concordat; in addition, it has foreseen that the decisions regarding abolishing the temporary respite decision and refusal of concordat and extending the temporary respite period will be duly announced[235] (EBL Art. 288 para 3). However, the law did not require to announce the stages before the temporary respite is decided[236]. To sum up; announcement and notification are obligatory in case temporary respite decision is taken, extension of the temporary respite for two months and rejection of the request for temporary respite while the announcement is not required if a request is submitted for the temporary respite[237].

The legislator has stipulated that the creditors may place an objection within a period of seven days following the announcement, claiming that there is no grounds for applying to concordat together with their reasons and that they may request the rejection of the concordat application[238] (EBL Art. 288 para 2 sentence 2). With the right of objection introduced as per EBL Art. 288 para 2 sentence 2 the preconceived practice of bankruptcy, concordat and postponement of bankruptcy in Turkish law has been maintained[239]. In the event that the creditor(s) fail to place an objection within the seven-day objection period stipulated by the law, the subsequent objections will not be accepted[240]. In addition, the examination to be carried out upon the objection of the creditors should be performed and resolved within the temporary respite period[241].

233 Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 288 (n 1) N 5; Kale, 'Konkordato' (n 16) 223.

234 Kale, 'Konkordato' (n 16) 223; Uyar, *Yeni Konkordato* (n 1) 47.

235 Özekes, 'Geçici Mühlet Kararı' (n 62) 75. As a matter of fact, according to the third paragraph of Article 288 of the Enforcement and Bankruptcy Law, *"The decisions regarding the extension of the temporary respite and the rejection of the concordat request are also announced in accordance with the second paragraph and the relevant authorities are notified"*.

236 Kale, 'Konkordato' (n 16) 222.

237 Kale, 'Konkordato' (n 16) 223.

238 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Özekes, 'Geçici Mühlet Kararı' (n 62) 75; Kale, 'Konkordato' (n 16) 223; Sarısözen, *7101 sayılı Kanun* (n 2) 58.

239 Sarısözen, *7101 sayılı Kanun* (n 2) 58. A decision of the Supreme Court about the possibility of objecting a decision from the past to the present is as follows: *"... According to the provision of Article 288 of the EBL, every creditor can object to the respite decision to be given upon the request for concordat within 7 days from the date of the announcement. The creditors may request the removal of the respite, claiming that the conditions required for the acceptance of the concordat request do not exist. In this respect, if an objection is made to the inspection authority, the creditor and the debtor must be heard by the court by a simple trial procedure, and a negative decision about the objection must be made after hearing the both the creditor and the debtor and making other investigations deemed necessary ..."* (Supreme Court 12th Civil Department, Main 1988/4765, Decision 1988/6165. For the decision *see:* https://lib.kazanci.com.tr/kho3/ibb/anaindex.html, Last Online Access: 4.3.2021).

240 Özekes, 'Geçici Mühlet Kararı' (n 62) 75.

241 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487.

D. Is It Possible to Appeal to the Court Against any Temporary Respite Decision?

In accordance with the provisions of concordat stipulated by Law No. 7101, it should be explicitly determined whether it is possible to appeal to the court against any temporary respite decision. It should be noted right away that the way to appeal to the court against any temporary respite decision to be ruled by the court is prohibited[242]. As a matter of fact, this issue is clearly regulated in the 6th paragraph of Article 287 of the Execution and Bankruptcy Law[243]. The legislator stipulates in EBL Art. 287 para 6 that the opportunity to appeal to the court is not allowed against the acceptance of the temporary respite request, the appointment of a temporary commissioner (trustee), the extension of the temporary respite and the decision to impose cautionary measures[244]. The purpose to prevent the creditors to appeal to the court against any temporary respite is to restraint the debtor's efforts to improve its financial situation from being interrupted as a result of the creditor's objection[245].

The provisions of EBL Art. 287 para 6 only restraints the opportunity to appeal to the court against the acceptance of the temporary respite request, the appointment of a temporary commissioner (trustee), the extension of the temporary respite and the decision to impose cautionary measures and has not governed whether it is possible for the creditor to appeal against the rejection of any temporary respite request[246]. **The predominant view that we also agree with in the doctrine is that**, legal action may be taken against the decisions regarding the rejection of any temporary respite request as the law does not explicitly regulate otherwise[247]. This is based on the rule that an appeal can be lodged against the court's finalized decisions, unless explicitly prohibited[248]. Accordingly, the debtor whose temporary respite request has been rejected will be able to apply to the Court of Appeals within seven days[249]. On the other hand, the decisions of the Court of Appeals cannot be further appealed[250] (EBL Art. 293 para 2).

242 Pekcanıtez and Erdönmez (n 8) 29; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651; Sarısözen, *Konkordato* (n 1) 192; Altay and Eskiocak (n 1) N. 113, p. 148.

243 In the sixth paragraph of Article 287 of the Enforcement and Bankruptcy Law, it is clearly stated that, *"It is not possible to apply for legal action against the acceptance of the request for temporary respite, appointment of a temporary commissioner, extension of the temporary respite and the decision regarding the measures".*

244 Kale, 'Konkordato' (n 16) 223; Özekes, 'Geçici Mühlet Kararı' (n 62) 75; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651.

245 Pekcanıtez and Erdönmez (n 8) 29.

246 Kale, 'Konkordato' (n 16) 223; Özekes, 'Geçici Mühlet Kararı' (n 62) 74; Sarısözen, *Konkordato* (n 1) 192; Altay and Eskiocak (n 1) N. 113, p. 148.

247 Kale, 'Konkordato' (n 16) 223; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651; Pekcanıtez and Erdönmez (n 8) 29; Özekes, 'Geçici Mühlet Kararı' (n 62) 74; Altay and Eskiocak (n 1) N. 113, p. 148.

248 Özekes, 'Geçici Mühlet Kararı' (n 62) 74; Pekcanıtez and Erdönmez (n 8) 29.

249 Kale, 'Konkordato' (n 16) 223.

250 Hence, according to the second paragraph of Article 293 of the Enforcement and Bankruptcy Law *"As a result of the evaluation of the peremptory respite request, if it is decided to reject the concordat request of the debtor for whom a bankruptcy decision has not been issued, the debtor or the creditor, if any, requesting concordat within ten days from the notification of this decision may apply for an appeal. The decision of the regional court of appeal is final. In cases where the decision of the first instance court is abolished and the respite decision is given by the regional court of appeal, the file is sent to the court of first instance for subsequent proceedings, including the commissioning of the commissioner".*

E. Duration and Extension of the Temporary Respite

The temporary respite to be granted by the Court within the framework of the concordat provisions is stipulated as "*three months*" in Turkish Law[251]. The three-month period stipulated by the law cannot be extended beyond "*two months*"[252] (EBL Art. 287 para 4). As is seen, the total duration of the temporary respite can be at most "*five months*"[253]. In order for the three-month period granted by the court for the temporary respite to be extended for another two months, extension should be requested by the parties[254]. In other words, the court does not ex officio decide to extend the temporary respite[255]. An issue that can be further discussed in the doctrine at this point is whether it is possible to directly claim a temporary respite of four months, instead of three months, considering that the maximum period allowed for temporary respite is five months[256]. ***Doctrine*** claims that this issue is not possible in Turkish law[257]. We, too, are of the opinion that it is not possible to make a decision in a different direction, while the duration is clearly stipulated in the Execution and Bankruptcy Law.

Our Execution and Bankruptcy Law has regulated that the request for an extension of the temporary respite is only possible within three months[258]. Accordingly, it is not possible to accept a further request for the extension of temporary respite that has not been submitted within three months[259]. The beginning of the validity period for the extension request is clearly regulated by the legislator[260].

An issue that can be further discussed in the doctrine at this point is whether it would be legal if the decision to be given by the court exceeds this period although the request for the extension of the temporary respite is submitted within three months. According to the view ***in the doctrine and to which we, too, agree***; if it has not been possible to extend the temporary respite due to court reasons despite the

251 Özekes, 'Geçici Mühlet Kararı' (n 62) 76; Öztek, Budak, Tunç Yücel, Kale and Yeşilova, Madde 287 (n 1) N 21; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Pekcanıtez and Erdönmez (n 8) 27; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652; Altay and Eskiocak (n 1) N. 57, p. 50; Uyar, *Yeni Konkordato* (n 1) 44.

252 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Özekes, 'Geçici Mühlet Kararı' (n 62) 76; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653; Pekcanıtez and Erdönmez (n 8) 27; Altay and Eskiocak (n 1) N. 57, p. 50; Uyar, *Yeni Konkordato* (n 1) 44. As a matter of fact, according to the Enforcement and Bankruptcy Law, *"The temporary respite is three months. The court may extend the temporary respite for a maximum of two months upon the request of the debtor or the temporary commissioner before the expiry of this three-month period. If the debtor has requested the extension, the opinion of the temporary commissioner is also taken. The total duration of the temporary respite cannot exceed five months".*

253 Özekes, 'Geçici Mühlet Kararı' (n 62) 76; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 486; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653; Uyar, *Yeni Konkordato* (n 1) 44.

254 Pekcanıtez and Erdönmez (n 8) 28; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

255 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

256 Pekcanıtez and Erdönmez (n 8) 28.

257 Pekcanıtez and Erdönmez (n 8) 28.

258 Özekes, 'Geçici Mühlet Kararı' (n 62) 77; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

259 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

260 Özekes, 'Geçici Mühlet Kararı' (n 62) 77.

request for an extension is submitted within the legal period, the debtor should not be aggrieved[261]. In this case, the extension should be implemented and it should be possible to maintain the cautionary measures imposed by the court as well as other consequences of the temporary respite[262].

The decision regarding the grant of the temporary respite is binding and cannot be appealed[263] (EBL Art. 287 para 6). The main reason for to restraint the objection against any decision to extend the temporary respite is to provide relief and legal security to the debtor[264].

F. Legal Consequences of the Temporary Respite

Certain consequences were aimed by the legislator within the context of the temporary respite. One of the consequences linked to the decision of temporary respite in the Execution and Bankruptcy Law is that the temporary respite is subject to the results of the peremptory (definitive) respite[265] (EBL Art. 288 para 1). It should be noted in this context that, the legal consequences arising from the peremptory (definitive) respite in the Execution and Bankruptcy Law in terms of creditors (EBL Art. 294), contracts (EBL Art. 296) and debtors (EBL Art. 297) shall also apply to the temporary respite[266]. However, the fact that the temporary respite will have the same consequences as the peremptory (definitive) respite as per EBL Art. 288 para 1 shall not be interpreted as there is no difference between these two means of relief[267]. The results that are specific to the peremptory (definitive) respite do not occur during the temporary respite[268]. To give an example to this situation, a creditors council cannot be established and a meeting of creditors cannot be held within a temporary respite[269] (EBL Art. 289 para 2). While expressing the difference between a temporary and a definitive respite in the doctrine of Swiss law, it has been concluded that the creditors

261 For the authors who defend this view in the doctrine, *see*: Özekes, 'Geçici Mühlet Kararı' (n 62) 77; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

262 Özekes, 'Geçici Mühlet Kararı' (n 62) 77; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653.

263 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 653; Pekcanıtez and Erdönmez (n 8) 29. Thus, in accordance with the last paragraph of Article 287 of the Enforcement and Bankruptcy Law*, "It is not possible to apply for legal action against the acceptance of the request for temporary respite, appointment of a temporary commissioner, extension of the temporary respite and the decision regarding the measures."*

264 Pekcanıtez and Erdönmez (n 8) 29.

265 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 655; Özekes, 'Geçici Mühlet Kararı' (n 62) 81; Pekcanıtez and Erdönmez (n 8) 30; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487.

266 Özekes, 'Geçici Mühlet Kararı' (n 62) 81; Pekcanıtez and Erdönmez (n 8) 30; SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293c (n 5) N. 3.

267 Pekcanıtez and Erdönmez (n 8) 30.

268 Özekes, 'Geçici Mühlet Kararı' (n 62) 81.

269 Özekes, 'Geçici Mühlet Kararı' (n 62) 81; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487. As a matter of fact, according to the second paragraph of the Enforcement and Bankruptcy Law, *"In order to make a decision on the peremptory respite, the court invites the debtor and the creditor, if any, demanding concordat to the trial. The temporary commissioner submits his written report before the hearing and, if the court deems it necessary, participates at the hearing for his/her statement to be taken. In its evaluation, the court also evaluates the reasons of objection put forward by the objecting creditor in their petition".*

council cannot be established and a meeting of creditors cannot be held during the temporary respite[270].

One other major consequence of the temporary respite decision ruled during the concordat procedure is about the suspension of the legal proceedings initiated by the creditors against the debtor[271] (EBL Art. 288 para; EBL Art. 294 para 1). In addition, the creditors will not be able to initiate new legal proceedings against the debtor for whom a temporary respite decision has been given[272]. As can be seen, the main consequence of the temporary respite in the legislation within the context of enforcement proceedings is the "*suspension of legal proceedings*" rather than the "*cancellation of legal proceedings*"[273]. There are some exceptions in the legislation regarding the regulation that stipulates the suspension of legal proceeding during the temporary respite[274]. Accordingly, unless permitted by the court, the debtor will not be able to engage in transactions defined in EBL Art. 297 para 2 as the prohibited transactions such as "*to establish a pledge on its properties*", "*to stand surety for third parties*", *"to partially or completely transfer the real estate and the permanent installation of the enterprise, to establish limited real rights and gratuitous legal transactions on them*"[275]. In addition, personnel wages and alimony receivables will not be subject to legal proceedings[276] (EBL Art. 294 para 2; EBL Art. 206 para 1).

Another consequence of the temporary respite decision is the "*appointment of a temporary concordat commissioner (trustee)*"[277]. As the debtor's power of disposition over the assets will pursue throughout the temporary respite (EBL Art. 297 para 1 sentence 1), the control over the activities by an appointed commissioner (trustee) is important in terms of protecting the interests of the creditors[278]. The qualifications of the temporary concordat commissioner (trustee) to be appointed by the court will be set forth by the *Regulation Governing the Concordat Commissioner (Trustee) and the*

270 SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293c (n 5) N. 4.

271 Altay and Eskiocak (n 1) N. 125, p. 153 et seq.

272 Pekcanıtez and Erdönmez (n 8) 32; Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487.

273 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 487.

274 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 488.

275 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652. As a matter of fact, pursuant to the second paragraph of Article 297 of the Enforcement and Bankruptcy Law, *"The debtor cannot establish a pledge on its properties, stand surety, partially or completely transfer, and establish limited rights or gratuitous legal transactions on the real estate and the permanent installation of the enterprise. Otherwise, the transactions made are null and void. The court must take the opinion of the commissioner and the creditors board before making a decision on these transactions"*.

276 Pekcanıtez and Erdönmez (n 8) 34. As a matter of fact, according to the second paragraph of Article 294 of the Enforcement and Bankruptcy Law; *"For the privileged receivables written in the first row of the article 206, follow-up can be performed through foreclosure"*. For the privileged creditors stated in the first paragraph of Article 206 of the Enforcement and Bankruptcy Law, *see* also: section V, A, fn. 213 above

277 After the temporary respite is provided to the debtor, a concordat commissioner will be appointed in order to evaluate whether the concordat will be successful or not (Altay and Eskiocak (n 1) N. 108, p. 146).

278 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 488. As a matter of fact, it is explicitly stated in the first paragraph of Article 297 of the Enforcement and Bankruptcy Law that *"the debtor can continue his/her business under the supervision of the commissioner"*.

Creditors Council[279] (CC Reg.) (EBL Art. 290 para 6)[280]. Execution and Bankruptcy Law stipulates the assignment of 1 (one) - or up to three in certain cases - commissioner (trustee)[281] (EBL Art. 287 para 3). The Regulation issued in 2019 governed that should three persons are to be appointed as concordat commissioners (trustees), one of them should be a "*lawyer*" and the other an "*independent auditor*"[282] (CC Reg. Art. 5 para 2). In case three concordat commissioners (trustees) are assigned, the independent auditor member should be someone appointed by the *"Public Oversight, Accounting and Auditing Standards Authority"*[283] (EBL Art. 287 para 4). This issue has been added to the Execution and Bankruptcy Law (Art. 287 para 4) by virtue of Law No. 7155[284] on the *"Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contract"*[285] which entered into force on 19.12.2018[286].

According to Turkish law, it is obligatory to appoint a temporary concordat commissioner (trustee) together with the temporary respite decision[287]. However, it is stipulated in Swiss law in accordance with SchKG Art. 293b para 2 that in exceptional cases, a concordat commissioner may not be appointed[288].

VI. Current Developments and Recent Practice in Turkey on Concordat

The provisions of Law No. 7101, which abolished the postponement of bankruptcy and introduced some amendments to the concordat provisions, were published in the

279 Official Gazette 30.01.2019 Number 30671.

280 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652. Hence, it is clearly stated in the sixth paragraph of Article 290 of the Enforcement and Bankruptcy Law that *"The qualifications of the concordat commissioner, the training, the institutions that will provide the training and the ones who will be exempted from the training and the other issues related to the commissioner are determined by the regulation implemented by the Ministry of Justice."* For the Regulation on the Concordat Commissioner and the Board of Creditors, *see* also: https://app.e-uyar.com/makale/index/68923b17-5275-4669-945c-a6ca65c2220e (Last Online Access: 4.3.2021).

281 Pekcanıtez, Atalay, Sungurtekin Özkan and Özekes (n 1) 488; Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 651; Kale, 'Konkordato' (n 16) 221; Sarısözen, *7101 sayılı Kanun* (n 2) 57; Uyar, *Yeni Konkordato* (n 1) 43. As a matter of fact, it is stated in the third paragraph of Article 287 of the Enforcement and Bankruptcy Law that *"The court appoints a temporary concordat commissioner to examine closely whether the concordat is possible to succeed with the temporary respite decision. Three commissioners may be appointed when necessary after considering the number of creditors and the amount of receivables."*

282 As a matter of fact, *in the Regulation on the Concordat Commissioner and the Board of Creditors* (CC Reg.), this issue is clearly explained in the second paragraph of Article 5 that *"In case three commissioners are appointed; one of the commissioners is elected from among the independent auditors, provided that they work in the province where the court is located. It is preferred that another commissioner to be elected is a legal expert."*

283 Altay and Eskiocak (n 1) N. 108, p. 146.

284 Official Gazette 19.12.2018, Number 30630.

285 *See:* https://www.resmigazete.gov.tr/eskiler/2018/12/20181219-1.htm (Last Online Access: 4.3.2021).

286 In the Government justification (Article 14) of the Law numbered 7155, it is explicitly stated that: *"With this article, in the event that the three commissioners are appointed, one of them is obliged to be selected from among the independent auditors authorized by the Public Oversight, Accounting and Auditing Standards Authority and approved as a cap auditor. Provided that there is no such independent auditor operating within the provincial administrative boundaries where the court is located, this obligation will not be valid."*

287 Pekcanıtez and Erdönmez (n 8) 35.

288 SK SchKG-Umbach-Spahn/Kesselbach/Burkhalter Art. 293b (n 5) N. 1.

Official Gazette dated 15.03.2018[289]. We should certainly take a look at the current developments and recent practice in Turkey on Concordat in order to evaluate whether the amendments introduced by Law No. 7101 on this issue are beneficial.

Until the Law Amendment No. 7101 introduced in March 2018, the number of companies declaring concordat in Turkey was almost at a minimum[290]. However, the Concordat procedure has been functionalized with the effect of Law Amendment No. 7101 introduced in April 2018 and there has been a significant increase in the number of companies requesting concordat[291].

While we had an increasing number of debtors applying to the Concordat regime in Turkey, the legislator was not content with the amendments introduced by Law No. 7101 and adopted other legal amendments and regulations. In this context, Law No. 7155 on the *"Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contract"* was published in the Official Gazette on 19 December 2018 and entered into force. It has introduced several amendments to the provisions of the Execution and Bankruptcy Law relating to the Concordat[292]. Apart from the amendments foreseen by the Execution and Bankruptcy Law and introduced by Law No. 7101, we see that the provisions of various regulations have been adopted as a current development. Accordingly, the *"Regulation Governing the Documents to be Annexed to the Concordat Application"* published in the Official Gazette dated January 30, 2019 within the context of the documents to be annexed to the concordat petition is important[293]. Also noteworthy is the "*Regulation Governing the Concordat Commissariat (Trustee) and the Creditors Council*", which is another regulation adopted by the legislator and published in the Official Gazette dated 30.01.2019. The qualifications of the temporary concordat commissioner (trustee) to be appointed by the court will be set forth by the "*Regulation Governing the Concordat Commissariat (Trustee) and the Creditors Council* "[294] (EBL Art. 209 para 6). In addition, the amendment published in the Official Gazette dated 26 December 2020[295] regarding

289 Kale, 'Konkordato' (n 16) 213; Sarısözen, *7101 sayılı Kanun* (n 2) 21.

290 Thus, the number of concordat in January 2018 was only one. Three concordat announcements were made in February. In March, when Law No. 7101 was amended, no concordat request was made. Due to the impact of the economic difficulties experienced by the companies in Turkey, 28 debtors in May 2018, 34 in June, 35 in July, 46 in August, 73 in September, applied to the concordat proceedings. The number of debtors who applied to concordat was determined as 252 in October, 336 in November and 279 in December. As can be seen, the interest in concordat has steadily increased, and the number of concordat, which reached 899 in 2019, has increased to 2000 in the last two years. For more detailed information, *see*: https://www.dw.com/tr/analiz-t%C3%BCrkiyede-konkordato-say%C4%B1s%C4%B1-2019-sonunda-iki-bine-dayand%C4%B1/a-52071822#:~:text=2019'un%20son%20%C3%BC%C3%A7%20ay%C4%B1nda,da%20bin%20993'e%20ula%C5%9Ft%C4%B1.&text=Konkordato%20ilan%20eden%20toplam%20bin,622'si%20Anonim%20%C5%9Firket%20stat%C3%BCs%C3%BCnde (Last Online Access: 10.02.2021).

291 Ibid.

292 The amendments introduced by Law No. 7155 are as follows: In (e) clause of first paragraph of Article 286 of the EBL (In the Art. 13 of Law No 7155); in second clause of the third paragraph of the Article 287 of the EBL (Art. 14 of the Law No. 7155)) and in the fifth and sixth paragraphs of Article 290 of the EBL (Art. 15 of the Law No. 7155).

293 *See:* section IV, B, 2 above.

294 Atalı, Ermenek and Erdoğan, *İcra ve İflas* (n 1) 652.

295 Official Gazette 26.12.2020, Number 31346.

the insolvency, which is one of the reasons on the grounds of which Concordat can be requested introduced significant amendments to the Provisional Article 1[296] of "*Communique on Procedures and Principles for the Execution of Article 376 of the Turkish Commercial Code No. 6102*"[297].

VII. Conclusion

The bankruptcy postponement mechanism, introduced in Turkish Law for to prevent equity companies and cooperatives from going bankrupt due to their insolvency and which allows them to recover, did not give the expected results when it was first implemented in 2003. As postponement of the bankruptcy mechanism could not respond to practical requirements, did not yield the expected results in terms of improving, restructuring the companies and allowing them to continue their commercial life, the legislator aimed to make the "*concordat*" provisions functional this time in 2018. With the entry into force of Law No. 7101 on 15.03.2018 for this purpose, a number of amendments have been introduced to the concordat provisions referred to in the Execution and Bankruptcy Law.

With the amendment to the Law No. 7101; significant legal amendments were introduced to the concordat institution which is regulated within the framework of the provisions 285 to 309 of the Execution and Bankruptcy Law and the regime has acquired a completely different scheme. The revision of the Swiss Federal Execution and Bankruptcy Law, which entered into force on January 1, 2014 in Switzerland, significantly expanded the function of the concordat moratorium. The amendments to the provisions of concordat on the grounds of Law No. 7101 were affected by the Swiss Execution and Bankruptcy Law (SchKG Art. 293-336). Based on these amendments, many provisions that previously caused the disruption of concordat were either revised or abolished. We, too, are of the opinion that the amendments of Law No. 7101, which was affected by the revisions of the Swiss Law in 2014, have paved the way for the provisions of the concordat mechanism in Turkish law to be functional. The opportunity to apply to the abolished bankruptcy postponement mechanism was only available to equity companies and cooperatives. This situation did not allow real person traders on the verge of bankruptcy to recover. After updating various provisions of the concordat with the amendments introduced by Law No.

296 The provisional article 1 after the amendment is as follows:
(1) In the calculations made for loss of capital or insolvency up until 1/1/2023 within the scope of Article 376 of the Law, half of the total sum of all foreign exchange losses arising from foreign currency liabilities that have not yet been executed and expenses, depreciation and personnel expenses arising from leases accrued in 2020 and 2021 may not be taken into account. In determining these amounts, calculation is made in order not to cause repetition. Regarding the calculations to be made within the scope of this paragraph, no records are included in the financial statements prepared pursuant to Article 13, this is shown in footnotes for informational purposes. See:
https://www.resmigazete.gov.tr/eskiler/2020/12/20201226-6.htm (Last Online Access: 10.02.2021).

297 *See:* https://lexist.com.tr/blog/2020/12/29/turk-ticaret-kanununun-376-maddesinin-uygulanmasina-dair-usul-ve-esaslar-hakkinda-tebligde-degisiklik-yapilmistir/https://lexist.com.tr/blog/2020/12/29/turk-ticaret-kanununun-376-maddesinin-uygulanmasina-dair-usul-ve-esaslar-hakkinda-tebligde-degisiklik-yapilmistir/ (Last Online Access: 10.02.2021).

7101, real person traders apart from equity companies and cooperatives are granted the opportunity to apply to the Concordat so that they can get rid of the risk of going bankrupt. The legislator made the right choice by revising the provisions of the Concordat to ensure equality between debtors who want to survive bankruptcy and continue their business activities.

Many provisions that previously caused the disruption of concordat were either revised or abolished based on these amendments introduced by Law No. 7101. Although the general understanding regarding the concordat procedure has been preserved in Turkish law following the amendments introduced by Law No. 7101, various significant amendments have occurred in the functioning and proceedings of the concordat procedure. The novelties brought by the legislator with the amendment of Law No. 7101 can be listed as follows:

1) One of the major changes introduced by Law No. 7101 for the regulations regarding concordat in Turkish law is related to the Court where the concordat application will be submitted. The old regulation stipulating that enforcement courts are in charge in the first place when applying for concordat has been repealed. Instead, with the amendments of Law No. 7101, it was stipulated that the court responsible for receiving the concordat application would be the *"commercial court of first instance"*. The fact that the Court solely assigned for Concordat procedures has been designated as the "*commercial court of first instance*" with Law No. 7101 will prevent making contradictory decisions, so it has become an appropriate arrangement for procedural economy. In addition, the fact that only a *"commercial court of first instance"* is appointed to deal with Concordat proceedings instead of different courts with this amendment and that the procedures will be carried out by a single court commissioned for the concordat procedure has become an appropriate arrangement as it will ensure that the procedure to be carried out faster and healthier.

2) After the new regulations introduced by Law No. 7101, the concordat proceedings will be initiated by the application of either the debtor or creditors to the commercial court of first instance with a preliminary concordat project. The amendment introduced a new regulation stipulating that not only the debtor but also each creditor who can claim bankruptcy can also apply for concordat proceedings (EBL Art. 285 para 2).

3) With the enactment of Law No. 7101, major changes have been made in the documents that should be submitted when applying for concordat. As a matter of fact, the documents to be annexed to the concordat application were insufficiently expressed in Art. 285 of the former Law in a single paragraph under the subheading of *"Requirements for the Acceptance of the Concordat Application"*. The regulation stipulated in the former Art. 285 of EBL has been completely amended, including its title. Following the amendment introduced by Law No. 7101, the documents to be annexed to the Concordat application of the debtor are listed separately in a different (EBL Art. 286) article.

4) Following the amendment to Law No. 7101, the concept of "preliminary concordat project" was accepted in Turkish Law (EBL Art. 286 para 1(a)).

5) With the new regulation, a new amendment was introduced in terms of whether the person applying for concordat is the debtor or the creditor. Furthermore; in the event that the applicant to the concordat is the *debtor*, the documents to be annexed to the petition submitted to the court will differ depending on whether the debtor is a *"merchant"* or not and, if it is a merchant, whether it is a real person or a legal person. In the event that the debtor or the creditor who will apply for concordat duly submit to the Court the documents stipulated in Article 286 of the Execution and Bankruptcy Law as amended by Law No. 7101, the Court will take a temporary respite decision without the parties having to assume any further burden of proof (EBL Art. 287 para 1).

6) The provisions of the bankruptcy postponement to the benefit of the debtor are included in the concordat regime and in this context, the decision regarding temporary relief was accepted. Thus, the opportunity to take a temporary relief decision has been included within the concordat provisions through which legal proceedings initiated by creditors against the debtor within the temporary relief will be suspended and new proceedings will be prevented (EBL Art. 288 para 1; EBL Art. 294 para 1).

7) In fact, an important novelty introduced by Law No. 7101 regarding the concordat proceedings is the opportunity to compose a "*creditors council*" upon the peremptory (definitive) respite or within the peremptory (definitive) respite period.

8) The commissioner (trustee) appointed by the Court during the concordat proceedings invites the creditors to declare their receivables. Based upon the amendments introduced by Law No. 7101, the commissioner (trustee) will give the creditors a period of "*fifteen days*" to determine who the creditors are and invite them to declare their receivables. As can be seen, the legislator shortened the "*twenty day*" period stipulated in the former law and decreased it to "*fifteen days*".

In brief; with the amendment to the Law No. 7101 significant legal amendments were introduced to the concordat institution which is regulated within the framework of Execution and Bankruptcy Law and the regime has acquired a completely different scheme. Thus, a positive development was experienced with the introduction of the Concordat to legal practice. After the amendments introduced to the Law No. 7101 in 2018, there has been a significant increase in Turkey in the number of debtors who want to get rid of bankruptcy by applying to the Concordat Regime. As a result of the developments experienced, the legislator was not satisfied only with the revision of Law No. 7101, but also realized many new legislative changes in order for the Concordat mechanism to gain function. In this context, various regulations have also been put into effect. We can conclude that it will be possible to ensure the recovery of debtors in economic difficulties on the grounds of the current developments in Turkey regarding Concordat.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Self-Disclosure or Burying the Evidence Dilemma: A Legal Review of the Data Breach Rules under the Turkish Personal Data Protection Law

Kendini İhbar Etme veya Delilleri Yok Etme İkilemi: Kişisel Verilerin Korunması Hukuku Bağlamında Veri İhlal Bildirimi Kurallarının Hukuki Analizi

Mehmet Bedii Kaya*

Abstract

Technology has penetrated every aspect of life and brought security and privacy issues to the forefront of the regulatory landscape. In such a hyper-connected world, security breaches are inevitable. Hence, general legislation in the field of protection of personal data is becoming ubiquitous. The rules are likewise being drafted to ensure the highest degree of privacy and security.

The violation of security requirements can have an unprecedented and catastrophic consequence on data controllers. A security incident can compel the data controller to notify a competent data protection authority of a breach and communicate all facts to affected data subjects. Data breach notification is self-disclosure of the data controller about a personal data-related incident regardless of the intentional or negligent character of the event. The underlying aim of this obligation is to prevent or mitigate all adverse effects or damage deriving from a data breach incident.

This article maps out the legal framework governing data breach notification under the European Union's law, in particular General Data Protection Regulation and the Turkish Data Protection Law. This article maintains that strict and burdensome data breach notification rules do not serve the interest of data protection of individuals as data controllers could refrain from notification and bury the pieces of evidence. Such a notification-phobia is a major threat to the overall cybersecurity realm. The article emphasizes that there is a need for balanced rules and adequate accountability tools which would encourage data controllers to report any data breach incidents without hesitation.

Keywords

Breach, Notification, Data Protection, Privacy, Cybersecurity

Öz

Teknoloji hayatın her alanına girmiş ve güvenlik ile mahremiyeti en temel regülasyon konusu haline getirmiştir. Her şeyin birbiriyle bu denli bağlantılı olduğu bir dünyada güvenlik ihlalleri kaçınılmazdır. Bunun bir neticesi olarak da kişisel verilerin korunması alanındaki düzenlemeler yaygınlaşmaktadır. Nihayetinde amaç en üst düzeyde mahremiyet ve güvenliği sağlamaktır.

Güvenlik yükümlülüklerinin ihlali veri sorumluları nezdinde benzeri görülmemiş ve yıkıcı sonuçlar doğurmaktadır. Bir güvenlik ihlali veri sorumlusunu, yetkili veri koruma otoritesine ihlali bildirmek ve aynı zamanda ihlalden etkilenen ilgili kişilere olayın detaylarıyla ilgili haber vermek zorunda bırakmaktadır. Veri ihlal bildirimi, veri sorumlusunun kasten veya ihmali olarak gerçekleşmiş kişisel verileri ilgilendiren bir olaya ilişkin kendisini ihbar etmesidir. Bu yükümlülüğün altında yatan temel amaç, bir veri ihlal olayından kaynaklanan tüm olumsuz etkileri veya zararı önlemek veya azaltmaktır.

Bu makalenin amacı Avrupa Birliği'nin veri ihlal bildirimlerine ilişkin temel düzenlemelerini, bilhassa da Genel Veri Koruma

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Tüzüğünü ve aynı zamanda Türk Kişisel Verilerin Korunması Kanununu incelemektir. Bu makalede katı ve külfetli veri ihlal bildirimi kurallarının veri sorumlularını bildirim yapmaktan imtina edip delilleri yok etmeye ittiği; bu sebeple de bu tür katı düzenlemelerin kişisel verilerinin korunmasına aslında hizmet etmediği tartışılmaktadır. Veri ihlal bildirimi yapma çekincesi genel anlamda siber güvenliğe yönelik önemli bir tehdittir. Bu makale kapsamında veri sorumlularının herhangi bir veri ihlal olayını tereddüt etmeden bildirmesini teşvik edecek dengeli düzenlemelere ve uygun hesap verebilirlik araçlarına ihtiyaç olduğu vurgulanmaktadır.

Anahtar Kelimeler
İhlal, Bildirim, Veri Koruma, Mahremiyet, Siber Güvenlik

Self-Disclosure or Burying the Evidence Dilemma: A Legal Review of the Breach Notification Rules under the Turkish Data Protection Law

Introduction

Information and communication technologies have evolved into vital instruments for society, politics, and economy. While digitalisation has contributed to the well-being of societies, it has also created new challenges and risks. In such a hyper-connected world, security breaches are inevitable. The need to safeguard privacy by utilizing state-of-art techniques, in this respect, stands at the epicentre of the digitalisation process.

In today's data economy, privacy has developed into a pivotal matter of regulation. General legislation in the field of protection of personal data is becoming increasingly ubiquitous.[1] The rules are also being tightened up to ensure the highest level of privacy and security.

Data protection regulations change how data controllers handle, process, transfer, and retain personal data. The most prominent legal obligation of a data controller, in this regard, is the maintenance of data security. Data breaches are considered one of the most significant threats to organizations.[2] The total average global cost of data breaches is estimated 3.86 million USD.[3] Therefore, violation of security obligations is heavily sanctioned.

The infringement of security requirements can have an unprecedented and catastrophic consequence on a data controller. A breach could turn all the spotlights on a data controller, and a minor incident could destroy the hard-earned reputation of the data controller, which has been built up over the years. Such a violation could trigger a set of civil and criminal lawsuits along with indemnity claims, class actions, and statutory or contractual claims against data controllers and all other stakeholders connected to such an incident.

1 For the data protection legislations around the world see CNIL, '*Data protection around the world*' https://www.cnil.fr/en/data-protection-around-the-world [accessed 1 March 2021].

2 Paul B Lambert, *Understanding the New European Data Protection Rules* (CRC Press - Taylor & Francis 2018) 312.

3 IBM, '*Cost of a Data Breach Report 2020*' https://www.ibm.com/security/digital-assets/cost-data-breach-report/ [accessed 1 March 2021].

The day when a data security breach occurs triggers the doomsday protocols of the data controller; the day when all the compliance projects are tested in a real-life scenario. Due to devastating consequences the data controller faces, the decision to run the alarm bells, i.e., notifying the data breach to the relevant stakeholders, is the most vital and challenging decision to be taken by a data controller as it creates a domino effect of kind.

The data controller, under the pressure of contractual obligations, afraid of losing business and under significant scrutiny of the supervisory authorities could have two simple options: either self-disclosure and bear the consequences or bury the evidence and pray that no one notices the incident. However, such notification-phobia is a major threat to the overall cybersecurity realm.

Contemplating the possible risks arising from non-disclosure, the EU's General Data Protection Regulation (hereinafter GDPR) of 2016, which entered into force on 25 May 2018, introduced a new obligation: data breach notification.[4] The GDPR has defined what constitutes a data breach, when and how to notify those affected and effected by such a breach, what information the notification of breach should encapsulate, the format and procedures of the notification, and exemptions of such obligation.

The data breach notification requirement is likewise a popular issue of Turkey's law and practice. The Turkish Data Protection Law no. 6698 (hereinafter the DP Law) has introduced a general data breach requirement that applies to all data controllers regardless of their sector, size, or the type of data they are processing. However, the rules governing breach notification remain quite complex and controversial because of the ambiguities and disparities concerning the scope, exceptions, substance, and thresholds of notifications. In particular, there is controversy in practice when the breach incident also triggers a parallel criminal investigation. There are also disagreements in determining the timeframe limit for notification as well as the announcement of such breaches to the public.

The primary purpose of this article is to review rules governing the personal data breach notification requirement under the Turkish data protection law. The article addresses what constitutes a breach, when a breach requires notification, what the threshold for notification is, what the procedures of the notification are as well as the exemptions of such requirements (if any), the subsidiarity of having such a general obligation of disclosure, and the prospective consequences of late or inaccurate notification. The article identifies any problem in the legal and institutional framework and attempts to map out any barrier to the efficient functioning of the

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 04.05.2016.

breach notification mechanism. The article, in this regard, lays down possible options for the alignment of Turkish law with the EU acquis.

The overall structure of the article takes the form of five sections. The first section provides an overview of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, aka Convention no. 108. The second section gives an overview of data breach notifications under European Union Law. The third section introduces General Data Protection Regulation (GDPR)'s articulation of data breach notifications and procedural obligations for data controllers and processors.

The fourth section focuses on Turkey's data protection law. This section maps out the regulatory and institutional framework of Turkey on data protection and cybersecurity. The fifth section describes potential reforms that Turkey needs to make based on the EU's experience.

The article examines the topic from a legal perspective and the technical aspects of data security are examined to a certain extent and depth. It is important to note that while the data breach notification is an issue, which is widely regulated under various jurisdictions in different parts of the world, e.g., Australia, Brazil, Canada, Colombia, the Philippines, South Korea, South Africa, Taiwan, Vietnam and the USA,[5] this article will only focus on the EU law. The impetus of this choice derives from the political and legal relevance of the EU to Turkey and most importantly, from Turkey's explicit political target of adopting the EU's data protection norms.

I. The Data Breach Notification Rules Under the Council of Europe's Data Protection Conventions

The first international agreement on data protection, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, or so-called Convention no. 108, is currently ratified by fifty-five states from different regions of the world.[6] The Convention no. 108 is commonly recognised as a foundation instrument of international data protection law.

The Convention no. 108 lays down a crucial rule for data security. According to Article 7 of the Convention no. 108, appropriate security measures must be taken to

5 The USA does not have a federal data protection law. However, there are various federal laws or rules that mandate notification of data breaches such as Financial Industry Regulatory Authority (FINRA), Gramm-Leach-Bliley Act (GLBA), HIPAA-HITECH Act Final Breach Notification Rule, Office of Management and Budget (OMB), Regulation Financial Disclosure (FD), Regulation S-K, Securities Act of 1933, Securities Exchange Act of 1934. For a list of such legislation see NCSL, '*Security Breach Notification Laws*' https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx [Accessed 1 March 2021]; see also Mark Burdon, Bill Lane, Paul Von Nessen, '*Data breach notification law in the EU and Australia e Where to now?*' (2012) 28 Computer Law & Security Review 296, 297 et seq; Software vendors would have to disclose breaches to U.S. government users under new order: draft https://reut.rs/39fy5Xm [Accessed 26 March 2021].

6 Council of Europe, '*Chart of signatures and ratifications of Treaty 108*' https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures [accessed 1 March 2021].

protect personal data stored in automated data files against accidental or unauthorised destruction or accidental loss and unauthorised access alteration or dissemination. The Convention no. 108, though, does not prescribe an additional provision dealing with breach notification.

It could be argued that the lack of an obligation to declare data breaches is a major shortcoming of the Convention. However, considering when this convention was adopted, i.e., the 1980s, the need for data breach notification had not emerged in the international realm as a fundamental safeguard of privacy. Furthermore, considering the level of connectivity, mobility, and overall cyber threats to personal data at that time, the Convention no. 108 cannot be condemned for the lack of an explicit provision to address breach notification.

The revised and updated version of the Convention no. 108, Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data or colloquially called the Convention 108+, likewise has attracted tremendous attention in the world. By January 2021, thirty-three states from different regions of the world had committed to transform the legal requirements of this Convention into their national law and eleven states have already ratified this Convention.[7]

The Convention 108+ reinforces the international privacy law through additional safeguards regarding the proportionality and data minimisation principles and lawfulness of the processing; introduction of new data types, e.g. sensitive data, which will now include genetic and biometric data, trade union membership and ethnic origin; higher transparency of data processing; new rights for the new contexts of data processing, e.g. in case of algorithmic decision-making context which is significant in the era of artificial intelligence; greater accountability of data controllers; stipulation of the "privacy by design" principle; implementation of the data protection principles to all processing activities; coherent rules for trans-border data flows; enhanced powers and independence of the data protection authorities, and strengthening legal basis for international cooperation.[8]

The most important innovation of the Convention 108+ inter alia is the obligation to disclose data breaches and the requirement to notify, without delay, any security breaches to the competent authorities. According to Article 7, Section 2, the Signatory States are required to oblige data controllers by law to notify, without delay, at least the competent supervisory authority, of those data breaches which may seriously interfere with the rights and fundamental freedom of data subjects.

7 Council of Europe, '*Chart of signatures and ratifications of Treaty 223*' https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/223/signatures [accessed 1 March 2021]; Turkey is not party to the Convention 108+.

8 It would be beyond the scope of this article to outline the novelties of The Convention 108+. For such an analysis see Paul De Hert and Vagelis Papakonstantinou, '*The Council of Europe Data Protection Convention reform: Analysis of the new text and critical comment on its global ambition*' (2014) 30 Computer Law & Security Review 633; see also Council of Europe, '*Council of Europe treaty bolstering data protection opened for signature*' https://go.coe.int/AVgeo [accessed 1 March 2021].

The Convention 108+ sets the minimum criteria for the notification of data breaches. This requirement is limited to cases that may seriously interfere with the rights and fundamental freedoms of data subjects, which should be notified, at least, to the supervisory authorities.[9] The Signatory States have, nevertheless, a wider margin of discretion on this requirement and are entitled to mandate the controllers to notify the data subjects beyond just the competent authorities.

Explanatory Note to the Convention 108+ highlights that the notification made by the controller to the supervisory authorities does not preclude other complementary notifications.[10] Given the fact that a data breach is likely to give rise to physical, material, or non-material damage to data subjects, data controllers should show due diligence and should notify the data subjects to mitigate the adverse effects of the breach.

The recognition of the data breach notification requirement as a fundamental instrument to uphold the rights and freedoms of individuals is a breakthrough in the international data protection realm. It is expected to increase global awareness for data security, as the reporting of such incidents will be statutory in the jurisdictions in the scope of the Convention 108+.

The developments at the Convention 108 are closely monitored by the EU. Recital 105 of the GDPR mandates the European Commission to take account of obligations arising from the third country's participation in multilateral or regional systems in particular about the protection of personal data as well as the implementation of such obligations. The European Commission especially oversees third country's accession to the Convention 108 while assessing the level of protection in third countries or international organisations.

The EU also gives significant attention to the ratification of the Convention 108+. The European Council, on 9 April 2019, has adopted a decision authorising EU member States to "*ratify, in the interest of the Union, the Protocol amending the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108) insofar as its provisions fall within the exclusive competence of the Union*."[11]

9 Council of Europe, '*The modernized Convention 108: novelties in a nutshell*' https://rm.coe.int/modernised-conv-overview-of-the-novelties/16808accf8 [accessed 1 March 2021].

10 Council of Europe, '*Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*' https://rm.coe.int/cets-223-explanatory-report-to-the-protocol-amending-the-convention-fo/16808ac91a [accessed 1 March 2021].

11 Council Decision (EU) 2019/682 of 9 April 2019 authorising Member States to ratify, in the interest of the European Union, the Protocol amending the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data OJ L 115/7, 02.05.2019.

II. The Breach Notification Regulations Under the EU Law

Data security obligation is not an innovation of the GDPR as the Directive 95/46/EC has previously articulated a specific rule for the security of data processing. It is remarkable that Article 17 of Directive 95/46/EC requires that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

The provision also highlights that protection measures must ensure a level of security appropriate for the risks represented by the nature of the data to be protected. However, no specific provision laid down rules regarding the notification of data breach under Directive 95/46/EC. This obligation has evolved under different instruments of the EU law and has ultimately become a fundamental pillar of the data protection eco-system after the ratification of the GDPR.

The Directive 2002/58/EC,[12] also known as E-Privacy Directive, which applies to the electronic communication services, requires electronic communication service providers to take appropriate measures to safeguard the security of their services, if necessary, in conjunction with the provider of the network, and to inform subscribers of any special risks of a breach of the security of the network.[13] Due to the importance of sustaining security in the electronic communication sector, Regulation (EU) 611/2013 also laid down guidance to conform to these obligations.[14]

The new information security management approach elaborated by E-Privacy Directive has influenced the Regulation No 910/2014,[15] also known as eIDAS Regulation which was issued on 23 July 2014 and entered into force on 1 July 2016 (except for certain provisions). The eIDAS Regulation has underlined that notification of security breaches and security risk assessments are essential while providing adequate information to concerned parties in the event of a breach of security or loss of integrity.[16]

12 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.07.2002.

13 For a comprehensive review of the E-Privacy Directive, in particular, the problems such as conceptual incoherence, limited practical coverage, and compatibility with information privacy law see Burdon, Lane and Von Nessen (n 5). The E-Privacy Directive is currently being reformed and the breach notification rules are also at the forefront of the reform negotiations. See Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press 2010), 193.

14 Commission Regulation (EU) No 611/2013 of 24 June 2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications, OJ L 173/2, 26.06.2013.

15 Regulation (EU) no 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257/73, 28.8.2014.

16 eIDAS Regulation Recital 38.

Under Article 19(2) of the eIDAS Regulation entitled 'Security Breach', qualified and non-qualified trust service providers are required, without undue delay, in any event within 24 hours after having become aware of security incidents, to notify the supervisory body and where applicable, other relevant bodies such as the competent national body for information security or the data protection authority, of any breach of security or loss of integrity that has a significant impact on the trust service provided or on the personal data maintained therein.

Notably, in addition to notifying the relevant competent bodies, where the breach of security or loss of integrity is likely to adversely affect a natural or legal person to whom the trusted service has been provided, the trust service provider is also required to notify the natural or legal person of the breach of security or loss of integrity without undue delay.

Another notification obligation is regulated under the Directive 2016/1148,[17] also known as the NIS Directive. This directive, which provides legal measures to boost the overall level of cybersecurity in the EU, entered into force in August 2016.

According to Article 14 of the NIS Directive, essential services operators and Article 16 digital service providers as defined under the NIS Directive are required to notify relevant computer security incident response teams, Computer Security Incident Response Team, also known as CSIRT, of any security incidents having a significant impact on the continuity of the essential services they provide. Furthermore, entities that have not been classified as operators of essential services and are not digital service providers, e.g., information society service providers, may voluntarily notify their users about incidents having a substantial impact on the continuity of the services which they provide as per Article 20 of the NIS Directive.

Payment services are also subject to specific security and notification rules. The Payment Services Directive (hereinafter PSD2),[18] lays down rules for operational and security incidents affecting electronic payments provided by payment services providers. According to Article 95 of the PSD2, the payment service providers are required to establish a framework with appropriate mitigation measures and control mechanisms to manage the operational and security risks relating to the payment services they provide.

In addition, as part of that framework, payment service providers need to establish and maintain effective incident management procedures, including for the detection and classification of major operational and security incidents. Similarly,

17 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, L 194/1, 19.07.2016.

18 Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015.

payment service providers must have in place adequate security measures to protect the confidentiality and integrity of payment service users' personalised security credentials as per Article 97 of the PSD2.

The PSD2 not only requires notification to the competent authority but in certain cases also requires notification to payment service users. According to Article 96 of the PSD2, in the case of a major operational or security incident, payment service providers are required without undue delay to notify the competent authority in the home member state of the payment service provider.[19] In addition to the notification to the competent authority, the PSD2 also requires notification to the payment service users in certain cases.

Article 96(1) of the PSD 2 stipulates that where the incident has or may have an impact on the financial interests of its payment service users, the payment service provider is required to, without undue delay, inform its payment service users of the incident and of all measures that they can take to mitigate the adverse effects of the incident.

It is significant to note that data security is often used as equal to cybersecurity. However, cybersecurity is a broader concept and encompasses not merely data, but all information systems as a whole, including but not limited to hardware, software, peripherals, network, and related infrastructure.[20] The primary objective of cybersecurity is to protect assets such as hardware (e.g. computers and smartphones), software, and data.[21] On the other hand, the main objective of data protection regulations is to protect the fundamental rights and privacy of the relevant data subject. It is noteworthy that the data protection regulations are human-centric instruments of law whereas cybersecurity regulations are asset-centric.

Cybersecurity and data protection regulations frequently intertwine. The line between these kinds of regulations is becoming blurred which is evident in the scattering of regulations and directives in multiple statutes and policies. These rules have established the normative background for cybersecurity and information security throughout the EU. Although the fragmentation of the regulatory framework is criticised, having such distinct obligations of notification adds another layer to

19 The rules with regard to classification of major incidents, the content, the format, including standard notification templates, the procedures for notifying such incidents, the criteria on how to assess the relevance of the incident and the details of the incident reports to be shared with other domestic authorities is determined by the European Banking Agency in accordance with the powers conferred under Article 96 of the PSD2. See, European Banking Authority, '*Guidelines on major incident reporting under Directive (EU) 2015/2366 (PSD2) EBA/GL/2017/10, 27.07.2017*' https://www.eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/guidelines-on-major-incidents-reporting-under-psd2 [accessed 1 March 2021].

20 Dominik, Herrmann and Henning Pridöhl, '*Basic Concepts and Models of Cybersecurity*' in Markus Christen, Bert Gordijn and Michele Loi (eds), *The Ethics of Cybersecurity* (Springer 2020), 12.

21 *Ibid*. 12.

information security management governance.[22] Furthermore, they contribute to the development of unique incident response mechanisms tailored up for meeting the regulatory framework.

III. The Examination of the GDPR

The GDPR has introduced extensive rules on data security and breach notification. The legislation lays down a general data security obligation, outlines the possible risks and dangers arising from data breaches, puts forth the procedure for notification of a personal data breach to the supervisory authority, and data subjects. It further clarifies the way of communication as well as exceptions and how to justify exceptions.

The GDPR highlights that certain obligations of data controllers including the communication of a personal data breach to a data subject could be restricted as far as necessary and proportionate in a democratic society to safeguard certain public and private interests.[23] In this regard, it should be noted that there might be certain national differences in terms of data breach notification conditions and procedures.

A. What Constitutes a Data Breach?

The GDPR mandates that both controllers and processors have in place appropriate technical and organisational measures to ensure a level of security appropriate to the risk posed to the personal data being processed.[24] The data security requirement makes a particular structural change that compels the entities to change their business practices, including their procurement practices, vendor relationships, and internal and external audit tools. This obligation requires data controllers to oversee all contractual relations, and mandates specific and strict contractual provisions while entering into any contract involving personal data. As well, it mandates sustainable and effective monitoring of personal data within and throughout the organization.

The GPDR articulates specific security measures that are deemed appropriate.[25] For instance, the pseudonymization and encryption of personal data is a vital security measure. Another fundamental measure is the ability to ensure the ongoing confidentiality, integrity, availability, and resilience of processing systems and services. Similarly, the ability to restore the availability and access to personal data promptly in the event of a physical or technical incident and a process for routinely

22 It is argued that the current regulatory framework seems to be offering solutions to the symptoms, rather than the causes. Accordingly, it is suggested that "*[p]art of the problem could be addressed by collecting data on breaches that are mindful of the technological environment, but also by an active attempt to create more harmony among the regulatory patchwork.*" Maria Grazia Porcedda, '*Patching the patchwork: appraising the EU regulatory framework on cyber security breaches*' (2018) 34 Computer Law & Security Review 1077, 21.

23 GDPR Recital 73 and Article 23.

24 GDPR Article 32.

25 GDPR Article 32(1)(b).

testing, assessing, and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing is the fundamental measures for the maintenance of security.

The GDPR highlights that risk assessment for the appropriate level of security, in particular the risks that are presented by processing from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed must be taken into account.[26] A personal data breach is defined under the GDPR as "*a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*."[27]

It is important to note that the GDPR only applies to breaches related to personal data. In other words, the GDPR does not apply if the breach does not affect any outcome regarding data protection. As reminded by Article 29 Data Protection Working Party (hereinafter the WP29) "*whilst all personal data breaches are security incidents, not all security incidents are necessarily personal data breaches*."[28]

Considering the problem surrounding the definition of "personal data breach", the WP29 attempts to provide further guidance.[29] According to the WP29, "destruction" of personal data covers situations where the data no longer exists, or no longer exists in a form that is of any use to the controller; damage is defined where personal data has been altered, corrupted, or is no longer complete; loss should be interpreted as the data may still exist, but the controller has lost control or access to it or no longer has it in its possession. The WP29 also explains unauthorised or unlawful processing situations may include disclosure of personal data to (or access by) recipients who are not authorised to receive (or access) the data, or any other form of processing that violates the GDPR.[30]

The WP29 maintains that a breach of confidentiality or integrity is rather clear, on the other hand availability breach may be less evident.[31] Indeed, there is not a blueprint approach or pre-defined template that could be implemented in every circumstance. Each situation and its impacts on personal data must be assessed according to its merits. For instance, a ransomware attack could be qualified as an availability incident and confidentiality breach if a network intrusion has also arisen

26 GDPR Article 32(2).

27 GDPR Article 4(12).

28 Article 29 Data Protection Working Party 'Guidelines on Personal data breach notification under Regulation 2016/679 (Adopted on 3 October 2017 As last Revised and Adopted on 6 February 2018)' https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49827 [accessed 1 March 2021], 7.

29 *Ibid*. 7.

30 *Ibid*. 7.

31 *Ibid*. 8.

during the injection of the malicious software.[32] Nevertheless, depending on the outcome of the breach in terms of confidentiality, integrity, and availability, the data controller is required to engage in notification procedures.

B. The Rationale for Data Breach Notification

The obligation for notification or self-disclosure of breach incidents could be grouped into three categories: regulatory, contractual, and voluntary. This is not an exhaustive list, but rather a guiding taxonomy.

Regulatory types of notification occur when specific legislation mandates breach notification. Contractual types of notification occur when a particular provision of a contract obligates parties to notify each other of any security breaches such as when a cybersecurity insurance could require the insurer or insured to report a breach of this kind. Voluntary types of notification occur when an entity exempted from regulatory requirements chooses to notify relevant stakeholders of any breach to maintain their corporate reputation.[33]

The circumstances that would trigger a breach notification are not limited with the aforementioned cases. For instance, a borrower who has been a victim of cyber-attack might be compelled to inform such an incident to the creditor if the incident has an impact on the business of the borrower and affects the repayment of the credit. Similarly, the creditor might be obliged to notify the third parties who would surrogate the credit. In such cases, the content, format and scope of the notification or the level of transparency will be determined according to the actual contract or service level agreement between the parties.

Notwithstanding the type of notification, the primary objective of the breach notification requirement is to prevent or mitigate all adverse effects or damage

32 *Ibid*. 9; Ransomware is a global threat and such malicious software has different types and forms. For the implications of a ransomware attack on data protection, there is a need to conduct computer forensics alongside network forensics. Depending on the logs of inbound and outbound network at the timeframe when the ransomware code was running, there could be different outcomes. For a detailed examination of different possibilities see EDPB '*Guidelines on Examples regarding Data Breach Notification Adopted on 14 January 2021 Version 1.0*' https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202101_databreachnotificationexamples_v1_en.pdf [accessed 1 March 2021], 7-13; A ransomware could also expose the entity to their customer. For instance, a ransomware operation known as 'Clop' is applying maximum pressure on victims by emailing their customers and asking them to demand a ransom payment to protect their privacy. See, https://www.bleepingcomputer.com/news/security/ransomware-gang-urges-victims-customers-to-demand-a-ransom-payment/ [accessed 7 April 2021]

33 Voluntary notification is a quite complex issue. As highlighted by Determann "*Even where notices are not legally required, companies sometimes issue notices anyway either because they are not sure whether a notice requirement applies, because they consider notification beneficial from a customer or public relations perspective or because they want to help potentially affected data subjects to mitigate risks, harm and damages claims. Such voluntary disclosures can be helpful, but they can also backfire and provoke over-reactions and unnecessary hassles for data subjects. For example, if a company issues a voluntary disclosure regarding weakness of systems hosting credit card numbers, credit card holders may be induced to cancel credit cards and make filings with credit bureaus, even if there is no concrete indication of an increased potential for abuse.*". See Lothar Determann, *Determann's Field Guide to Data Privacy Law (Fourth Edition)* (Edward Elgar 2020), 5.50.

emanating from a data security incident.[34] This enables the data subjects to take any remedial measures, e.g., changing passwords and cancelling credit cards.[35]

The European Commission has stated in its impact assessment report of the GDPR, "*breach notifications provide a systematic feedback about the actual risk and the actual weaknesses of existing security measures; they enable authorities and consumers to assess the relative capabilities of data controllers with respect to data security; they force data controllers to assess and understand their own situation regarding security measures*".[36]

As underlined by GPDR, a personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymization, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned.[37]

Breach notification triggers the mechanism of accountability, liability against data subjects, business partners, and most importantly, responsibility against data protection authorities. The breach notification requirement imposes a level of transparency on data controllers and makes them crystal clear about their data protection policies and practices. Overall, cybersecurity investment has become widely accepted and increasingly part of standard business practices as cybersecurity incidents have cost companies greatly. Notably, the international technical standards, such as ISO 27001, have been the catalyst for the institutionalization of data security breach management.

As highlighted by the European Union Agency for Cybersecurity (hereinafter ENISA), the cost of reacting to a security breach is usually higher than the cost of adequately addressing the issue proactively.[38] In the same context, it is maintained that "*[e]enterprises are increasingly realizing that it is more cost-effective to include cybersecurity as part of the overall system development lifecycle and rigorously test systems for vulnerabilities, as opposed to trying to fix the aftermath of a cybersecurity breach*".[39]

34 GDPR Recital 85.

35 Lambert (n 2) 305.

36 European Commission, '*Commission Staff Working Paper SEC(2012) 72 final - Impact Assessment accompanying the General Data Protection Regulation*' https://www.europarl.europa.eu/cmsdata/59702/att_20130508ATT65856-1873079025799224642.pdf [accessed 1 March 2021], 100.

37 GDPR Recital 85.

38 ENISA, '*Guidelines for Securing the Internet of Things*' https://www.enisa.europa.eu/publications/guidelines-for-securing-the-internet-of-things [accessed 1 March 2021], 39.

39 Andrew Gorecki, *Cyber Breach Response That Actually Works* (Wiley 2020), p. 21.

C. Notification of a Personal Data Breach to the Supervisory Authority

Article 33 of the GDPR prescribes an extensive rule for notification of a personal data breach to the supervisory authority. As soon as the controller becomes aware that a personal data breach has occurred, the controller is required to notify the personal data breach to the supervisory authority without undue delay and, where feasible, not later than 72 hours after having become aware of it.

It is important to note that the key for notification is awareness of the personal data breach, not the occurrence of the incident. The WP29 interprets the expression of awareness as having become aware "*when that controller has a reasonable degree of certainty that a security incident has occurred that has led to personal data being compromised.*"[40] The standard triggering data notification of a breach is a reasonable degree of certainty.[41] The determination of when an organisation is aware of a breach is potentially critical for legal liability.

The core task of the data controller is conducting an internal evaluation of the event. In this regard, the data controller should ascertain that all appropriate technological protection and organisational measures have been implemented to establish immediately whether a personal data breach has taken place and to promptly inform the supervisory authority.[42] As highlighted by the WP29, "*a key element of any data security policy is being able, where possible, to prevent a breach and, where it nevertheless occurs, to react to it on time.*" [43] Considering these obligations, to emphasise the standard needs to be interpreted narrowly rather than leaving a wide discretion to the data controller.

The data controller could be aware of the data breach through different channels. For instance, the data processor or one of the business partners within the supply chain of the controller could be aware of the breach and warn the controller. Another possibility is that a data subject or any third party could alert the data controller about a breach.

Similarly, the data controller could be aware of the breach in the context of a bug bounty programme or continuous red teaming process.[44] Such programmes invite third-party security researchers to discover any problems, vulnerabilities, or bugs of a given information system as per specific instructions.[45] Lastly, there are illegal dark

40 The WP29 (n 28) 10-11.

41 *Ibid*. 12.

42 GDPR Recital 87.

43 The WP29 (n 28) 6.

44 For example, EDPB, '*Decision 01/2020 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Twitter International Company under Article 65(1)(a) GDPR Adopted on 09 November 2020*' https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_bindingdecision01_2020_en.pdf [accessed 1 March 2021].

45 The bug bounty could be limited. For instance, the companies could require the researchers to refrain from denial-of-service attacks, spamming, brute-force attacks, social engineering (including phishing) of staff or volunteers, any physical attempts against property or data centers, using scanners or automated tools to find vulnerabilities. Any researcher, who exceed such limits, might face legal and criminal actions.

web markets whereby stolen personal data are sold or exchanged. There are security researchers who scan such networks and deliver intelligence reports regularly to the relevant data controllers.

Public authorities, such as cybersecurity agents or the competent computer security incident response teams could also notify the data controllers about suspicion of a breach. Regardless of the channel of notification, the main duty of the controller is to take such intelligence seriously and initiate an efficient investigation accordingly.

The complexity of IT systems, the diversity of the hardware and software deployed, and the proliferation of providers/suppliers could lead to an investigation of a breach to be concluded speedily. The WP29 maintains that during the period of investigation the controller may not be deemed as being "aware".[46] The data controller, nevertheless, must launch an inquiry and be ascertained with a reasonable degree of certainty about whether a breach has taken place.

Article 33 also provides that where such notification cannot be achieved within 72 hours, the reasons for the delay should accompany the notification and information may be provided in phases without undue further delay. The WP29 exemplifies such a scenario as "bundled" notification multiple, similar confidentiality breaches over a short period affecting large numbers of data subjects in the same way.[47]

On the other hand, the controller is exempted from notification if it can demonstrate as per the accountability principle, that the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. To reach such a conclusion, one must assess impacts and document the underlying evaluation of such a decision as per the accountability principle.

Notification to the supervisory authority requires qualified correspondence and subject to strict formal requirements. According to Article 33(4), the controller is required to (a) describe the nature of the personal data breach including where possible, the categories and the approximate number of data subjects concerned and the categories and the approximate number of personal data records concerned; (b) communicate the name and contact details of the data protection officer or another contact point where more information can be obtained; (c) describe the likely consequences of the personal data breach; (d) describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

In general, the data controller is expected to conduct a comprehensive forensics investigation, scrutinize the impact of a data breach, map out the individuals and

46 The WP29 (n 28) 11.

47 *Ibid*. 16.

data affected, establish an active channel of communication with the supervisory authority, make an impact assessment of the prospective effect of the breach, and document concrete actions taken for addressing the breach.

Considering the variety and volume of information to be compiled, the GDPR leaves the door open for data controllers for submitting further documentation. According to Article 33(4) of the GDPR, where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without further delay. As highlighted by the WP29, "*the focus should be directed towards addressing the adverse effects of the breach rather than providing precise figures.*"[48]

Within this context, the WP29 underlines that where precise information is not available (e.g., exact number of data subjects affected), this should not be a barrier to timely execute breach notification. The WP29 emphasizes that the focus of the notification requirement to the supervisory authority is "*to encourage controllers to act promptly on a breach, contain it and, if possible, recover the compromised personal data, and to seek relevant advice from the supervisory authority.*"[49]

In all situations, the data controller is obligated to document in detail. Such documentation must involve three main elements: (1) the facts relating to the personal data breach; (2) the effects of the breach; (3) the remedial action taken. Furthermore, the GDPR mandates that the documentation must be precise and well-structured so that it enables the supervisory authority to verify compliance with Article 33 of the GDPR.

Such requirements are minimum and should be included at the notification at least. In accordance with the merits of the incident and the sector-specific or data-specific risks, most importantly, as per the accountability principle, the level of documentation and the substance of such documentation could vary among the data controllers.

Indeed, the most prominent obligation deriving from the principle of accountability is to have effective warning mechanisms. In a digitalised world where all accountability tools are in operation, is it difficult to bury any evidence? If all works properly, the data generated through security information and event management systems or so-called 'siem' systems, produce rock-solid evidence. Automatic notification systems are also becoming increasingly prevalent in the context of stopping data breaches.

D. Communication of a Personal Data Breach to the Data Subject

If a personal data breach is likely to result in a risk to the rights and freedoms of natural persons, another procedure is triggered in addition to the notification to the supervisory authority: communication of the breach to data subjects. Both Articles 33

48 *Ibid*. 5.

49 *Ibid*. 15.

and 34 use the same wording for pressing the buttons of notification, i.e., the personal data breach's potential or actual "*risk to the rights and freedoms of natural persons*". However, despite similar wording, the burden of triggering notification as per Article 34 is higher.

In Article 34, every potential breach requires notification to the supervisory authority but only high-risk scenarios necessitate communication to data subjects. The reason for this distinction is explained by the WP29 as protecting individuals from unnecessary notification fatigue.[50] In contrast to a notification to the supervisory authority, there is no precise time limit for communication to the data subject.

Considering the consequences of a data breach, Article 34 of the GDPR mandates that such communication shall be made without undue delay. As highlighted by the WP29, "*the focus of any breach response plan should be on protecting individuals and their personal data*."[51] The threshold for such a notification, in this regard, will be determined in accordance with the merits of the breach, the type of the data (e.g., sensitive data), and the severity of the breach.

The rationale to communicate a data breach to the relevant data subject is to allow the subject to take necessary precautions.[52] Therefore, the GDPR underlines that such communications to data subjects should be made reasonably feasible as soon as possible and in close cooperation with the supervisory authority, respecting guidance provided by it or by other relevant authorities such as law enforcement authorities.[53] The WP29 states that if justified and on the advice of law-enforcement authorities, the controller may delay communicating the breach to the affected individuals as long as it does not prejudice such investigations.[54] In such situations, communication is initiated at a later date to prevent interference in ongoing investigations.

As explained within the GDPR, the need to mitigate an immediate risk of damage would call for instantaneous communication with data subjects whereas the need to implement appropriate measures against continuing or similar personal data breaches may justify more time for communication.[55] The GDPR also states that an exception to a notification without undue delay may occur if the nature and gravity of the personal data breach scenario warrant it.[56] Hence, what is meant by "*without undue delay*" will vary in different scenarios.

50 *Ibid*. 20; For examples to distinguish between risk and high risk to the rights and freedoms of individuals see *ibid*. 31.

51 *Ibid*. 5.

52 GDPR Recital 86.

53 GDPR Recital 86.

54 The WP29 (n 28) 21.

55 GDPR Recital 86.

56 GDPR Recital 87.

Article 34 also follows the same methodology adopted by Article 33 terms of the content of the communication. It is likewise a qualified correspondence. Article 33(2) of the GDPR mandates that such communication should describe in clear and plain language the nature of the personal data breach and contain at least the information and measures such as (a) the name and contact details of the data protection officer or other contact points where more information can be obtained; (b) the likely consequences of the personal data breach; (c) the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

The GDPR also leaves the door open for non-notification if certain conditions are met. Article 34(3) of the GDPR lays down three exemptions where communication with the data subject is not necessary. The conditions for exemptions need to be interpreted narrowly. As pointed out by the WP29, while notification may initially not be required if there is no likely risk to the rights and freedoms of individuals, this may change over time and the risk might have to be re-evaluated.[57]

The first exemption of communication is a technical one. If a controller implements appropriate technical and organisational protection measures, and those measures are applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption, there is no need for communication. As highlighted by WP, in such cases, nevertheless there could be need for notification if there are problems in terms of availability of personal data, e.g., the controller has no adequate backups.[58]

Other scenarios where a notification obligation would occur is when the risk to the rights and freedoms of a natural person may change. For example, this may occur when a backup exists but considering the length of time taken to restore the data from that backup and the effect the lack of availability has on individuals, or encryption key is compromised.[59]

Nevertheless, this exemption highlights the importance of privacy by design approach and the law rewards data controllers, who have adopted such an attitude by freeing them from a major burden. The use of encryption, in this regard, is a meaningful tool.

The second exemption is a risk-based one. If a controller takes subsequent measures which ensure that the high risk to the rights and freedoms of data subjects is no longer likely to materialise, there is no need for communication. This exemption is in line

57 The WP29 (n 28) 19.

58 *Ibid*. 18.

59 *Ibid*. 19.

with the general rule for notification, which is the personal data breach most likely to result in a risk to the rights and freedoms of natural persons.

The third exemption is a practical one. If the communication to the data subject would involve disproportionate effort, there is no need for individual correspondence with data subjects. Rather in such cases, the data controller is required to make a public communication or similar measure whereby the data subjects are informed in an equally effective manner. The WP29 advises that controllers should choose the means that maximizes the chance of accurately communicating information to all affected individuals.[60]

The decision for a public announcement of a data breach is a quite-complex issue. The GDPR reminds that the data breach rules and procedures should take into account the legitimate interests of law-enforcement authorities where early disclosure could unnecessarily hamper the investigation of the circumstances of a personal data breach.[61] Considering the problems surrounding digital investigations, due consideration should be given to the announcement of disclosure to the general public to avoid the destruction of evidence and prevention of identification of perpetrators.

The determination of the risk remains at the epicentre of the notification process.[62] The GDPR stresses that the likelihood and severity of the risk to the rights and freedoms of the data subject must be determined by reference to the nature, scope, context, and purposes of the processing.[63] Likewise, the risk must be weighed based on an objective assessment, i.e., whether data processing operations involve a risk or a high risk. The WP29, in the same direction, highlights that "*where the consequences of a breach are more severe, the risk is higher and similarly where the likelihood of these occurring is greater, the risk is also heightened. If in doubt, the controller should err on the side of caution and notify*".[64]

60 *Ibid*. 21.

61 GDPR Recital 88.

62 GDPR elaborates different outcomes of the risks to the rights and freedoms of natural persons. Accordingly, the varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular of children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects. See GDPR Recital 75.

63 GDPR Recital 76.

64 The WP29 (n 28) 26; For a detailed guidance about the determination of the risk see also ENISA, '*Recommendations for a methodology of the assessment of severity of personal data breaches*' https://www.enisa.europa.eu/publications/dbn-severity/at_download/fullReport [accessed 1 March 2021].

Article 34(4) of the GDPR confers a wide margin of discretion to the supervisory authorities having considered the likelihood of the personal data breach resulting in a high risk could either require the controllers to communicate to the data subjects if they have not already or decide that the conditions of exemptions are justified. Article 58 also gives supervisory authorities the power to order a controller to communicate personal data breaches to data subjects.

The GDPR also empowers the European Data Protection Board (hereinafter the EDPB) with respect to data breach procedures. According to Article 70, the Board is entitled to issue guidelines, recommendations, and best practices for establishing personal data breaches and determining undue delay and for the particular circumstances in which a controller or a processor is required to notify those affected by personal data breaches as well as for the circumstances in which a personal data breach is likely to result in a high risk to the rights and freedoms of the natural persons.

F. The Status of Joint Controller

According to Article 26 of the GDPR, where two or more controllers jointly determine the purposes and means of processing, they are regarded as joint controllers. The GDPR transparently mandates the joint controllers to determine their respective responsibilities for compliance with the obligations. The GDPR underlines that the protection of the rights and freedoms of data subjects as well as the responsibility and liability of controllers and processors and the monitoring and measures of supervisory authorities require a clear allocation of the responsibilities, including where a controller determines the purposes and means of processing jointly with other controllers or where a processing operation is carried out on behalf of a controller.[65]

Breach notification obligation necessitates the fulfilment of organized and synchronised action. The WP29 suggests that contractual arrangements between joint controllers include provisions that determine which controller will take the lead on or be responsible for compliance with the breach notification obligations of the GDPR.[66]

G. The Status of Data Processor

A data breach can also take place throughout the services of a data processor. Article 28 of GPDR mandates that processing by a processor must be governed by a contract or legal act. Such a contract or legal act, among other things, must stipulate, in particular that the processor assists the controller in ensuring compliance with the obligations under Articles 32 to 36 taking into account the nature of processing and the information available to the processor.

65 GDPR Recital 79.

66 The WP29 (n 28) 13.

Besides Article 28, Article 33 of the GDPR also imposes a general obligation on the data processors for notification of the breach. According to Article 33(2), the processor is required to notify the controller without undue delay after becoming aware of a personal data breach. The data controller, after being notified by the processor and henceforth becoming aware of the breach, will respectively notify the competent supervisory authority or the data subject if needed.

Two issues must be addressed in the event of the breach within the processor's jurisdiction. Firstly, who should carry out the whole examination, the controller or the processor? Secondly, when will the 72-hour countdown regarding awareness and required notification to the relevant authorities begin?

The WP29 maintains that the processor is not required to determine to assess the likelihood of risk emanating from a breach before notifying the controller; it is the controller that must make this assessment on becoming aware of the breach.[67] The processor only needs to ascertain that a breach occurred and notify the controller accordingly. Therefore, in principle, the controller should be deemed as "aware" once the processor notifies the breach.[68]

The GDPR does not provide an explicit time limit within which the processor must alert the controller, but only states it must do so "*without undue delay*". The WP29 recommends the processor promptly notifies the controller, with further information about the breach providing in phases as more details become available. The processor must assist the controller to meet the notification requirements of the supervisory authority within 72 hours.[69] Where the processor provides services to multiple controllers that are all influenced by the same incident, the processor will have to report the details of the incident to each controller.[70]

The lack of an explicit statutory deadline for a data processor may contribute to inconsistent practices. It could be argued that the lack of an explicit mandate under the GPDR could open the doors for misuse. Indeed, as per Article 28 of the GPDR, where processing is to be carried out on behalf of a controller, the controller can only use processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of the GDPR and ensure the protection of the rights of the data subject. The data controller, henceforth, cannot avoid responsibility on the grounds of intentional belated notification from the data processor.

67 *Ibid*. 13.

68 *Ibid*. 13.

69 *Ibid*. 14.

70 *Ibid*. 14.

H. Administrative Fines

Deficiencies in data security maintenance, the improper appraisal of risk ratings, the failure to respond in a timely or improper manner while notifying a breach, the failure of communication of data breach to the data subjects or inadequate reporting could give rise to heavy sanctions. Data controllers who violate their obligations under Article 32 to 34 of the GDPR are subject to administrative fines up to €10,000,000, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

Article 83 of the GPDR lays down general conditions for imposing administrative fines and requires that each supervisory authority ensures that the imposition of administrative fines in each case must be effective, proportionate, and dissuasive.[71] In addition to this general requirement, the GDPR also requires that when deciding on whether to impose an administrative fine or deciding on the amount of the administrative fine in each case, due regard be given to the following:

(1) the nature, gravity, and duration of the infringement;

(2) the intentional or negligent character of the infringement;

(3) any action taken by the controller or processor to mitigate the damage suffered by data subjects;

(4) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them;

(5) any relevant previous infringements by the controller or processor;

(6) the degree of cooperation with the supervisory authority, to remedy the infringement and mitigate possible adverse effects of the infringement;

(7) the categories of the personal data affected by the infringement;

(8) how the infringement became known to the supervisory authority, in particular and if so, to what extent the controller or processor notified the infringement;

(9) where measures have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;

(10) adherence to approved codes of conduct or approved certification mechanisms;

71 For a comprehensive review of substance of administrative fines see, The WP29, '*Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679 Adopted on 3 October 2017*' http://ec.europa.eu/newsroom/just/document.cfm?doc_id=47889; For instance, German data protection authorities has published a detailed methodology for determination of administrative fines. See, '*Konzept der unabhängigen Datenschutzaufsichtsbehörden des Bundes und der Länder zur Bußgeldzumessung in Verfahren gegen Unternehmen*', https://www.datenschutzkonferenz-online.de/media/ah/20191016_bu%C3%9Fgeldkonzept.pdf [accessed 1 March 2021].

(11) any other aggravating or mitigating factor applicable to the circumstances of the case such as financial benefits gained, or losses avoided directly or indirectly from the infringement.

Article 58 of the GPDR considers allowing regulators to issue reprimands is a core investigative power that each supervisory authority must have. It is noteworthy that in the case of a minor infringement or if the fine likely to be imposed would constitute a disproportionate burden to a natural person, a reprimand may be issued instead of a fine.[72]

I. Evaluation of the GDPR's Rules and Procedures

The main objective of the GDPR is to prevent potential risks and prejudices rather than imposing sanctions due to violations.[73] It is argued that "*the security obligations are designed not only to prevent data breaches and cyberattacks but also to achieve the broader goal of ensuring the functioning of ICT systems, their interoperability and, more in general, their reliability*".[74]

This innovation of the GDPR has been a breakthrough in the EU, and thousands of violations have been reported to the data protection authorities since 2008. The data protection authorities have also levied severe sanctions for different data security violations. For instance, in Germany for the period from 25 May 2018 to 27 January 2021 77,747 personal data breaches were reported to the supervisory authorities while fines totalling 69,085,000 Euros were imposed.[75] Similarly, in the Netherlands, in the same period, 66,527 personal data breaches were notified while fines with a total value of 2,540,000 Euros were levied.

Total number of personal data breaches notified per jurisdiction for the period from 25 May 2018 to 27 January 2021 inclusive[76]	
Germany	77.747
Netherlands	66.527
United Kingdom	30.536
Denmark	18.938
Ireland	17.131

The GDPR creates a specific accountability scheme for the maintenance of data security, which adds another layer to the general accountability obligation deriving

72 GDPR Recital 148.

73 Alessandro Mantelero, *et al*., '*The common EU approach to personal data and cybersecurity regulation*', 1 International Journal of Law and Information Technology 1(2021) 3.

74 *Ibid.*, 4.

75 DLA Piper, '*GDPR fines and data breach survey: January 2021*' https://www.dlapiper.com/en/poland/insights/publications/2021/01/dla-piper-gdpr-fines-and-data-breach-survey-2021/ [accessed 1 March 2021], 9.

76 *Ibid.*

from Article 5, i.e., the principles relating to the processing of personal data. Irrespective of notification to the supervisory authority or communication to the data subjects, the data controller is required to document any personal data breaches comprising the facts relating to the personal data breach, its effects, and the remedial action taken. Any notification or communication should be accompanied by a detailed forensic report and mitigation or remediation plan. The WP29 recommends that the controller document its reasoning for the decisions taken in response to a breach.[77]

As explained, as per Article 33(5) of the GDPR, the controller needs to record details of the breach including its causes, what took place, and the personal data affected. It should also include the effects and consequences of the breach along with the remedial action taken by the controller. The GDPR explains that when setting detailed rules concerning the format and procedures applicable to the notification of personal data breaches, due consideration should be given to the circumstances of that breach including whether personal data had been protected by appropriate technical protection measures, effectively limiting the likelihood of identity fraud or other forms of misuse.[78]

The notification of the breach to the relevant data protection authority and data subjects respectively needs an internal assessment by the data controller. The primary factor that determines the overall process and success of the fulfilment of the legal obligations is the accountability mechanisms put in place by the data controller before the incident of the breach.[79]

It could be argued that the documentation requirements are high and the time for the notification (72 hours) is quite short whereas the liability compared to the requirements is disproportional. Indeed, the GDPR establishes a sustainable data protection system with various tools and instruments from code of conduct to certifications. The main paradigm of this data protection eco-system is the accountability approach.[80]

The GDPR's detailed data breach notification rules and the short timeframe for the GDPR's detailed data breach regulatory rules and the short timeframe for notification are the result of companies historically hiding breaches for a long time.[81] GPDR "*seeks to curb the culture of secrecy by first holding the controllers accountable for the safety of the data, second, having them react quickly to such attacks, and lastly requiring the controller to be transparent if it occurs, in order to increase accountability*".[82]

77 The WP29 (n 28) 27.

78 GDPR Recital 88.

79 For example, incident detection and reporting, incident notification to organization (e.g., notification or demand from hacker; posting online; etc.), internal notification(s), team notifications, risk assessment, impact assessments, disciplinary action, hacker relation action, data protection supervisory authority external breach notification, individual data subject breach notification, customer breach notification. See, Lambert (n 2) 312.

80 Mantelero, *et al*. (n 73) 4.

81 Sanjay Sharma, *Data Privacy and GDPR Handbook* (Wiley 2020) 107.

82 *Ibid*.

Yet, there are significant problems in practice while implementing the data breach notification. The rules introduced by the GPDR are arguably "*extremely broad and stringent requirements are paired up with extremely broad and vague exceptions*".[83] According to an analysis of breach notifications received from various areas within the public and private sector conducted by the Data Protection Commissioner of Ireland, late notifications, difficulty in assessing risk ratings, failure to communicate a breach to data subjects, repeating breach notifications, and inadequate reporting are the prominent mistakes of the data controllers and the major problems in the practice.[84]

IV. The Turkish Law

A. Breach Notification Rules Outside of the Turkish DP Law

Turkey does not have a general network and information security law or umbrella legislation on cybersecurity. The legal framework is relatively fragmented when it comes to reporting security breaches. The Turkish government has announced that it will transpose the EU NIS Directive into its national law to defragment the legal framework.[85]

Turkey's cybersecurity law is scattered throughout different legal frameworks. In 2016, a distinct provision was incorporated into Section 11 of Article 60 of the Electronic Communication Law no. 6698, and the Turkish Information and Communication Technologies Authority ("the ICTA") was given a unique authority to compel public institutions, organisations, real and legal persons to take all kind of precautions against cyber-attacks, and to establish deterrence against such attacks. The ICTA is authorized to levy sanctions from 1.000 to 1.000.000 Turkish Liras if the necessary measures are not adopted by the relevant entity or person.[86]

The ICTA constantly traces the cybersecurity incidents through publicly available and private forums and mediums, e.g., security bulletins and deep web forums, audits the companies with respect to specific cyber threats, establishes coordination between public and private entities and stakeholders, and alarms the entities for trending threats and technical vulnerabilities.

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83 Determann (n 33) 5.44.

84 The Data Protection Commission (DPC), '*A Practical Guide to Personal Data Breach Notifications under the GDPR*', https://www.dataprotection.ie/en/dpc-guidance/breach-notification-practical-guide [accessed 1 March 2021], 2.

85 Presidency of the Republic of Turkey, '*The Eleventh Development Plan (2019-2023)*' https://www.sbb.gov.tr/wp-content/uploads/2020/03/On_BirinciPLan_ingilizce_SonBaski.pdf [accessed 1 March 2021].

86 This power granted to the ICTA is quite wide and vague. Nevertheless, the Turkish Constitutional Court has ruled that such a power is related to the maintenance of public order at cyber space and has rejected the request for annulment of this aforementioned provision. The Court held that "*Undoubtedly, ensuring cyber security is among the duties assigned to the State in ensuring that individuals live in safety.*" See the Turkish Constitutional Court, Case No: 2017/16, Decision No: 2019/64, Decision Date: 24.07.2019.

Other than the telecommunication sector, a general notification requirement is also in effect for the banking sector. According to Article 38 of Regulation on Network and Information Security in Electronic Communications Sector[87] operators in the electronic communication sector are obliged to notify network and information security violations, which affect 5% of their subscribers. These notifications and other similar notifications to the ICTA are expected to include the measures that are to be taken against these breaches.

Besides the telecommunication sector, a general notification requirement is currently valid for the banking sector. Pursuant to Article 18(5) of the Regulation on Banks' Information Systems and Electronic Banking Services which is overseen by the Turkish Banking Regulation and Supervision Agency, banks are obliged to notify their customers in case of a cyber-attack resulting in breach or disclosure of data or personal data.[88] Similar obligation has likewise been laid down for the notification of cyber-attacks resulting in any serious outage or disruption. As per Article 6, such incidents are required to be reported to the national cybersecurity incident response team.

Similar notification requirements exist under different laws such as By-Law on Information Systems Management of Capital Markets Board of Turkey,[89] Regulation on Information Security in Industrial Control Systems Used in Energy Sector,[90] Regulation on Specific Principles for Safety of Nuclear Power Plants[91], and Internet Domain Names Regulation[92]. The common requirement under these regulations is to notify the customers and the competent authority in case of cyber threats and risks.

Furthermore, commercial regulations could lead to a notification of a security breach. According to Article 82 of the Turkish Commercial Law, merchants, who must act prudently, need to keep their books accurately and ensure the security of their documents. Pursuant to Section 7 of Article 82, if the books and documents of a merchant are lost during the statutory retention term due to a disaster such as fire, flood, earthquake or theft, the merchant is entitled to request a document from the competent court within fifteen days from the date of learning about the loss.

If fiscal data is compromised, a notification to the tax authorities could enter into question. According to Article 7 of the Electronic Book General Communiqué,[93] if a force majeure in the context of the Turkish Tax Procedure Law occurs which affects

87 OJ 13.07.2014/29059.

88 OJ 15.03.2020/31069.

89 OJ 05.01.2018/30292.

90 OJ 13.07.2017/30123.

91 OJ 17.10.2008/27027.

92 OJ 07.11.2010/27752. See also, Internet Domain Names Communiqué, OJ 21.08.2013/28742.

93 OJ 13.12.2011/28141.

e-books, e-book keepers need to apply to the Turkish Revenue Administration within 15 days as of the date of the event and demand for a certificate of loss. It is noteworthy that cyber-attacks could likewise constitute a force majeure situation.

As discussed under Section III, the breach notification could also emanate from a contractual obligation. Cyber risk insurances are classical examples of such contracts that encapsulate unique notification rules and procedures. According to the ENISA, cyber risk insurances are contracts dealing with a broad range of risks in cyberspace and covers matters like liability issues, property loss and theft, data damage, loss of income from network outage, and computer failures or website defacement.[94]

The proliferation of cybersecurity and data protection regulations has boosted demand for such insurance contracts and is indeed regarded as demand-side triggers.[95] Cyber risk insurances have become popular in Turkey in diverse sectors and by various entities. Even though cyber risk insurances do not cover all possible cyber threats, which indeed would be impractical considering the evolving landscape of cyberspace and hyper-connectivity,[96] they at least stand for essential tools for addressing prominent threats.

According to Article 1475 of the Turkish Commercial Law, the insured is obliged to notify the insurer within ten days of a breach event that may give rise to its liability.[97] In addition, the policyholder is obliged to notify the insurer without delay when it becomes aware of the materialisation of the risk as per Article 1446 of the Turkish Commercial Law.

Besides notification obligation, the Turkish Commercial Law also mandates a detailed documentation obligation. Pursuant to Article 1447, after the materialisation of the risk, the policyholder must, following the contract or upon the insurer's request, provide all information and documents which are necessary for determining the extent of the risk, and indemnity might be expected from the policyholder to the insurer within a reasonable period. Having an incident response and notification plan, in this regard, is considered the primary element of a cyber-risk insurance contract.[98]

94 ENISA, '*Incentives and barriers of the cyber insurance market in Europe*' https://www.enisa.europa.eu/publications/incentives-and-barriers-of-the-cyber-insurance-market-in-europe/at_download/fullReport [accessed 1 March 2021], 8.

95 Kirsty Middleton, Maria Kazamia, '*Cyber Insurance: Underwriting, Scope of Cover, Benefits and Concerns*' in Pierpaolo Marano, Ioannis Rokas and Peter Kochenburger (eds), *The "Dematerialized" Insurance - Distance Selling and Cyber Risks from an International Perspective* (Springer 2016), 187.

96 It would be beyond scope of this article to address all problems with regard to cyber insurances. Nevertheless, it is argued that "*[c]overing cyber risks could put companies in a challenging situation in which a traditional approach to risk aggregation might prove inadequate. Companies tend to think of coverage as their only cyber insurance product. They could establish a robust infrastructure by building partnerships with all the stakeholders. Companies should adopt a broader view of risk prevention through partnerships and aiming at insuring rather than just insurance.*" Bernardo Nicoletti, *Insurance 4.0: Benefits and Challenges of Digital Transformation* (Palgrave Macmillan 2021), 87.

97 This provision is an imperative provision that cannot be altered to the detriment of the insured as regulated under Article 1486(2) of the Turkish Commercial Law.

98 Ahmet Karayazgan, *Hukuki Yönüyle Sİber Riskin Sigorta ve Reasüransı* (Legal. 2020), 147.

The maintenance of quality and reliability of data is the most critical challenge for cyber risk insurances. To overcome such restraint, insurers could mandate the deployment of a cyber-agent within the insured information systems. Such agents monitor the operation of all systems, keep records of any security event and incidents and report them when needed. The automatization of security events and incidents is a breakthrough development as it eliminates the risk of under-reporting and hiding the evidence.[99]

There is a misconception that cyber insurance policies are extremely expensive and the amount that firms have to pay in premiums and deductibles for insurance coverage is comparable to the amount a firm pays out of pocket to cover the costs of a breach.[100] Nevertheless, cyber risk insurances are evolving into efficient instruments for enhancing data breach notification mechanisms. Contractual obligations may be more effective than regulatory obligations when it comes to the disclosure of breaches. Moreover, cyber insurance monetary payments may be used by authorities to find bad actors. The payments in the scope of cyber insurances are significant pieces of evidence while identifying data breaches that could guide the data protection authorities.

What if such insurances are misused to defraud the insurance process? Indeed, if the fraud includes manipulation with regard to the personal data breach, then the same controller will encounter the scrutiny and sanctions of the relevant data protection authority. Hence, the co-existence of penalties and fines creates a kind of check-balance system for cyber insurance frauds.

Aside from the security-related provisions, a general rule under the Turkish Criminal Law no. 5237 could also indirectly trigger a breach notification. Article 279 of the Criminal Law mandates that any public officer who fails to report an offense (which requires a public investigation and prosecution) or delays in reporting such offence to the relevant authority after becoming aware of such offence in the course of his duty will be sentenced to a penalty of imprisonment for a term of six months to two years. Taking into consideration the data protection-related crimes fall under the Criminal Law, it could be the case that a data breach could be discovered ex officio by the public officers.[101]

B. The Examination of the Turkish Data Protection Law

Turkey has adopted its first general data protection law in 2016. Moreover, an independent supervisory authority, so-called the Turkish Data Protection Authority

99 It is argued that the insurance market suffers with a handicap because many companies are reluctant to share information in general. See, Centre for Maritime Law, '*Maritime Industry: Cyber-Risk & Security*' https://cmlnluo.law.blog/2020/01/05/maritime-industry-cyber-risk-security/ [accessed 1 March 2021]; Kevin DiGrazia, '*Cyber Insurance, Data Security, and Blockchain in the Wake of the Equifax Breach*' (2018) 13 Journal of Business & Technology Law 225, 260.

100 *Ibid*. 260.

101 Türkay Henkoğlu, *Adli Bilişim - Dijital Delillerin Elde Edilmesi ve Analizi* (Pusula 2014),79.

("the DP Authority") was established for overseeing the implementation of the DP Law. The central decision-making body of the DP Authority is the Turkish Data Protection Board (hereinafter the DP Board).

Although the DP Law is essentially modelled after the Directive 95/46/EC, it has unique rules tailored in accordance with Turkish law and policy. The Turkish government has also announced that it will bring the DP Law in line with the GDPR over time.

In 2019, the DP Board issued a decision that laid down the procedures and principles of personal data breach notification.[102] The DP Board maintains that the purpose of the notification to the DP Board and the data subjects affected by the breach is to ensure that measures are taken to prevent or mitigate the adverse consequences of such violations.[103]

a. What constitutes a data breach according to the Turkish DP Law?

The DP Law, in parallel with Directive 95/46/EC, lays down a general data security obligation on the data controllers. According to Article 12(1) of the DP Law, the controllers must take all the necessary technical and administrative measures to provide a sufficient level of security to prevent unlawful processing of personal data, restrict unlawful access to personal data, and ensure retention of personal data.

The DP Board explains that appropriate measures will be determined on a case-by-case basis which prevents the application of a single model for data security.[104] The DP Board, in this regard, stipulates that the appropriate measures must be determined by taking into account the nature of the work performed by the data controller and the personal data protection are important as well as the size and turnover of the company.

The DP Law, in contrast to Directive 95/46EC, has introduced a general breach notification obligation. According to Article 12(5) of the DP Law, in case the processed data are obtained by other parties through unlawful methods, the controller is under the legal obligation to notify the data subject and the DP Board within the shortest time.

The DP Law does not specifically define rules addressing different types of breaches of security. The general scenario that triggers a breach notification is limited to cases whereby personal data "*obtained by other parties through unlawful*

102 See the DP Board, '*Procedures and Principles of Personal Data Breach Notification, Decision No. 2019/10 of 24.01.2019*' https://www.kvkk.gov.tr/Icerik/6647/The-Board-Decision-No-2019-10-of-24-01-2019-about-Procedures-and-Principles-of-Personal-Data-Breach-Notification- [accessed 1 March 2021].

103 *Ibid*.

104 The DP Authority, '*Obligations Concerning Data Security*' https://kvkk.gov.tr/Icerik/6601/Obligations-Concerning-Data-Security- [accessed 1 March 2021].

methods". In other words, the breach notification obligation is only limited to cases where intentional or accidental unlawful access of third parties to a personal data occurs.

What is meant by "*to be obtained by unlawful methods*"? It is argued that unlawfulness should not be interpreted narrowly and limited to only breach of the DP Law.[105] Considering the vastness of the legal framework regulating personal data such as in the Turkish constitution, sector-specific legislations, international agreements, "*to be obtained by unlawful methods*" must be interpreted as violation of any data protection legislation besides the DP Law.[106] This teleological view is indeed reasonable and fits the purpose of the DP Law, which is the protection of fundamental rights and freedoms of people, particularly the right to privacy with respect to processing of personal data.

On the other hand, the type of security breaches that trigger notification procedure must be scrutinised. To recap, a personal data breach means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed as per Article 4 of the GPDR. Depending on the outcome of the breach in terms of confidentiality, integrity, and availability, the data controller is required to trigger notification mechanisms pursuant to the GDPR.

It could be argued that according to the DP Law, the notification of a breach will be required only when the confidentiality of personal data is breached. On the other hand, a breach of integrity and most importantly, a breach of availability will not trigger any notification process.

As the WP29 highlights, a loss of availability may also occur where there has been significant disruption to the normal service of an organisation, for example, experiencing a power failure or denial of service attack which renders personal data unavailable.[107] The WP29 also defines that a security incident resulting in personal data being made unavailable for some time is also a type of breach as the lack of access to the data can have a significant impact on the rights and freedoms of natural persons.[108]

Additionally, under the current version of Article 12 of the DP Law, a security incident leading to destruction, loss, or alteration of personal data or simply an attack on the availability of personal data will not be reported to either the DP Board or data subjects unless the result of such incident allowed third parties to gain access to such

105 Murat Volkan Dülger, *Kişisel Verilerin Korunması Hukuku 2. Baskı* (Hukuk Akademisi 2019) 419.

106 *Ibid*.

107 The WP29 (n 28) 8.

108 *Ibid*. 8.

data. In other words, breach of confidentiality requires notification whereas integrity and availability do not require any notification.

The DP Board requires data controllers to explain the impact of a data breach while triggering the notification process. Data controllers are expected to explain the extent of the breach and how it has affected confidentiality, integrity, and availability of personal data. However, such a distinction of different types of security breaches is only articulated under the data breach notification form. It would be against most basic principles of law to the extent the obligations of data controllers strictly regulated under the law through such an administrative form.

Section 5 of Article 12 only mandates notification cases regarding processed data illegally obtained by third parties through unlawful methods. This is the major shortcoming of the Turkish law. There is a need to enhance the normative value of data security under the DP Law by explicitly articulating that confidentiality, integrity, and availability are the main pillars of data security and must be notified if breached.

b. Notification of a personal data breach to the DP Board

What does "shortest time" mean in the context of Article 12(5) of the DP Law? The DP Board has defined the shortest time as requiring an entity to notify within 72 hours after becoming aware of a data breach.

According to the DP law, the key to the notification is awareness, not occurrence. While the DP Board does not provide any guidance with regard to the threshold of awareness, it could be argued that a reasonable degree of certainty is sufficient like in the GPDR. The data controller, in this regard, must launch an inquiry and ascertain with an acceptable degree of certainty whether a breach has taken place.

The DP Board follows the footsteps of the GPDR and mandates that where such notification cannot be achieved within 72 hours, the reasons for the delay should be attached to the notification to be made to the DP Board without further delay. Likewise, the DP Board states that in cases where it is not possible to provide the information simultaneously, this information must be provided gradually without delay.

How shall 72 hours be interpreted? For instance, if a data controller completes all internal procedures within hours and initiates notification procedures at the end of the deadline, is it still liable for not reporting sooner? While the focus of any breach is to protect individuals and their personal data, each case must be evaluated according to its own merits.

Another important topic that needs to be addressed is the scope of application of the DP Law. The DP Law lays down no specific provision for its extraterritorial application.

Yet the DP Board introduces a specific rule that could be applied to a circumstance of extraterritorial application. If data breaches occur through data controllers established abroad and that affects Turkish citizens and entities or if data subjects benefit from the products and services provided within Turkey, these data controllers are required to notify the DP Board and follow the same procedures as domestic companies.

The DP Board has standardised and digitalised the personal data breach notification process to account for domestic and extraterritorial breaches through a standard "Personal Data Breach Notification Form," to be used in all phases of notification. To account for expediency and other challenges, the DP board permits online notification of any data breach.[109]

The notification to supervisory authority is also qualified correspondence which is subject to strict formal requirements. The DP Board requests a broad range of information with respect to various details of the breach, its effects on the data subjects and the data controller, and the measures taken respectively[110] Notably, the DP Board is entitled to announce such breach at its official website or through other methods it deems appropriate where necessary. The discretion remains at the DP Board for publication of such notice.

The DP Board may officially publish breaches on their website or through other methods as deemed necessary. The DP Board's website is a governmental site that is well indexed on search engines and various platforms which bundle breach notifications. Publication of online breaches can turn the spotlight on a data controller and undermine a reputation developed over years. These breaches are also widely distributed as examples within academic works highlighted in legal newsletters and national news coverage and are retained in archives permanently.

The amplification of the breach through multiple channels could ruin the digital identity of a data controller regardless of the size and details of the incident and can create irrecoverable damage to the controller. Therefore, it could be said that the publication of such a breach is the most severe and indirect sanction of a data breach. These outcomes could create a psychological barrier to the notification of breaches. To avoid such a negative public appearance, the data controllers could refrain from notification of a breach.

109 The DP Board, '*Data Breach Notification*' https://ihlalbildirim.kvkk.gov.tr [accessed 1 March 2021].

110 The information to be provided by the data controllers are as follows: (1) The start and end time of the breach, (2) the time when the breach was detected, (3) if the breach is communicated by the data processor to the data controller, the detection time by the processor and the communication time to the controller, (4) the source of the breach and the method of occurrence of the breach, (5) the potential impact of the breach, (6) how the breach was detected, (7) the personal data types affected from the breach, (8) the number of people and total records of data affected from the breach, (9) the personal data group affected from the breach, (10) whether the data subjects are informed with regard to the breach and the details of such communication, (11) whether any domestic or international organization or institution is notified or to be notified with regard to the breach, (12) the possible negative outcomes that data subjects could encounter due to the breach, (13) the effects of the breach on the organization of the data controller, (14) the technical and organizational measures taken by the data controller before and after the breach.

Although the DP Board was notified of 408 breach incidents by January 2021, only 72 of those notified were published on the official website indicating the lack of transparency and objective criteria for the publication of breaches and a shortcoming of Turkish law. The DP Board has not published its criteria for the publication of a data breach.

Examining all the publications, it could be said that the criteria such as the communication of the breach to the data subjects, the extent of the breach and the damage, the number of affected data subjects, the type of personal data, and whether such breach was announced by the data controller himself/herself via any appropriate channel are being used by the DP Board. Nevertheless, to ensure equal treatment, fairness and most substantially, to provide legal certainty, there is a need to lay down an objective criterion for publication of the breaches by the DP Board.[111]

It is noteworthy that the Turkish Criminal Law no. 5237 regulates various data protection-related crimes, e.g., unlawful recording of personal data, illegally obtaining or transferring data, and the failure to destroy data as per the legal requirements. To identify the perpetrators, a data controller besides notifying the DP Board, might need to make a criminal complaint and trigger a criminal investigation.

The criminal investigations must be conducted in full confidentiality. Pursuant to Article 285 of the Turkish Criminal Law, any person who publicly breaches the confidentiality of an investigation is sentenced to a penalty of imprisonment for a term of one to three years as well as incurring judicial fine.

As explained earlier, GDPR underlines that the data breach rules and procedures should take into account the legitimate interests of law-enforcement authorities where early disclosure could unnecessarily hamper the investigation of the circumstances of a personal data breach. If a data controller informs the DP Board about a lodged criminal complaint, the DP Board is required to await the completion of investigation phase before the publication of such breach on its website or through other means.

b. Communication of a Personal Data Breach to the Data Subjects

The DP Board has clarified the rules with respect to the communication of the breach to the data subjects. The persons affected by such data breaches should be informed about the breach in the shortest reasonable period. If the data subject can be reached by mailing address, notification should be made directly. If one cannot

111 The publication of data breaches has also technical consequences. For instance, when a data controller's information systems are infected with a ransomware which encrypts all data and demands a ransom for the decryption key, the absolute confidentiality of the negotiations is vital. An early or untimely publication of a data breach could generate non-recoverable burdens on the data controller and the data controller could lose the only chance of achieving the decryption key.

be reached, notification should be made by appropriate methods such as publication through the data controller's website.[112]

In contrast to the notification to the DP Board, there is no exact time limit for communication of the breach to data subjects. The DP Board requires such communication to be launched in the shortest reasonable period. It is suggested that a similar time limit as already specified while notifying the DP Board (i.e., 72 hours) should be mandated for communication of a personal data breach to the data subjects, preferably a longer time limit.[113]

The DP Board requires the data controllers to establish an efficient communication channel that would enable the data subjects to appraise the full extent of the breach. The DP Board has clarified the minimum content required for breach communications to data subjects based on the GDPR's criteria.[114]

Within this context, the communication is required to describe in clear and plain language the nature of the personal data breach and contain at least the information and measures such as (1) when the breach has occurred, (2) the affected personal data by specifying the categories of personal data (personal data / personal data of special nature), (3) the likely consequences of the personal data breach, (4) the measures taken or proposed to be taken by the controller to address the personal data breach including, where appropriate, measures to mitigate its possible adverse effects, (5) the name and contact details of the data protection officer or other contact points, e.g. the full address of the website of the data controller, call centre number, etc., where more information can be obtained by the data subjects.

As discussed previously, in the GDPR while every risk requires notification of the breach to the supervisory authority, only high risk necessitates communication to the data subjects. The data controller is exempted from communicating with data subjects if technical, risk-based or practical grounds justify it. For instance, if the communication to the data subject would require disproportionate effort, there is no need for individual correspondence with data subjects. Similarly, if a controller takes subsequent measures which ensure that high risk to the rights and freedoms of data subjects is no longer likely to materialise, it is exempted from communicating with data subjects in order to prevent individuals from unnecessary notification fatigue.

However, the DP Law differs from the GDPR because it does not provide any such exemptions to data controllers regarding data subject notification. Under the DP law,

112 For instance, as a result of low quality of data or out-of-date communication information, it might not be possible initiate a communication. See, Mesut Serdar Çekin, *Avrupa Birliği Hukukuyla Mukayeseli Olarak 6698 sayılı Kişisel Verilerin Korunması Kanunu* (On İki Levha 2018), 112.

113 Dülger (n 105) 422.

114 The DP Board, '*Decision No: 2019/271 Date: 18.09.2019*' https://kvkk.gov.tr/Icerik/5547/2019-271 [accessed 1 March 2021].

obligation to communicate the breach in all cases regardless of the nature and scope of the breach, imposes a significant burden on the data controllers. Such burdensome requirements could create psychological barriers to the notification of data breaches. The lack of objective criteria for communication of personal data breach to the data subjects is a shortcoming of the Turkish law.

c. The Status of Data Processors

Pursuant to Article 12(2) of the DP Law, in a case where the processing of personal data is carried out by another natural or legal person on behalf of the data controller, the data controller is jointly responsible with that individual to comply with the regulations. The data controller is expected to conduct the necessary audits or hire a consultant to ensure the implementation of the DP Law provisions.

The DP Board mandates that if the personal data held by the data processor is obtained by others via unlawful methods, the data processor is required to notify the data controller without any delay. The data controller, when notified by the data processor and when it becomes aware of the breach, must initiate the data breach notification process.

Although the DP Board does not set a specific time limit for such notifications from the data processors, the data controller cannot evade responsibility on the grounds of intentional belated notification from the data processor. However, the data controller may seek recourse from the data processor via contractual arrangements if the processor intentionally delays notification.[115]

d. Accountability

The DP law does not articulate a principle of accountability among its general principles. However, the DP Board further mandates that documentation must be available for the DP Board to examine. Nevertheless, the controller is required to document all personal data breaches including the facts relating to the personal data breach, its effects, and the measures taken as specified by the DP Board's decision in 2019.

The DP Board adds another layer to this accountability requirement. The DP Board requires the data controller to prepare a data breach response plan, which must be reviewed regularly. Such a plan must address issues such as to whom the report will be provided, the responsibilities regarding the notification, and the assessment of potential consequences of a data breach.

115 Çekin (n 112) 112.

e. Administrative Fines

The DP Law does not merely regulate an obligation of data security but also sanctions the infringement of this obligation. Under Article 18(1)(b) of the DPL, the Turkish DP Board is entitled to levy an administrative fine of 29.503 TL to 1.966.862 TL[116] on data controllers who fail to fulfil the data security obligations. Therefore, improper notification, late notification, failure to maintain data security, and improper communication of the incident to data subjects could all be subject to a separate or combined administrative fine.

The discretion granted to the DP Board is quite broad. The margin between the lower and upper limit of the administrative fine is a magnitude of sixty-six. Indeed, the Turkish Misdemeanours Law allows administrators to determine fines based on the minimum and maximum limits. Pursuant to Article 17, in such cases, the criteria such as the substance of unfairness level of the committed misdemeanour, the fault, and economic status of the perpetrator need to be taken into account while exercising discretion.

The GDPR states that supervisory authorities should exercise discretion regarding administrative fines. These fines should be based on the nature, gravity, and duration of the infringement, the international character of infringement known to the data protection supervisory authority, compliance with measures ordered against the controller or processor, adherence to a code of conduct, and any other aggravating or mitigating factor.[117] Within this context, the DP Law is less-detailed and fails to address all criteria for determination of administrative fines in the GDPR.

The DP Board, as an administrative body subject to public law, must exercise its discretion objectively, specify the level of the unlawfulness of the data breach, and justify its reasons for divergence from the minimum limits of fines through elaborating such reasoning via references to the merits of the case. The failure of such detailed reasoning may create legal uncertainty, which is against the rule of law in a democratic society.

It is noteworthy that similar regulatory authorities such as the ICTA and the Turkish Competition Authority have issued secondary regulations on the implementation of administrative fines which have explicit criteria to be used in the determination of administrative fines. To disperse the clouds of ambiguity and provide legal certainty, the DP Authority needs to issue additional clarification regarding a calculation methodology for administrative fines.

Since actual commencing operation in 2017, the DP Board imposed administrative

116 These amounts are updated annually. The numbers represent the margin to be used in 2021. The amount is equivalent to about 3.924 to 261.555 USD by 18.01.2021.

117 GDPR Recital 148.

fines amounting to approximately 36 Million Turkish Liras. According to the annual report of the DP Authority in 2019, only a total fine of 11 million Turkish Liras was levied due to data breaches.[118] The detailed statistics are as follows:

Table 1: Data Breach Statistics

	2017	2018	2019	2020	2021	Total
Total number of cases	1	28	139	228	17	413
Closed cases	1	24	116	95	0	236
Pending cases	0	4	23	133	17	177
Published breaches	0	4	37	27	2	70

As discussed previously, the Turkish Criminal Law regulates various data protection related crimes. The implementation statistic of these crimes is as follows:

Judicial Statistics 2019[119]

The Crime	Total	Filing a public case	Number of imprisonment sentence decisions	Number of decisions of judicial and administrative fine
Art. 135 - Recording of Personal Data	2987	755	108	2
Art. 136 - Illegally Obtaining or Giving Data	26590	5962	634	27
Art. 138 - Destruction of Data	95	12	1	-

It is noteworthy that the number that has been reported to the DP Board is quite-low. Even, when the judicial statistics are examined with regard to the implementation of personal data-related crimes under the Turkish Criminal Law, there is a significant gap between the DP Law and the Turkish Criminal Law. The reason of avoiding notification of the breaches by the data controllers or in other words, the reasons of notification-phobia needs be queried respectively.

Furthermore, when the decisions adopted by the DP Board in the context of data security are reviewed, there are shortcomings in the implementation of the DP law. As explained, according to the DP law, the key to the notification is awareness, not occurrence. The data controller, in this regard, must launch an inquiry and ascertain with an acceptable degree of certainty whether a breach has taken place.

For instance, the DP Board has chosen to impose an administrative fine on a data controller on the ground of late notification even though the controller has argued

118 The DP Authority, '*2019 Faaliyet Raporu*' https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/c325adf5-5337-4567-95c8-b6b953b745aa.pdf [accessed 1 March 2021].

119 The Turkish Ministry of Justice, '*Judicial Statistics 2019*' https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1092020162733adalet_ist-2019.pdf [accessed 1 March 2021].

that the delay has derived from the slowness of technical forensic examination (the examination of server and firewall log records).[120] It is learned from this decision that the incident was detected on 28.02.2020 and the DP Board was notified on 04.03.2020 when the forensic investigation was concluded. Nevertheless, this was considered as a late notification by the DP Board.

Undoubtedly, the forensic examination could take a substantial time respecting the volume and variation of the logs to be investigated.[121] The DP Board could have laid down the rules to be respected for digital forensic procedures or refer to either national or international standards of digital forensic; so that the DP Board could have guided the data controllers appropriately. However, the DP Board has failed to lay down an objective criterion for distinguishing occurrence and awareness of a data breach. Notably, such vague decisions, which do not address the technical dimensions adequately, create additional legal and psychological barrier to the notification of breaches.

On the other hand, the DP Board has decided not to impose any administrative fine on a data controller who is operating in the energy sector despite late notification of a data breach.[122] The DP Board has regarded the multi-national structure of the data controller as well as the obstacles in ascertaining and determining the breach notification requirements as legitimate excuses. It is important to note that such inconsistent decisions undermine the principle of equal treatment.

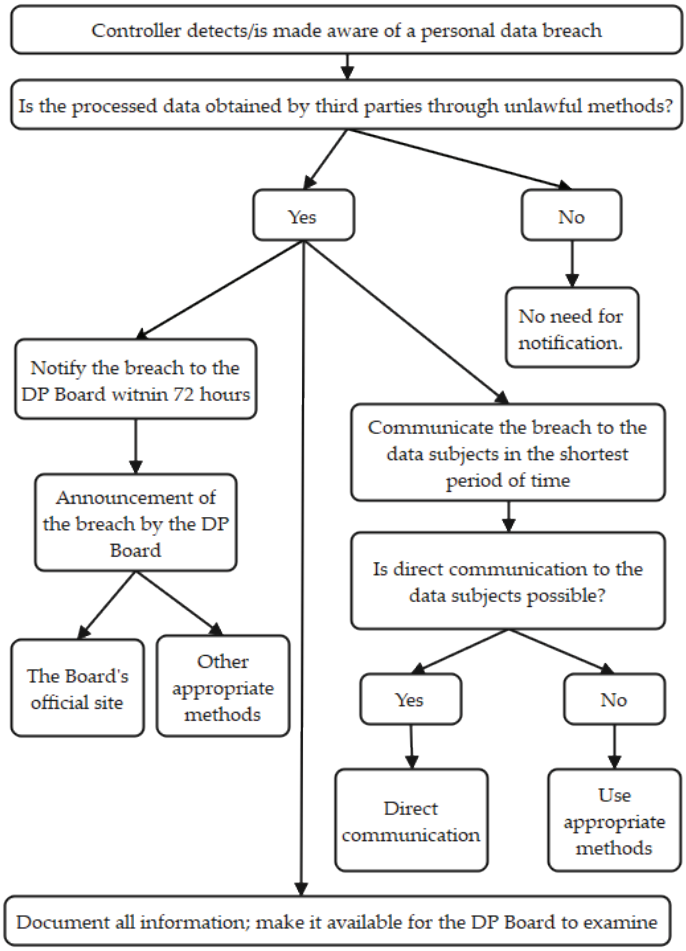
f. The Breach Notification Flowchart

The data breach notification process as per the Turkish DP Law could be summarised as follows:

120 The DP Board, Decision No: 2020/905 Date: 24.11.2020.

121 For a comprehensive review of digital forensics see Grep Gogolin, *Digital Forensics Explained (Second Edition)* (CRC Press 2021).

122 The DP Board, Decision No: 2020/934 Date:08.12.2020.



V. Evaluation of the Findings

The main drawbacks of the DP Law could be categorized under seven groups:

(1) The DP law fails to address all types of security breaches that requires notification

Currently, the DP Law only requires notification of a breach to the data subjects when personal data is obtained by other parties through unlawful methods. To recap, Section 5 of Article 12 is straightforward and only mandates the notification in case the processed data are obtained by third parties through unlawful methods. Hence, there is a need to enhance the normative value of data security under the DP Law by explicitly articulating that confidentiality, integrity, and availability are the fundamental pillars of data security and need to be notified if breached.

(2) The DP Law mandates excessive notification/communication requirements

The GPDR has established its data protection rules and mechanisms based on 'risk'. It is noteworthy that the term 'risk' is articulated seventy-five times throughout the GDPR, including recitals. The Directive 95/46/EC also articulates the term 'risk' throughout eight instances. Under the EU law, the breach notification system is built-up on the risk. The DP Law, on the other hand, does not articulate the term 'risk' within its main text.

Although the GDPR introduces the obligation to notify a breach, it has various exemptions. To recap, notification to the competent supervisory authority is required unless a breach is unlikely to result in a risk to the rights and freedoms of individuals whereas communication of a breach to the individual is only triggered where it is likely to result in a high risk to their rights and freedoms.

Under the GDPR, while every risk requires notification of the breach to the supervisory authority, only high risk necessitates communication to the data subjects. However, under the Turkish Law, though, there is not much distinction or exemption. Data controllers are obliged to notify the DP Board and communicate the breach to the data subjects regardless of the nature or scope of the breach.

When it comes to data breach notification the GDPR builds a rational system. As discussed, under the GDPR, the data controller is exempted from communication if technical, risk-based, or practical grounds justify it. The DP Law, though, does not provide any such exemption.

It is noteworthy that there is a prevailing public interest in disclosing threat. A wise public policy, in this regard, must be the prevention of the problem in the first place. The key policy priority should therefore be to invest in the long-term care of cyber resilience and incentivise the notification of breaches accordingly. The DP Law, though, does not provide any such exemptions for the data controllers.

The obligation to communicate the breach in all cases regardless of the nature and scope of the breach imposes a significant burden on the data controllers. Such burdensome requirements could create psychological barriers to the notification of data breaches. The lack of objective criteria for communication of personal data breach to the data subjects a shortcoming of the Turkish law. The current legal framework and practise fail to protect the data subjects from unnecessary notification fatigue. There is a need to reform the law and limit the instances of notification and communication.[123]

123 For a similar criticism see Çekin (n 112) 112.

(3) The risk of public exposure due to excessive requirements of notification creates a psychological barrier

Due to the requirement to notify and communicate all breach scenarios regardless of the risk, data controllers also bear the risk of being publicised through the publication of the breach on the DP Authority's website. To recap, it could be said that the publication of such a breach is the most drastic sanction of a data breach. These outcomes could create a psychological barrier to the notification of breaches. The motivation to avoid such a public appearance could lead the data controllers to refrain from notification of a breach.

The publication of breaches stigmatises the data controller. Over time, policymakers might consider an institutional "*right to be forgotten*" where entities can legally remove data breach news from online sources.

(4) The time limit of 72-hour notification is too short considering the burden of notification and communication

Almost all data breach incidents need to be reported to the DP Board and communicated to the data subjects. The time limit for the notifications to relevant authorities is 72 hours whereas the very same breach needs to be communicated to data subjects in the shortest reasonable time. The lack of exceptions or exemptions of notification and communication increases the burden of the data controllers.

In this context, late notification is inevitable. However, the late notification or communication is also sanctioned by the DP Board. Considering the consequences of notification such as administrative fines being publicly exposed, the data controllers could refrain from notifying the DP Board. The low numbers of notifications prove the fact that data controllers refrain from a notification.

(5) The ex-officio expansion of investigations to matters not directly related to data breaches give rise to institutional reluctance while notifying a breach

When a data controller notifies a data breach, the DP Board can also expands its investigation into other compliance pillars of the DP Law. For instance, a data controller notifying the DP Board of a security incident related to certain local computers could face a further investigation questioning the international data transfer policy of such company which is not directly related to the security event.

Without a doubt, the DP Board can expand the scope of the investigation ex-officio. However, such exercise of the discretion has indirect consequences. As stated above, the rationale behind the regulation of data breach notification is to prevent or mitigate all adverse effects or damage emanating from a data security incident. This

enables the data subjects to take any remedial measures, e.g., changing passwords and cancelling credit cards. The fear of being under broad scrutiny of the DP Board for the subjects not related to the security incident gives rise to institutional reluctance while notifying a breach. The DP Board's legal but strategically questionable action evolves into a catalyst for burying the evidence.

A breach notification not only serves the parties of the incident but also creates an opportunity for all stakeholders within the data processing community to update their systems since it uncovers the unknown security vulnerabilities, problematic processing methods, or persistent threats. In this regard, any unnecessary burden imposed will undermine the public interest. To promote notification by data controllers, the data breach rules and practice needs to be treated separately. This will increase the number of cases reported and henceforth will maximise the public benefit.

(6) The lack of specific provisions for joint-controllers creates legal uncertainty

The DP Law does not regulate joint-controllers. The lack of a specific provision regulating joint controllers adds another burden on the data controller when they act collectively in a specific processing activity.

(7) The lack of clear methodology for calculating administrative fines is a significant shortcoming

The discretion granted to the DP Board is relatively wide. To disperse the clouds of ambiguity and provide legal certainty, there is an actual need for a secondary regulation to be issued by the DP Authority that lays down the methodology of calculation of administrative fines in case of a data breach.

Notification of breach must be incentivised. How the infringement became known to the data protection supervisory authority, in this regard, must be the key factor in determining the fine. If a data collector or a data processor is fulfilling their legal obligations and cooperating with authorities, fines should be mitigated or altogether removed and replaced with a notice of reprimand to encourage responsible behaviour.[124]

Under the current practice, the data collector is asked to fill the standardized data breach notification form and lay down the technical and organizational measures taken by the data controller before and after the breach. The DP Board, while determining the administrative fine to be levied, takes into account measures taken after the occurrence of the security incident as thresholds while determining the necessary security measures.

124 Eventually, the breach notification is an action of self-disclosure. The outcomes of such notification could lead to administrative, civil, and criminal proceedings. It could be argued that this obligation might be intertwine with or even paradoxical to the general principle of law that no one shall be compelled to make a statement that would incriminate himself/herself or to present such incriminating evidence. For instance see Article 38 of the Turkish Constitution.

Indeed, cyber threats against information security are evolving rapidly and threat agents are also diversifying.[125] Agents such as attackers, bot-network operators, criminal groups, foreign intelligence services, insiders, phishers, spammers, spyware/malware authors, terrorists, and industrial spies target entities by using tools at varying sophistication levels. A major vulnerability could remain undetected for years. The level of protection needs to adjust regularly in accordance with the risks to the information security posed by internal and external threats. It is natural to adopt an unusually high-level security measure after an unprecedented attack. Therefore, the measures taken during extraordinary periods should not be taken as the threshold of liability.

Conclusion

Cyber threats against information systems are evolving rapidly and the threat agents are also transforming. Security breaches are regarded as one of the most serious risks and no entity is immune from a security breach.[126] An average term to diagnose and analyse a data breach is predicted to be 280 days.[127] In this context, there is a silent war between entities and attackers. Furthermore, cyber activities have likewise become "*an integral part of international relations*".[128]

Sustaining the most viable security level without hindering the momentum of digitalisation is a truly complicated task. As rightfully pointed out by Sharma:

> "*It is ironic that hackers and other threats to personal data are the driving force of data protection and cyber-security growth. As cyber-security mechanisms become tougher, hacking practices become more intensive. This creates a continuous cycle, where companies are unaware of how vulnerable their data is until the worst scenario occurs.*"[129]

Nevertheless, regulations worldwide drive entities to make major investments to ensure the most viable protection of their information systems.[130] Companies invest into cutting-edge technologies for maintaining information security. For that purpose, artificial intelligence-based tools are being deployed for detecting insider data leaks.

125 CISA, '*Cyber Threat Source Descriptions*' https://ics-cert.us-cert.gov/content/cyber-threat-source-descriptions [accessed 1 March 2021].

126 For instance, '*United Nations data breach exposed over 100k UNEP staff records*' https://www.bleepingcomputer.com/news/security/united-nations-data-breach-exposed-over-100k-unep-staff-records/ [accessed 1 March 2021].

127 IBM, '*Cost of a Data Breach Report 2020*' https://www.ibm.com/security/digital-assets/cost-data-breach-report/ [accessed 1 March 2021].

128 The German Federal Government, '*On the Application of International Law in Cyberspace Position Paper*' https://www.auswaertiges-amt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyberspace-data.pdf [accessed 1 March 2021].

129 Sharma (n 81) 94.

130 According to a study, %77 of the entities who have made investment for boosting their cyber security considers the driving factor of such action as regulations. See, TÜSİAD, '*2020 Türkiye Siber Risk Algı Araştırması*' https://tusiad.org/tr/yayinlar/raporlar/item/download/9428_0ff86134737e19b44a7425cb059f44f8 [accessed 1 March 2021] 2.

However, this kind of practices lead to massive employee surveillance. Drawing the boundary between the legitimate interests of data controllers and the privacy of workers and establishing balance is a quite complex task.

A security breach can compel the data controller to notify the breach to the competent supervisory authority and communicate all facts to the data subjects. As discussed, the underlying aim of this obligation is to prevent or mitigate all adverse effects or damage deriving from a data breach incident.

The EU, in this regard, with its pioneer legislation, i.e., the GDPR, comes forward. As explored in-depth, the data protection eco-system constituted by the GDPR stands on six pillars: coherent rules, simplified procedures, coordinated actions, user involvement, more effective information, and stronger enforcement powers.[131] The GDPR creates a balanced breach notification mechanism. Under the EU law, while every risk requires notification of the breach to the supervisory authority, only high risk necessitates communication to the data subjects. There are also certain exemptions and exceptions to these rules.

In the same way, the most prominent innovation of the Convention 108+ is the obligation to uncover data breaches and the requirement to notify, without delay, any security breaches to the competent authorities. The Convention 108+ also narrows the data breach notification to cases that may seriously interfere with the rights and fundamental freedoms of data subjects, which should be notified.

The Turkish DP Law is mostly modelled after the Directive 95/46/EC with substantial inspiration from the GDPR. The legal framework is tailored up in accordance with the Turkish political and social contexts. There are similarities, even identical provisions with the EU law at as much as there are substantial deviations from the acquis. The shortcomings of the DP Law could be summarised as follows:

(1) The DP law fails to address all types of security breaches that requires notification

(2) The DP Law mandates excessive notification/communication requirements

(3) The risk of public exposure due to excessive requirements of notification creates a psychological barrier to reporting

(4) The time limit of 72 hours notification is too short considering the burden of notification and communication

(5) The ex-officio expansion of investigations to matters not directly related to data breaches give rise to institutional reluctance while notifying a breach

131 The WP29 '*Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679*' (n 71) 4.

(6) The lack of specific provisions for joint-controllers creates legal uncertainty

(7) The lack of clear methodology for calculating or enforcing administrative fines is a significant shortcoming

Cyber-attacks and threats targeting data processing systems are also targeting the Turkish network and information realm. While Turkey suffers from cyber-attacks, it has a low number of data breach notifications. Based on the statistics and decisions of the DP Board, the present legal framework leads to a situation that could be called as "*notification-phobia*".

While information security incidents take place in Turkey, these data breaches are not reported adequately. The data controllers chose to bury pieces of evidence due to the burdensome design of the legal framework, the fear of being heavily sanctioned, and the risk of being stigmatised due to publication of the incident in all public mediums. The DP Law leads to a dilemma: self-disclosure or burying the evidence.

The Turkish government has the political target of adopting the EU's data protection norms. Having similar rules and practice is beneficial for both Turkey and the EU considering the cross-border nature of the cyber threats and the close social and economic ties between Turkey and the EU accordingly.

The problem that has become increasingly obvious is that strict and burdensome data breach notification rules do not serve the overall protection of data protection of individuals as data controllers could refrain from notification and bury the pieces of evidence. Such notification-phobia is a major threat to the overall cybersecurity realm. There is a need for balanced rules and adequate accountability tools which would encourage data controllers to disclose any data breach incidents without reluctance.

Sharing information will not extinguish cyber threats but will considerably decrease their effect.[132] As discussed earlier, a major vulnerability could remain undetected for years. Knowing the presence of the virus, its origin, variations, and potential effects are fundamental for preventing infection to evolve into a pandemic. There is a prevailing public interest in disclosing threats. A wise public policy, in this regard, must be the prevention of the problem in the first place. Accordingly, the breach notification must be incentivised in order to strengthen Turkey's overall cyber resilience.

132 Centre for Maritime Law, '*Maritime Industry: Cyber-Risk & Security*' https://cmlnluo.law.blog/2020/01/05/maritime-industry-cyber-risk-security/ [accessed 1 March 2021].

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Significance And Utility of the Rules of Treaty Interpretation, as Encapsulated in the 1969 Vienna Convention on the Law of Treaties, for the Purpose of Ascertaining the Meaning of Treaty Provisions

Antlaşma Hükümlerinin Anlamını Tespit Etmek Amacıyla, 1969 Viyana Antlaşmalar Hukuku Sözleşmesi'nde Özetlendiği Şekliyle, Antlaşma Yorumlama Kurallarının Önemi ve Faydası

Zora Kızılyürek*

Abstract
The interpretation of treaties is a complicated and problematic question at times. It is vital to interpret the law accurately in order to ascertain the correct meaning of treaty provisions and terms to provide a precise application. Consequently, rules of treaty interpretation play a significant role in purpose of finding distinct meaning of treaty provisions which is critical for both in the implementation stage and in mending any disputes afterwards. The aim of the treaty interpretation rules included in the 1969 Vienna Convention on the Law of Treaties (VCLT) is to bring precision and transparency to the agreements between member states. Therefore, in this paper the significance and the utility of the rules of treaty interpretation set in the 1969 Vienna Convention will be considered. This will be done by briefly considering the background of the convention. Then the rules of interpretation laid in article 31-33 such as ordinary meaning, context, purpose and object will be analysed. Additionally, the usefulness of these articles will be critically analysed with adequately supported legal opinions and a broad use of case law. This paper will claim that the rules of treaty interpretation of the VCLT is an extremely important tool in the interpretation of treaties.

Keywords
1969 Vienna Convention, Law of Treaties, Treaty interpretation, article 31, 32 and 33, interpretation rules

Öz
Antlaşmaların yorumlanması meselesi karmaşık ve sorunludur. Kesin bir uygulama sağlamak üzere antlaşma hükümlerinin ve şartlarının doğru anlamını tespit etmek için kanunu doğru yorumlamak çok önemlidir. Sonuç olarak, antlaşma yorumlama kuralları hem uygulama aşamasında hem de sonrasında herhangi bir anlaşmazlığın giderilmesinde kritik olan anlaşma hükümlerinin doğru anlamını bulma bakımından önemli bir rol oynamaktadır. VCLT'ye dahil edilen anlaşma yorumlama kurallarının amacı, üye devletler arasındaki anlaşmalara kesinlik ve şeffaflık getirmektir. Bu nedenle, bu makalede, 1969 Viyana Sözleşmesinde belirlenen antlaşma yorumlama kurallarının önemi ve faydası ele alınacaktır. Bu, Viyana antlaşmasının arka planı kısaca dikkate alarak yapılacaktır. Daha sonra olağan anlam, bağlam ve amaç gibi 31-33. maddelerde ortaya konan yorum kuralları incelenecektir. Ek olarak, bu maddelerin yararı, yeterince desteklenen hukuki görüşler ve geniş bir içtihat hukuku kullanımıyla eleştirel bir şekilde analiz edilecektir. Makale, VCLT'nin antlaşma yorumlama kurallarının antlaşmaların yorumlanmasında yararlı olduğunu savunacaktır.

Anahtar Kelimeler
1969 Viyana Sözleşmesi, Antlaşmalar Hukuku, Antlaşmanın yorumlanması, madde 31, 32 ve 33, yorumlama kuralları

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The significance and utility of the rules of treaty interpretation, as encapsulated in the 1969 Vienna Convention on the Law of Treaties, for the purpose of ascertaining the meaning of treaty provisions

I. Introduction

As Lord McNair quoted, *"there is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation"*.[1] Finding the meaning of a treaty provision is vital in understanding and applying the law. The Vienna Convention on the Law of Treaties is one of the core tools that states today are using to cooperate in international relations.[2] This tool aims to bring precision and transparency to the agreements between member states. The rules on interpretation are found in article 31, 32 and 33 of the Convention.[3] The article 31 serves the purpose of providing the general rules of interpretation. The article 32 is the supplementary tool in the application of interpretation rules. The last one, article 33, regulates rules which apply to treaties which are written in two or more languages.[4]

II. Brief background of the treaty

The Vienna Convention on the Law of Treaties is an established scheme governing interrelationship of various rules of international law aiming to secure coherence and legal certainty.[5] The convention only applies to treaties, which are written agreements, ruled by international law, [6] [7] and addresses questions such as application, withdrawal, validity, treaty formation, reservations and notably interpretation where the focus of this paper is. The significance of the rules of treaty interpretation derives from their very direct link to the enforcement of international law.[8] Sovereign states are bound by the treaties they sign, and the interpretation rules have a utility to give effect to those treaties through interpreting them.[9] Further, their significance is demonstrated in the fact that the VCLT grants a jurisdiction to the International Court of Justice to rule on cases where disputes arise due to the treaty interpretation rules.[10] This treaty applies to international agreements between two or more states which are governed by international law, whether it is embodied in a single instrument or in two or more related instruments.

1 Plaintiff M70/2011/Plaintiff M106 of 2011 v Minister for Immigration and Citizenship

2 The Vienna Convention on the Law of Treaties

3 The Vienna Convention on the Law of Treaties article 31, 32 and 33

4 Ibid.

5 Philippe Sands, Treaty, Custom and the Cross-fertilization of International Law, 1 Yale Hum. Rts. & Dev. L.J. (1998).

6 The Vienna Convention on the Law of Treaties article 2(1)(a)

7 Koowarta v Bjelke-Petersen (1982) 153 CLR 168

8 Cassese, Antonio, 2001. International Law, Oxford University Press, Oxford. P. 126

9 Sangroula, Yubaraj, International Treaties: Features and Importance from International Law Perspective (January 10, 2010). Available at SSRN: https://ssrn.com/abstract=2359978 or http://dx.doi.org/10.2139/ssrn.2359978

10 Bauer P, The Vienna Convention on the Law of Treaties, Encyclopaedia Britannica, (May 16, 2020), Available at <https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties>

III. Roles of article 31, 32 and 33 of the VCLT

The rules of treaty interpretation are encapsulated in article 31-33 of the VCLT. [11] As stated in *the Guinea-Bissau v. Senegal*, the correct methods on the interpretation of international customary law are codified under Article 31 and 32.[12] If the wording of a treaty is clear, it is regulated under article 31 with general rules of interpretation .[13] If the wording is ambiguous, it is interpreted with supplementary provision of article 32 which includes a subjective element, a discretion of the interpreter.[14] Article 33 on the other hand focuses on treaties authenticated in different languages.[15]

IIII. Application of ordinary meaning under article 31

Article 31 states that a treaty has to be interpreted in ordinary meaning of the terms, in good faith and within their context, purpose and object. [1617] It further clarifies that where the wording of a treaty is clear there is an automatic application of article 31.[18] The utility of this rule is to reflect parties' intention primarily through ascertaining the ordinary meaning of the treaty provisions.[19] The 'ordinary meaning' is illustrated in the case of *La Bretagne* where a dispute arose relating to the ordinary meaning of the word 'fishing regulations'. Gardiner argues that ordinary meaning cannot be divorced from the context as they are immediately and intimately linked with the context.[20] However, in this case the meaning has evolved since the time the agreement was concluded between parties thus leading to a dispute in ascertaining the meaning of the word.[21] Thus as *Linderfalk* debated, interpretation rules may not always serve function as it lacks to specify whether the ordinary meaning of the word will be considered at the stage of concluding or interpreting the agreement.[22] The words used in a treaty must reflect the intention of both parties and not what one negotiating party's intention alone.

11 The VCLT articles 31,32 and 33

12 Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) 14 February 1985 (1985) 77 ILR 636. *(I.C.J. Reports 1991*, pp. 69-70, para. 48). Available at < https://jusmundi.com/en/document/decision/en-arbitral-award-of-31-july-1989-guinea-bissau-v-senegal-judgment-tuesday-12th-november-1991>

13 The VCLT article 31

14 Ibid.

15 The VCLT article 33

16 Article 31(2) of the Vienna Convention on the Law of Treaties: context is restricted to preamble and annexes of the treaty

17 The Vienna Convention on the Law of Treaties article 31(1)

18 Merrills, J. (1971). Two Approaches to Treaty Interpretation. The Australian Yearbook of International Law Online. 4. 55-82. 10.1163/26660229-004-01-900000005.

19 Namibia [1970] ICJ Rep 1971 16

20 Richard Gardiner. 'Treaty Interpretation'**.** Oxford: Oxford University Press, 2008. Pp. 165-176

21 'La Bretagne', Canada v France, Award, 17 July 1986 (1986) 82 ILR 591.

22 Ulf Linderfalk, Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making, *European Journal of International Law*, Volume 26, Issue 1, February 2015, Pages 169–189, https://doi.org/10.1093/ejil/chv008

V. 'Special' meaning under article 31

Additionally, paragraph 4 states that ordinary meaning can be departed from and 'special' meaning can be given to words, if parties intended it.[23] 'Special meaning includes a discretionary element when it comes to interpreting it. *Brownlie* stresses that this rule is too general and contradictory.[24] He emphasises that it leaves a high degree of freedom to the interpreters to establish intentions of the parties in giving a meaning to a word departed from its ordinary meaning.[25] However, in ascertaining special meaning, interpreters shall take into account any treaties, instruments, subsequent practice, agreements, state of affairs and relevant rules. [2627] This shows that the article is not narrowly drawn and there are various requirements to take into an account in interpreting. Consequently, as *Orakhelashvili* underlines, the interpreter has not got a freedom to interpret as spontaneously as s/he likes, and the rules of treaty interpretation are set.[28] The aim of interpretation is to find the exact meaning of words parties has agreed when entering into an agreement which could be words which are not given ordinary meaning by the parties.[29]

VI. Interpretation within the context under article 31

One of the other requirements of the article 31 is the context of a treaty while using the interpretation rules of the VCLT which is illustrated in the case of *El Greco Ltd v Mediterranean Shipping Co.* by *Allsop J*. He declared that if the piece of legislation giving effect to a treaty used the words from that particular treaty, then the legislation should be interpreted in the context of the words used in that treaty.[30] As *Brennan CJ* added, 'the treaty interpretation is a holistic exercise' therefore, words should be interpreted within their context.[31] A context would also include annexes or other agreements between parties.[32] Art 31(3) states that 'There shall be taken into account, together with the context...(c) any relevant rules of international law applicable in the relations between the parties.'[33] Reading this provision in line with art 31(2), it shows that the treaty has to be interpreted in a broad perspective of international law and not in a narrow manner. In the case of *Oil Platforms (Islamic Republic of Iran v United*

23 Ress, 'The Interpretation of the Charter', in B. Simma (ed.), The Charter of the United Nations: A Commentary, (1994) 25, at 30

24 I. Brownlie, Principles of Public International Law (6th edn, 2003), at 602.

25 Gabcikovo-Nagymaros [1977] ICJ Rep 7

26 Ibid. Art 31, para 3(b) applied in Y Le Bouthillier in Corten and Klein MN 43–44

27 ibid., Art. 31, para. 3(c)

28 Alexander Orakhelashvili. *The Interpretation of Acts and Rules in Public International Law*. Oxford: Oxford University Press, 2008.

29 Ibid.

30 El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA (2004) 140 FCR 296

31 Minister for Immigration & Ethnic Affairs v Teoh (1997) 190 CLR 225, Brennan CJ agreeing with McHugh J

32 The Vienna Convention on the Law of Treaties article 31(2)

33 The Vienna Convention on the Law of Treaties article 31(3)

States of America), the International Court of Justice found jurisdiction relating to a use of force on oil platforms, by applying a provision of another treaty between two states.[34] The significance of the rules of treaty interpretation are the comprehensive interpretation approach and a very broad application it has.

VII. Object of the parties in ascertaining the meaning under article 31

Considering the purpose requirement of article 31(1), a treaty should be interpreted in the light of its object and purpose.[35] The utility of this rule is to give full effect to the treaty and find the purpose and objective of parties.[36] As *Waldock* reasonably expressed, the impact of these treaty interpretation rules is that these requirements may create floodgates of vast interpretation.[37] *Van Damme* however debates that these rules provide logic and order to a certain extent as the purpose and object of parties play a crucial role in ascertaining a meaning of a treaty. These requirements can be seen as a burden on the interpreter as well as an empowerment.[38] This is a great example which shows the significance of the rules of treaty interpretation of the VCLT as the role of an interpreter's understanding can be critical in application of these rules. Nevertheless, there are certain decisions such as *Jones v Saudi Arabia* where the House of Lords interpreted the Torture Convention in a narrow manner, showing that purpose and object requirement do not necessarily open flood gates. [39]

VIII. Article 32 and its supplementary application

Examining the next important article, article 32 deals with the use of supplementary means of treaty interpretation in relation to article 31.[40] It is used if the wording is ambiguous, hence why it includes wider discretion of the interpreter and a broader subjective element compared to article 31.[41]As decided in the *Qatar v Bahrain case,* the fundamental concern of this provision is the materials and information which can be used for interpretation such as preparatory work or the occurrences of its conclusion. [42] The preparation stage or other circumstances which led to the conclusion of treaties can play a critical role in interpreting intentions of the parties.[43]

34 Oil Platforms (Islamic Republic of Iran v United States of America) [2003] ICJ 4 at [41]-[45]

35 Cf. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *BYBIL* (1949) 284

36 The Island of Palmas Case (Scott, Hague Court Reports 2d 83 (1932)

37 Third Report of the Special Rapporteur, Sir Humphrey Waldock (Sixteenth Session of the ILC (1964)), Doc. A/CN.4/167 and Add.1-3, ILC Yb. 1964, II, 5, at 60–61

38 Isabelle Van Damme. Treaty Interpretation by the WTO Appellate Body. Oxford: Oxford University Press, 2009.

39 Jones v. Ministry of Interior of the Kingdom of Saudi Arabia. Case No. [2006] UKHL 26.

40 Dörr, Oliver & Schmalenbach, Kirsten. (2012). 'Article 32. Supplementary means of interpretation'. 10.1007/978-3-642-19291-3_35.

41 Ibid.

42 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) 1994/2

43 Navigational and Related Rights [2009] ICJ Rep 213

Therefore, this rule of treaty interpretation is significant as it provides flexibility in ascertaining the meaning of treaty provisions. On the other hand, as *Gardiner* highlights, this rule does not produce a formula to create an irrebuttable interpretation or provide a scientifically proven result.[44] This is due to the complexity such wide discretion may create which would amount certain disputes to be left unresolved due to the lack of objectivity.

VIIII. General application vs. supplementary application

In analysis of the utility of these two rules, *Linderfalk* states that their usefulness is impeded by the confusion they generate through creating a wide range of opinions in regard to their normative content.[45] *Rosenne* further stresses that these rules are too general, subsidiary and not structured in a hierarchical way.[46] Arguing a contrary view, the rules are specified in their functionality and there is a clear general versus supplementary application. For example, article 31 starts as 'the treaty shall be interpreted' which shows a mandatory use of language. On the other hand, article 32 states 'may be had to supplementary means' which is not compulsory and only supplementary therefore the interpreter has a choice to use it.[47] The significance of these rules are the useful direction they give in determining how to interpret a treaty and a clear set of roles each rule has. The convention overall is based on a textual approach and not on an interpretation approach. Hence why article 31 primarily sets general rules of application whereas article 32 has a supplementary role. The supplementary nature of this article derives from the need to ensure that predatory work is not used as an alternative, distinct from general rules of article 31 but rather a supporting tool.[48]

X. Article 33 and its role in interpreting treaties written in more than one language

The final treaty interpretation rule to consider is article 33 which regulates the interpretation of treaties in two or more languages. *Fernandez* explains that language is an element of sovereignty that a state can express itself through.[49] Therefore, disagreements on interpretations can occur in texts of the treaty with different languages.[50] The utility of article 33 is to resolve these disputes. The implication

44 Richard Gardiner. 'Treaty Interpretation'**.** Oxford: Oxford University Press, 2008. Pp. 165-176

45 Linderfalk U, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation (2007) 54 Netherlands international law review 133

46 S Rosenne, Developments in the Law of Treaties (1945-1986) (CUP, Cambridge 1989) 182-83.

47 R Gardiner, Treaty Interpretation (OUP, Oxford 2008) 120.

48 Y Le Bouthillier in Corten/Klein Art 32 MN 32–38. The traditional doctrinal controversy on the use of preparatory work (1971) 11 IJIL 39, 3957.

49 Carlos Fernández de Casadevante Romani. *Sovereignty and Interpretation of Inter- national Norms*. Berlin: Springer, 2007

50 Ibid.

of this rules is considering the object and purpose of the treaty to ascertain which text reconciles the most.[51] In the case of *Habsburg-Lorraine House v The Polish State Treasury*, the court ascertained the meaning of the treaty by comparing different texts.[52]

XI. Importance of treaty interpretation rules

The importance of the rules of treaty interpretation is, it is widely used in international courts. *Fitzmaurice* views treaty interpretation rules captured in the VCLT as being multifaceted.[53] The rules contain wide-ranging interpretative principles, correspondingly give broad powers of interpretation to international courts and tribunals.[54] Different courts use interpretation rules differently.[55] For example, the ICJ and WTO's Appellate Body treat these rules as general or customary international law.[56] On the contrary, the European Court of Human Rights and CJEU rely on dynamic interpretation distinguishing it from the convention's textual approach.[57] For example in the case of *Soering v the United Kingdom* concerning the abolishment of death penalty, the ECtHR ruled that 'the convention is a living instrument which must be interpreted in a manner consistent with today's understanding of justice standards'.[58] Whereas *the Chicken Cuts* case where the WTO's Appellate Body used the textual approach to settle the dispute .[59] Hence this shows the significance and utility of these rules as they can be broadly applied in different international courts, in a multi-dimensional level to respond to diverse needs of treaty interpretation.[60]

XII. Conclusion

In conclusion, as Kolb said, international law is law in action which develops constantly.[61] The VCLT plays a significant role in balancing the need to provide legal certainty to law and a need for flexibility in interpreting treaties which can be incomplete and lacking precision. The rules of treaty interpretation in the VCLT provides a certain set of standards such as interpreting words in their ordinary

51 VCLT Article 33 (4)

52 Annual Digest of International Law Cases, 1929-1930, case No. 235.

53 Gerald Fitzmaurice, Vae Victis or Woe to the Negotiator? Your Treaty or Our Interpretation of It, 65 AJIL 358, 370 (1971)

54 Richard Gardiner. 'Treaty Interpretation'**.** Oxford: Oxford University Press, 2008. Pp. 165-176

55 Richard Gardiner. 'Treaty Interpretation'**.** Oxford: Oxford University Press, 2008. Pp. 165-176

56 Fitzmaurice reviews Treaty Interpretation by Richard Gardiner and On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties by Ulf Linderfalk.

57 The Court of Justice of the European Union, Koen Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) 41(4) The International Lawyer at 1011–32.

58 Soering v United Kingdom 161 Eur. Ct. H.R. (ser. A) (1989)

59 WTO Appellate Body EC – Customs Classification of Frozen Boneless Chicken Cuts WT/DS269/AB/R (2005), paras 282–309.

60 Malgosia Fitzmaurice, Dynamic Interpretation of Treaties, Part I, 2008 HAGUE Y.B. INT'L L. 101.

61 Robert Kolb. Interpretation and creation of international law. Outline of a Modern Legal Hermeneutics for Public International Law. Brussels: Bruylant, 2006. Pp. 959

meaning as well as flexible rules such as supplementary rules to interpret words broadly. There is a good balance in this two-stage process considering the textual approach the VCLT has. The main focus is the ordinary meaning of words, yet there is a flexibility. In applying article 31(4) or article 32, interpreters may have too much discretion to ascertain meaning of the treaties. This could lead to uncertainty and complexity due to the subjective element of interpretation. As discussed above some scholars may doubt the extent of utility these rules have as sometimes giving ordinary meaning to words may also lead to confusion. However, in general these rules play a significant role to bring precision to the meaning of treaties thus strengthening international cooperation. Their utility is further illustrated in the fact that they can be enforced broadly both in respect of different executive agencies and the level of freedom there is in the interpretation methods.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Impact of the Seat of Arbitration on Judicial-Interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 regarding Challenges of Awards Make London An Attractive Hub?

"Tahkim Yerinin, Müdahale Etmeme İlkesi Üzerindeki Rolü: Hakem Kararlarına Karşı Kanun Yoluna İlişkin 1996 tarihli İngiliz Tahkim Kanunu 67, 68 ve 69. Bölümler Londra'nın Cazip Bir Tahkim Merkezi Olmasını Sağlıyor Mu?"

Fulya Teomete Yalabık*

Abstract

There are various determinants that induce London to be the favourable seat. In this regard, the grounds for challenging an award have some severe implications on determining London as the arbitral seat.[1]

Arbitrations with a London seat are exercised under the 'supervisory jurisdiction'[2] of the English courts and the Arbitration Act 1996 (AA 1996).[3] That is to say, any challenge to an interim or final award made by the arbitrators may be fulfilled in the courts of the location chosen as the arbitral seat.

The consensual nature of international arbitration depends on certain core principles such as party autonomy, judicial non-intervention and finality of the arbitral awards. Nonetheless, the binding aspect of the arbitral award and its enforceability akin to that of final judgements of national courts necessitate some "balanced" degree of judicial supervision.[4]

Keywords

English Arbitration Act, Arbitral seat, challenging an award, judicial non-intervention, finality

Öz

Londra'yı tercih edilen bir tahkim yeri haline getiren çeşitli belirleyiciler söz konusudur. Bu bağlamda, hakem kararlarına karşı kanun yoluna başvuru sebeplerinin, Londra'nın tahkim yeri olarak belirlenmesinde bazı önemli etkileri vardır.

Tahkim yerinin Londra olarak belirlendiği tahkimler İngiliz mahkemelerinin 'denetleyici yetkisi' ve 1996 tarihli Tahkim Kanunu'nun kapsamında icra edilmektedir. Yani, hakemlerin ara veya nihai kararlarına yönelik kanun yolu başvurularında tahkim yeri olarak belirlenen yer mahkemeleri yetkili olmaktadır.

Uluslararası tahkimin rızaya dayalı doğası, taraf özerkliği, yargıya müdahale etmeme ve hakem kararlarının kesinliği gibi bazı temel ilkelere bağlıdır. Bununla birlikte, hakem kararının bağlayıcı yönü ve ulusal mahkemelerin nihai kararlarına benzer şekilde icra edilmeleri, "dengeli" bir şekilde uygulanacak bir yargı denetiminin varlığını gerektirmektedir.

Anahtar Kelimeler

İngiliz Tahkim Kanunu, Tahkim yeri, hakem kararına karşı kanun yoluna başvuru, yargılamaya müdahale etmeme ilkesi, kesinlik

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1 Susan Blake, Julie Browne, Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th edn, OUP 2018) 484.
2 *C v D* [2008] Bus LR 843.
3 Blake, Browne, Sime (n 1) 483.
4 Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration-A Case for an Efficient System of Judicial Review' (2011) 28 (6) Journal of International Arbitration 533.

The Impact of the Seat of Arbitration on Judicial-Interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 regarding Challenges of Awards Make London An Attractive Hub?

Introduction

The seat of an arbitration is the juridical link of the arbitration process, in other words, "the jurisdiction in which an arbitration takes place legally."[5] It differs from the venue, which correlates to the geographical location in which the arbitration proceedings occur.[6] Despite the distinctness, since the seat and venue are tied closely, when there is no choice about the seat in the arbitration agreement, the venue becomes an important element in designating the jurisdiction of the applicable court.[7]

Arbitrations with a London seat are exercised under the 'supervisory jurisdiction'[8] of the English courts and the Arbitration Act 1996 (AA 1996).[9] That is to say, any challenge to an interim or final award made by the arbitrators may be fulfilled in the courts of the location chosen as the arbitral seat.[10]

Currently, London performs the most preferred seat role for international arbitration worldwide.[11] London's reputation derives from the foundation of the AA 1996, which is modern, arbitration-friendly legislation.[12] Thereby, there are various determinants that conduce London to be a pre-eminent hub. This article identifies the characteristics of London's attractiveness as the seat of arbitration in general. Then, the article particularly focuses on the importance and effect of the grounds on which

5 Simon Greenberg, Christopher Kee, Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011) 54. There must be a country whose duty is to supervise, or decide what control there should be over an arbitration, *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 2 All ER (Comm) 493.

6 Greenberg, Kee, Weeramantry (n 5) 54.

7 Phillip Capper, Dipen Sabharwal, Clare Connellan, 'When is the 'Venue' of an Arbitration its 'Seat'?, Kluwer Arbitration Blog (November 25, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/> (accessed 15.07.2021); Gonzalo Vial and Francisco Blavi, 'New Ideas for the Old Expectation of Becoming an Attractive Arbitral Seat' (2016) 25 Transnational Law & Contemporary Problems 279, 281; *Shashoua and ors v Sharma* [2009] EWHC 957 (Comm).

8 *C v D* [2008] Bus LR 843.

9 Blake, Browne, Sime (n 1) 483.

10 ibid 484.

11 2018 Queen Mary University of London, White & Case International Arbitration Survey: The Evolution of International Arbitration, <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> 9; see also 2021 International Arbitration Survey: Adapting arbitration to a changing world, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (accessed 15.07.2021). According to the 2021 Survey, London once again is selected as the most preferred arbitral seat. However, London was selected by 64% of respondents in 2018, it dropped to 54% in this new Survey. One of the significant reasons for this drop may be because London was not selected as the most preferred seat for respondents in Asia-Pacific. Asia-Pacific, both Singapore and Hong Kong surpassed London by a margin of 20%. This shows that regional seats such as Singapore and Hong Kong are growing in reputation and popularity and upset the balances in the arbitration map. Nevertheless, this growing success of Asia-Pacific has not had a strong effect of defeating London's robust reputation as the most preferred seat.

12 Vial and Blavi (n 7) 290; Julian Lew, 'London' in Michael Ostrove, Cladia Salomon, Bette Shifman (eds), *Choice of Venue in International Arbitration* (OUP 2014) 242.

an award can be challenged under the AA 1996. In this regard, the effects of AA 1996 article 67, 68 and 69on the attractiveness of London as the seat are analysed.

Following a brief introduction, in the first chapter, the importance of the arbitral seat is examined. Secondly, the reasons why London is chosen as a preferred hub are discussed. Lastly, the effects of grounds of challenging an award in the selection of London as the seat are elaborated.

I. The Importance of the Arbitral Seat

The arbitral seat has essential legal and practical consequences that can substantially change the progress and result of the arbitral process for the parties in international arbitration.[13] The choice of the seat is critical for the parties[14] primarily because it decides the *lex arbitri*, or the law of the place where the arbitration is to occur, and this grants the related courts supervisory jurisdiction over the proceedings.[15]

The seat will also determine the extent to which the national court will promote or interfere in the arbitration procedure.[16] Some countries have legislations that restrain party autonomy concerning the procedure and recognize the courts' intervention in the arbitral process. On the other hand, some other countries have rather permissive national laws that tolerate the parties' extensive procedural autonomy and limit intervention by the courts. It is an indicator of the effective reinforcement for the arbitration procedure in relevant countries.[17]

In principle, the courts of the arbitral seat are empowered to receive and decide upon appeals of arbitration awards so that the extent to which an arbitral award may be challenged will be decided in accordance with the arbitral seat. Besides this, the ambit of the entitled parties to apply for the judicial review will be determined by the selection of jurisdiction. These aspects will guide the degree to which an award is presumed to be final.[18]

The degree of the limitation on the grounds of challenging an award may change from country to country, and also in some countries the challenge of the award is

13 Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, (3th edn, Wolters Kluwer International 2010) 2052; Peter Turner and Reza Mohtashami, *A Guide to LCIA Arbitration Rules* (OUP 2009) 114-115.

14 Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) chapter 3.

15 Capper Sabharwal, Connellan (n 7); David Hesse, 'The Seat of Arbitration is Important. It's That Simple.', Kluwer Arbitration Blog, (June 10, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/> (accessed 15.07.2021); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, (Kluwer Law International 2012) 170; Hakeem Seriki, 'Enforcing Annulled Arbitral Awards: Can the Unruly Horse Be Tamed?' (2018) 8 Journal of Business Law 679, 683.

16 Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 Int Comp Law Q 517.

17 ibid.

18 ibid.

provided on errors of law.[19] In sum, the grounds for annulling arbitral awards are established in the national arbitration laws of the seat[20], and the degree and extent to which judicial review would be available to parties will be based on those same laws[21] and the national court's approach towards international arbitration. Moreover, national courts could influence the quickness and costs of the proceedings because they might be involved at a certain level in points like the selection, challenge, removal and appointment of arbitrators.[22]

The recognition and enforcement of an arbitral award will also be affected by the choice of the seat. The seat will be directly significant in identifying whether an award is a 'New York Convention award' or not, which will necessarily determine whether an award has mutual recognition and enforcement in other countries.[23]

Besides, the selection of the seat will have an impact on the accessibility of the venue to the parties of the arbitration and the infrastructure providing the support to conduct the arbitration process easily and properly.

The consequences arising from the choice of the arbitral seat transform the decision into one of the most crucial elements of any international agreement,[24] pressuring the parties to designate the arbitral seat attentively.[25] Selecting a specific seat designates matters that probably alter the outcome of arbitration: the recognition and enforcement of arbitral awards, the courts with supervisory jurisdiction over the arbitration, and the costs of the procedure.[26] In other words, the arbitral seat directly influences the prospect of an effective arbitration process and outcome. A poor choice could produce unenforceable awards; an extensive review of international arbitral awards is more likely invalidated; court's undue interference costs further expenditure and time. For these reasons, seat selection is essential and determinative of the outcome.[27]

According to the 2018 Survey on International Arbitration by the Queen Mary University of London, the most crucial considerations for preferred seats were their 'general reputation and recognition', the 'neutrality and impartiality of the local legal

19 Gonzalo Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' (2017) 50(2) International Lawyer 329, 330; William Kirtley, The Importance of the Seat of Arbitration, International Arbitration Attorney Network (February 8, 2016), <https://www.international-arbitration-attorney.com/importance-seat-arbitration/> (accessed 15.07.2021).

20 Teresa Giovannini, 'The Making and Enforcement of Arbitral Award: What are the Grounds on Which Awards Are Most Often Set Aside?' (2001) 1 Business Law International 115.

21 Vial (n 19) 331.

22 ibid.

23 Turner and Mohtashami (n 13) 114-115.

24 Born (n 13) 64.

25 Capper, Sabharwal, Connellan (n 7); Vial (n 19) 329.

26 Vial (n 19) 332.

27 ibid 332-3.

system', 'the national arbitration laws', 'the track record of enforcing agreements to arbitrate' and 'arbitral awards'.[28] The last three arguments indicate that arbitration users will favour a particular seat if the legal mechanism furnishes them with sufficient guarantees. For example, objective and impartial treatment by courts and a smooth recourse to arbitration are regarded as satisfactory.[29]

In parallel with the 2018 Survey, in the recent 2021 Survey on International arbitration, the most important considerations were 'greater support for arbitration by local courts and judiciary', 'increased neutrality and impartiality of the local legal system' and 'better track record of enforcing agreements to arbitrate and arbitral awards'.[30] It can be deduced that the other preferred choices were influenced by the unprecedented situations that Covid 19 has caused. These are 'ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitral tribunals', 'ability for local courts to deal remotely with arbitration related matters' and 'allowing awards to be signed electronically'.[31]

II. The Reasons Behind Why London is Chosen As The Seat?

Becoming a favourable international arbitration hub amounts to an extremely competitive task. There are several components that are determinative on attractive seats.[32] For example, a supportive legal system for arbitration, a neutral approach from national courts, competent practitioners, and political and economic permanency are principal characteristics of prominent centres like London for international arbitration.[33]

A. Contracting State Under the New York Convention

In order to protect the efficiency of the arbitral proceedings, it is a sensitive matter to enable judicial review of arbitral awards.[34] Since parties mostly prefer arbitration to avert unwanted aspects of litigation,[35] one of the main purposes of arbitration is not to be frustrated by comprehensive judicial review of awards. On

28 2018 Queen Mary University of London, White & Case International Arbitration Survey (n 11) 9.

29 ibid 10.

30 2021 International Arbitration Survey (n 11).

31 2021 International Arbitration Survey (n 11).

32 Vial and Blavi (n 7) 307. In addition, it is worth to mention that 'The London Principles' developed by a working group for the Chartered Institute of Arbitrators centenary, comprise ten elements list to provide a balanced and independent basis for the assessment of existing seats and to encourage the development of new seats, Janet Walker, 'The London Principles and Their Impact on Law Reform' (2018) 84 (2) Arbitration 174, 178. When these principles are considered, it can be seen that London as a leading arbitral seat complies all of these principles.

33 Vial and Blavi (n 7) 307-308.

34 Jessica L Gelander, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations' (1997) 80 Marquette Law Review 625, 626.

35 ibid 641.

the other hand, absolute autonomy from the forum is not conclusively favourable.[36] A complete lack of judicial control might threaten the arbitral process because "a forum with no system of review is more susceptible to abuse."[37] To stabilize these abovementioned interests, the New York Convention formulates limited grounds for declining to recognize and enforce international arbitration awards.[38] In this regard, it is suggested that the arbitral seat must always be a state that has abided by the New York Convention because the location where the award is made has considerable legal effects for its enforceability.[39]

The New York Convention, to which the 167 other countries are signatories, became effective in the United Kingdom (UK) in 1975. Being a party to the New York Convention also enhances London's attractiveness. However, considering all 167 countries, which are also signatories to the New York Convention, applying the same rules while enforcing a foreign arbitral award rendered anywhere else globally, the UK is not in the minority to be favoured by the New York Convention today. Brexit has not negatively affected the enforcement of arbitral awards and the UK remains a signatory to the New York Convention.

It should also be considered that there is a right of appeal before the courts on questions of English law unless the parties otherwise agree.[40] Furthermore, an award can be challenged on the ground of deficiency of substantive jurisdiction or a serious irregularity affecting the tribunal.[41] These challenges and their impact on London's appeal as the arbitral seat will be examined in more detail in the third section below.

B. The National Court's Attitude Towards Arbitration

The national court's attitude towards international arbitration is important for choosing an arbitral seat. Domestic courts should interfere as little as possible in the arbitral proceedings but should be available at the same time to assist the arbitrators whenever required. The most preferred place for arbitration is one where domestic courts assure the unity of the procedure but do not unnecessarily and unjustly interfere with honest mistakes of law or fact.[42] Such an approach safeguards the parties' authority to adapt the arbitration to their particular expectations and necessities. Accordingly, the London practice trends to show a pro-arbitration attitude.[43] The AA 1996 is a crucial pillar of the support of arbitration. In that regard, the English courts

36 Vial and Blavi (n 7) 282.

37 Gelander (n 34) 626.

38 ibid 628.

39 Gary B Born, *International Commercial Arbitration*, (Kluwer Law International 2014) 2056.

40 Section 69 of AA 1996.

41 Section 67 and 68 of AA 1996.

42 Waincymer (n 15) 171.

43 Vial and Blavi (n 7) 284.

are authorised to make orders in aid of the arbitration process of a tribunal. Such discretion may be vital to the hassle-free conduct of an arbitration. However, the courts will not exceed their authority and intervene in proceedings, and they should be very attentive to leave the convenient points to the tribunal.[44] The national court's support role is for not only before and during the arbitration but also after the award. Whilst challenging an award, the AA 1996 gives national courts three precise grounds and expects that these grounds are not used unduly. The national court's attitude towards challenging an award is discussed in detail in the third part of this article.

C. Material Conditions and Location

It is decisive for the parties to prefer a seat surrounded by institutions and resources of high standards to encourage the arbitration process and assure that it proceeds effectively. One notable advantage of arbitrating in London is the convenience of experts to function as arbitrators specialised in resolving a wide variety of commercial disputes.[45]

In addition, third-party funding has been encouraged in arbitration by the English courts. In *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*[46], the Court decided that third-party funding exists under the scope of other costs according to section 59(1)(c) of the AA 1996. That is why the Court concluded that it was part of the authority of a tribunal established under the ICC Rules to award recovery of the additional costs to be paid to a third-party funder. Essentially, this implies that arbitration is more tempting than litigation to parties in cases where third-party funding may be required and presumably attracts more third-party funders to London.[47]

A particular seat may become broadly used if it is conveniently located and accessible.[48] A well-connected city has extensive opportunities to offer the international arbitration community.[49] London is a suitable hub that allows the arbitration's parties, representatives, and arbitrators to convene in the same place for hearings and other procedural matters. The parties should consider all relevant circumstances, such as geographical location, the capacity of suitable accommodations, the standard of the arbitration facilities, and the quality and variety of transportation and communication

44 HC Trading Malta Ltd v Tradeland Commodities SL [2016] EWHC 1279 (Comm).

45 Srishti Jain, 'UK: Why London Continues to be an Attractive Seat for International Arbitration Post-Brexit' Mondaq, 23 June 2021, <https://www.mondaq.com/uk/arbitration-dispute-resolution/1082072/why-london-continues-to-be-an-attractive-seat-for-international-arbitration-post-brexit> (accessed 15.07.2021).

46 [2016] EWHC 2361 (Comm).

47 Duncan Speller and Mark Feldner, 'The International Arbitration Review: United Kingdom-England and Wales', edition 12, (July 2021) <https://thelawreviews.co.uk/title/the-international-arbitration-review/united-kingdom-england--wales > accessed 15.07.2021).

48 Pierre A Karrer, Introduction to International Arbitration Practice (Kluwer Law International 2014) 16.

49 Vial and Blavi (n 7) 287.

systems.[50] Moreover, amenities that are not directly relevant to the proceedings, such as restaurants or shopping centres, could also be an effective factor for a forum.[51]

In light of this, London confirms that it is a favourable arbitration hub regarding its material conditions and location.

D. The Neutrality of the Place

The neutrality of the arbitral seat can be seen as the union of practical and juridical parts.[52] Whilst the practical feature indicates a typical concern for protecting the parties' genuine equality, the juridical part emphasizes the impartiality of the arbitral tribunal's decision in a case where domestic courts actively supervise and intervene in the decisions of the arbitral tribunal.[53] According to the survey results, London is a preferred hub in international disputes particularly regarding the impartiality and neutrality of the English legal system.[54]

E. Political and Economic Stability

Political and economic environments have significant importance on parties' preference for an arbitral seat.[55] Parties generally choose politically and economically stable countries as the seat of arbitration because these countries enable better assurances of protection and trust.

London is an enviable arbitral hub for its political and economic stability. Nevertheless, Brexit has some potential effects on this stability and causes some discussions about London's attractiveness. On January 31, 2020, the UK ceased to be a European Union (EU) Member State, but its practical impact was not seen until the end of the transition period on 31 December 2020. With the provisional application of a trade and cooperation agreement between the UK and the EU on 1 January 2021, the parties' relationship has essentially undergone a change.

The impact of Brexit on the London legal market still preserves its popularity. According to some views, the unpredictability caused by Brexit threatens London's prominence as a desirable seat within Europe.[56] On the other hand, it is a fact that the

50 Alexander J Belohlavek, 'Seat of Arbitration and Supporting and Supervising Function of Courts' in Alexander Belohlavek, Nadezda Rozehnalova (eds), *Interaction of Arbitration and Courts*, Czech *Yearbook of Arbitration*, vol 5 (2015, Juris) 35.

51 Vial and Blavi (n 7) 285.

52 ibid.

53 Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration', Swiss Essays on International Arbitration (1984), 30, 31, <https://www.lalive.law/data/publications/43_-_On_the_Neutrality_of_the_Arbitrator_and_of_the_Place_of_Arbitration_Recueil_de_travaux_suisses_sur_l'arbitrage_international.pdf> (accessed 15.07.2021).

54 2018 Queen Mary University of London, White & Case International Arbitration Survey (n 11) 11; 2021 International Arbitration Survey (n 11) 8.

55 Vial and Blavi (n 7) 286.

56 Michael Mcllwrath, 'An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe' (2016) 33 (7) Journal of International Arbitration 451, 454.

UK continues to be a signatory to the New York Convention. Whereas there are still concerns about to what extent an English judgment will continue to be enforceable in other European Union (EU) Member States, an arbitration award will maintain use of the current enforcement system.[57] Additionally, Brexit has allowed English courts more independence to apply for anti-suit injunctions to shield the robustness of an arbitration agreement to arbitrate seats in London. Before Brexit, anti-suit injunctions could not be issued to prevent parties from pursuing any court proceedings in the other EU Member States.[58] After the Brexit, in case of breach of arbitration agreements, issuing anti-suit injunctions by the English courts was more straightforward.

Despite Brexit, England and Wales is preserving its primacy and is still maintaining one of the most favourite seats for international arbitration.[59] This is because the sophisticated attractions of England and Wales as a seat depend not only on the strong infrastructure of the AA 1996 but also on 'judicial willingness' to commit the governing guidelines that established the Act.[60] According to the arbitration community, Brexit has not had and will not have a considerable influence on the very qualified and independent English judiciary that has substantial accomplishments in multifaceted international arbitration.[61] As stated in the Queen Mary Survey 2018,[62] 55% of the respondents believed that Brexit would have no influence on the preference of London as a seat. They anticipated that its 'formal legal structure' would probably remain unaffected and maintain to support arbitration. It can be stated that after a close observation of the after Brexit implications in the UK, no negative impact has been monitored so far by the UK's withdrawal from the European Union.[63] In line with the 2021 Queen Mary Arbitration Survey, London's continued popularity as a seat, as was predicted by the majority of the respondents in the 2018 survey, has not been significantly impacted.[64] London maintains its reputation as a reliable seat of choice.

F. Development of Jurisprudence

Places like London with a long-standing culture of arbitration tend to have a wider jurisprudential advancement of international arbitration questions.[65] Such an advanced practice experience may give the parties certainty about the attitude of

57 Speller and Feldner (n 47).

58 *Allianz SpA and Others v West Tankers Inc* [2009] EUECJ C-185/07.

59 2018 Queen Mary University of London, White & Case International Arbitration Survey (n 11) 11-12; 2021 International Arbitration Survey (n 11) 6.

60 Speller and Feldner (n 47).

61 ibid.

62 2018 Queen Mary University of London, White & Case International Arbitration Survey (n 11) 11-12.

63 Justin Williams, Hamish Lal, Richard Hornshaw, 'Arbitration Procedures and Practice in the UK (England and Wales): Overview' <https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitiontype=default&contextdata=(sc.default)&firstpage=true> (accessed 15.07.2021).

64 2021 International Arbitration Survey (n 11).

65 Vial and Blavi (n 7) 287.

domestic courts in various stages of the arbitration process[66], for example, the national court's non-interventionist approach for challenging arbitral awards. Recent case law proves the fact that the English courts are supportive of international arbitration. Accordingly, the court will only intervene when it is assured that the applicant has exhausted all available arbitral processes. For example, the court will not grant interim relief in cases where the parties can submit such issues to an emergency arbitrator with jurisdiction to order urgent relief.[67]

III. The Effect of Grounds of Challenging An Award in the Selection of London As The Seat

A. In General

One of the distinctive aspects of arbitration as an alternative dispute resolution process is the limited opportunity for challenging arbitral awards.[68] The AA 1996 specifically included the doctrine of competence-competence into English arbitration law so that competence of an arbitration tribunal to determine and rule on its own jurisdiction in a final and binding way is recognized. However, in some situations mentioned below (in part B), the arbitral tribunal's decision may be dependent on the review by domestic courts, which might necessitate a full re-hearing of the jurisdictional issue.

The AA 1996 is grounded on three prevailing fundamentals provided in section 1. Fairness; 2-Party autonomy; and 3-The restriction of judicial intervention.[69] AA 1996 is projected to encourage the arbitration proceeding and decreases judicial intervention throughout the arbitration process.[70] In this regard, the courts have a tendency to build a high barrier on parties willing to challenge arbitration awards[71] by making challenges only available in severe cases. In such cases where the tribunal misjudges in the conduct of the arbitral process, the lawfulness of the award requires correction.[72]

Unofficial statistics out of the arbitration claims from the Commercial Court between 1996 and 2007 signify that London has progressively transformed into a

66 ibid.

67 *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327.

68 James Carter and Camilla Macpherson, 'Arbitral Awards-Challenging to Challenge' (2016) 19 (4) International Arbitration Law Review 89.

69 AA 1996 Section 1(a), (b), (c), <https://www.legislation.gov.uk/ukpga/1996/23/contents> (accessed 11 May 2019).

70 *Itochu Corporation v Johann MK Blumenthal GMBH & Co KG &Anr* [2012] EWCA Civ 996.

71 *Bandwidth Shipping Corporation Intaari* (the 'Magdelena Oldendorff') [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7.

72 DAC Report, paras 284-287, The 1996 DAC Report on the English Arbitration Bill: The Last Part, (1999) 15(4) Arbitration International 413; *La Société pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v Statoil Natural Gas LLC (Statoil)* [2014] EWHC 875.

more attractive venue for arbitrations since the AA 1996, which has made challenges to and appeals from an arbitration award relatively rare.[73]

Despite the large numbers of London seated arbitrations (hundreds a year approximately), in 2015, only 31 reported challenges to arbitral awards were brought, which is a meaningful sign of the restrictive approach for challenging awards.[74]

B. Challenging an Award Under the AA 1996

1. In General

The finality of the process - the absence of a system for challenges or appeals - is often mentioned as an advantage of arbitration, and challenging awards have been seen as time-consuming and costly.[75] Continuing the process which began in the Arbitration Act 1976, the AA 1996 codified additional restrictions on the factors in which a party is allowed to challenge an award in the English courts.[76]

The AA 1996 regulates three grounds on which a party may challenge a tribunal's awards in the English courts: 1-deficiency of substantive jurisdiction (section 67); 2-serious irregularity affecting the tribunal, proceedings or award (section 68); and 3-an appeal on a question of law (section 69). Also, sections 67, 68, 69 all expressly provide for appeals to the Court of Appeal, even though the guidelines behind the AA 1996 are to discourage such additional appeals.[77]

In this essay, the grounds on which a party may challenge a tribunal's awards are not examined in detail; however, these grounds are analysed partially within the scope of being an essential factor for London's attractiveness as the arbitral seat.

Section 67 and 68 are mandatory provisions of the AA 1996 and therefore cannot be eliminated by agreement of the parties; on the other hand, appeals under section 69 may be waived by agreement.[78] Only the first two originate from the UNCITRAL Model Law[79], but the third does not and instead symbolizes a delimited form of the

73 Hilary Heilbron, *A Practical Guide to International Arbitration in London* (1st edn., Informa Law 2008) 115.

74 Carter and Macpherson (n 68) 90.

75 David Wolfson and Susanna Charlwood 'Chapter 25: Challenges to Arbitration' in Julian D M Lew, Harris Bor, et al (eds) *Arbitration in England, with Chapters on Scotland and Ireland* (Kluwer Law International 2013) 527.

76 ibid.

77 *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291.

78 Section 4(1) and Section 1 of the AA 1996.

79 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2016, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> (accessed 15.07.2021). However, the Model Law, article 34, provides for an arbitral award to be set aside in certain circumstances mainly different from those established by AA 1996, section 67 and 68, Kyriaki Noussia, 'The Arbitration Act 1996: Time for Reform' (2019) 2 Journal of Business Law 140, 145.

wider right of appeal in the former Arbitration Act 1979 (AA 1979)[80] to the AA 1996.[81] Under section 69 of the AA 1996, a party may appeal on a question of law emerging in the proceedings. Section 69 stems from the AA 1979, as restrictively interpreted by the courts.[82] There is no counterpart to section 69 in the Model Law, and most of the leading arbitration jurisdictions do not support appeals on this basis.[83]

Section 69 of the Arbitration Act allows appeals to the court on a question of law arising out of an award made in the proceedings. Leave to appeal is only given with the permission of the court. Before granting permission to appeal, the court must be satisfied that [84]: a-The determination of the issue will substantially affect the rights of one or more of the parties; b- The question is one which the tribunal was asked to determine; c-(i) The decision was obviously wrong or (ii) that the question is one of general public importance and the decision is at least open to some doubt; d-It is just and proper in all the circumstances for the court to determine the question despite the parties' agreement to arbitrate.

In this regard, the ground of challenge, which is prominent and focuses on the attractiveness of London as a favourable hub, is under section 69, an appeal on a question of law. Since many different countries adopted the Model law (rules) regarding challenging an award, AA 1996 section 69 creates a different preference for parties in arbitration and makes London attractive as the arbitral seat. In other words, London gives commercial parties the prospect of appealing an arbitral decision on the point of law. It is clear that the biggest factors behind London's preference among other seats proves to be the English courts' legislative framework and support of arbitration.[85] On the other hand, section 69 creates an uncommon aspect and provides a route to appeal that is currently unavailable at other popular top seats.

2. Some Discussions Regarding Section 69: The Delicate Balance Between Arbitration and the Courts

Justice is an indivisible part of any civilised democratic society, and the state has overall responsibility to guarantee that justice is served both in private and public

80 Chapter 42, section 1 and 2, <http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga_19790042_en.pdf> (accessed 15.07.2021).

81 Wolfson and Charlwood (n 75) 561.

82 *Pioneer Shipping Ltd v BTP Tioxide Ltd* (The Nema) (No 2) [1982] AC 724 (HL). Whilst section 69 of the AA 1996 is presumably not to be seen as a exact codification of the pioneering judicial guideliness, cases pre-existing the AA 1996 regarding appeals on questions of law persist to be relevant: *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtsgesellschaft mBH & Co* (The Northern Pioneer) [2002] EWCA Civ 1878.

83 Wolfson and Charlwood (n 75) 543.

84 Section 69(3) AA 1996.

85 See Zuhair Farouki, 'Section 69 of the English Arbitration Act: London's discrete edge in its quest to become the top arbitration seat' Jus Mundi Blog, May 17 2021, <https://blog.jusmundi.com/section-69-of-the-english-arbitration-act-londons-discrete-edge-in-its-quest-to-become-the-top-arbitration-seat/?utm_source=rss&utm_medium=rss&utm_campaign=section-69-of-the-english-arbitration-act-londons-discrete-edge-in-its-quest-to-become-the-top-arbitration-seat> (accessed 15.07.2021).

tribunals. So, for justice to be fulfilled, the courts should not hesitate to intervene reasonably when necessary.[86]

The advancement of international arbitration law has been remarkable through an evident inclination to restrict the possible court interferences during an arbitration. On the other hand, it is progressively understood in the international arbitration community that the interference of the courts is not necessarily troublesome for the arbitration. It may even be supportive for the sake of efficiency and fairness in the arbitral process.[87] However, it is not simple to balance the need for finality in the arbitral process and the broader public interest of judicial control, if only to protect the harmony of decisions and uniformity of the application of the law.[88]

It should also be noted that even though section 69 appeals in particular are very unlikely to succeed, section 69 applications are used as a prominent means by losing parties. Despite having minimal prospects of success, losing parties expect they have an opportunity to cause substantial delays and costs on their adversaries. Thus, losing parties can abuse this mechanism to reach a settlement or some other advantage for their benefit.[89]

In the course of the drafting of the AA 1996, there were proposals for the abolition of the right to appeal on a question of law, as it was regarded to represent an invasion by the courts on the independence of the arbitration process to which the parties had settled.[90] However, the Departmental Advisory Committee on Arbitration (DAC) considered that a limited right of appeal on a question of law provides a convenient balance between the parties' decision to arbitrate rather than litigate on the one hand; and the necessity to assure that tribunals were accurately utilizing English law and that English courts could maintain to improve English law through arbitration appeals on the other.[91] The 2007 Report of the Steering Committee created by the Commercial Court Users Committee, reviewing the workings of the AA 1996 through a survey of lawyers, arbitrators, parties and institutions, indicated that 60% were in favour of maintaining the right to appeal on a point of law as presented in section 69.[92]

86 Lord Saville, 'The Denning Lecture 1995: Arbitration and the courts' (1995) 61 Arbitration 157.

87 Claude Reymond, 'The *Channel Tunnel* Case and the Law of International Arbitration' (1993) 109 LQR 337, 341; Hakeem Olalekan Seriki, Judicial Involvement and Intervention in Arbitration Proceedings After the Arbitration Act 1996, PhD Thesis, (Wales Cardiff, 2002) 3, 29, 60, 396 (emphasizing being 'supportive' rather than 'intrusive').

88 Nigel Blackaby, Constantine Partasides, Alan Redfern, J Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 592.

89 Jan Paulsson, 'Arbitration-Friendliness: Promises of Principle and Realities of Practice' (2007) 23/3 Arbitration International 477, 489.

90 R Holmes, M O'Reilly, 'Appeals from Arbitral Awards: Should Section 69 be Repealed?' (2003) 69(1) Arbitration 1, 9; M Needham, 'Appeal on a Point of Law Arising out of an Award (1999) 65(3) Arbitration 205, 210-211.

91 DAC Report (n 72) paras 284-287.

92 Bruce Harris, 'Report on the Arbitration Act 1996' (2007) 23(3) Arbitration International 437; Paulsson (n 89) 491.

The wording of the AA 1996 identifies limits on each of these grounds of challenge. Furthermore, the English courts have tended to approach the express requirements of the AA 1996 moderately, conforming with their general guidelines of non-interference in the arbitral process.[93] As a consequence, challenges to arbitral awards are exceptionally successful.[94] Nevertheless, the AA 1996 provides a resolute structure for the challenge where the arbitral process is endangered with serious concerns.

In this direction, in the recent case *Alegrow S.A. v Yayla Agro Gida San ve Nak AS*[95], even after leave to appeal had been granted, it was clear to see the court's reluctance to overturn arbitral awards. In this decision, it was emphasised that the English court should strive to uphold arbitration awards.[96] In order to comply with this principle, the court should read an arbitration award in a reasonable and commercial way, that there will be no substantial fault that can be found. Thus, it should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the object of upsetting or frustrating the process of arbitration."[97] In cases of uncertainty, courts should construe the award in such a way as to make it valid rather than invalid.[98]

Similarly, in *Tricon Energy Ltd v MTM Trading LLC,*[99] English courts again showed their pro-arbitration approach by demonstrating a reluctance to interfere even after the permission to leave. In this case, the court exercised its supervisory role to remedy errors of law regarding a claim for demurrage. The charterers disputed that the demurrage claimed by the owners was due to the principal basis that the demurrage claim had not attached all necessary supporting documents as required by clause 38 of the charterparty terms, and specifically that the bills of lading had not been provided. As a consequence of these documents not being submitted, the charterers argued that they could not determine whether the claim was well-founded, and the demurrage claim had since become time-barred.[100] The charterers appealed pursuant to section 69 of the Arbitration Act 1996 in respect of the following question of law

93 Wolfson and Charlwood (n 75) 561; Carter and Macpherson (n 68) 91; Neil Andrews, *The Modern Civil Process, Judicial and Alternative Forms of Dispute Resolution in England* (Mohr Siebeck 2008) 260.

94 There are recent examples of rare success achieved by the parties in challenging arbitral awards on points of law, *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm) (the court held that the tribunal had been wrong to conclude that the claim was not time-barred under the provisions of the relevant contract. Contrary to the findings of the tribunal, the original claim was filed without all the necessary documents and was therefore defective. As the limitation period had subsequently passed, the claim became time-barred), *Alegrow S.A. v Yayla Agro Gida San ve Nak AS* [2020] EWHC 1845 (Comm), and *CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Co* [2021] EWHC 551 (Comm).

95 *Alegrow S.A. v Yayla Agro Gida San ve Nak AS* [2020] EWHC 1845 (Comm).

96 Referring *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] 1 Lloyd's Rep 638 *in Alegrow S.A. v Yayla Agro Gida San ve Nak AS* [2020] EWHC 1845 (Comm) at [48].

97 ibid.

98 ibid.

99 *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm).

100 *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm) at [22].

arising out of the award: "Where a charterparty requires demurrage to be calculated by reference to the bill of lading quantities and contains a demurrage time bar which requires the provision of all supporting documents, will a claim for demurrage be time-barred if the vessel owner fails to provide copies of the bills of lading?".[101] The Court decided that there was a requirement to provide the bills of lading with the claim in accordance with clause 38.[102]

Moreover, there is a considerable amount of English jurisprudence on the relevant provisions of the AA 1996, such that a party determining a challenge is comprehensively supported to evaluate its likely prospects of success.[103]

Section 69 of the AA 1996 has given a very restricted right of appeal of awards to the English courts on a point of law.[104] Practitioners are inclined to like this protected nature of arbitration, but also the section 69 'balancing act' has been seen as being devoted redundantly for the sake of arbitral autonomy, impeding the progress of the common law and neglecting the exigence to guarantee the uniform application of English law.[105] From this point of view, the common criticisms of a more permissive right of appeal - the need to protect privacy and confidentiality and party autonomy - are considered to be exaggerated.[106] In order to rebalance section 69, it is recommended that the present provision that the question of law is of "general public importance" for decisions that are not "obviously wrong" should be shifted by the requirement that the question of "general doctrinal importance or of general importance to the industry concerned."[107]

Overall, redressing the necessary balance is of serious importance: hardly any appeals endanger deadlocking the improvement of the common law. On the other hand, too many appeals jeopardize disaffecting users of arbitration from London.[108] There are two fundamental points in favour of a more permissive section 69: 1-developing the common law, 2-securing the coherent practice of English law. There are five concerns regarding the principles of the Act against a more permissive section 69: 1-the necessity for finality in arbitration, 2-the privacy and confidentiality of arbitration, 3-the notion that English arbitration law is different from that of other jurisdictions and the UNCITRAL Model Law[109] in allowing appeals for error of

101 *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm) at [17].

102 *Tricon Energy Ltd v MTM Trading LLC* [2020] EWHC 700 (Comm) at [36].

103 Wolfson and Charlwood (n 75) 561.

104 Richard Liu, 'A Balancing Act: Section 69 of the Arbitration Act 1996' (2018) 21 (1) International Arbitration Law Review 18.

105 ibid.

106 ibid.

107 ibid.

108 ibid.

109 UNCITRAL Model Law (n 79).

autonomy, 4-the economic need to maintain the desirability of the London seat of arbitration, and 5-party autonomy.[110]

Several prominent cases[111] derived from arbitration after the 'Nema Guidelines'[112] which recognized a restrictive interpretation of the Arbitration Act 1979 still remain under the AA 1996.[113] This situation indicates that a restrictive appeal structure is not an obstruction to the common law's progress.[114] In this regard, a more permissive section 69 would harm the core principles of arbitration and the leading position of London as an arbitral seat. This delicate balance provided by the AA 1996 should be protected in the same way.

Conclusion

There are various determinants that induce London to be the favourable seat: ease of travel, accommodation, hearing rooms, political stability, political and cultural neutrality, reliability and neutrality of the legal system, quality of local arbitrators, quality of the court system, convenient geographical location, telecommunication, airports, hotels, restaurants, and banks that function adequately.

On the other hand, the grounds for challenging an award have some severe implications on determining London as the arbitral seat. The consensual nature of international arbitration depends on some core principles like party autonomy, judicial non-intervention and finality of the arbitral awards. Nonetheless, the binding aspect of the arbitral award and its enforceability akin to that of final judgements of national courts necessitate some "balanced" degree of judicial supervision.[115]

English courts are firmly supportive of international arbitration, adhering to the principles of party autonomy and judicial non-interference preserved in the Act.[116] Relatively few challenges have been made to London seated arbitral awards, which indicates the quality of arbitral tribunal's decisions. However, it is also possible to conceive that few challenges are an acknowledgement by parties that there is a low probability of succeeding in any challenge.[117]

110 Liu (n 104).

111 *The Achilleas* [2008] UKHL 48, [2009] 1 AC 61.

112 Originated from *The Nema* [1982] AC 724 (HL).

113 On the other hand, it is true that, there is a large extent decline in the applications for permission to appeal each year under section 69. There had been about 300 special cases each year prior to 1979, however in 2015 there were 58 applications for permission to appeal under section 69, with 19 of them being granted permission, Lord Thomas, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration' Courts and Tribunals Judiciary 2016, paragraph 21, <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (accessed 15.07.2021).

114 Liu (n 104) 19.

115 Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration-A Case for an Efficient System of Judicial Review' (2011) 28 (6) Journal of International Arbitration 533.

116 Speller and Feldner (n 47).

117 Carter and Macpherson, (n 68) 91.

Most importantly, AA 1996 ensures a very sensitive balance between the arbitration parties' autonomy and the English courts' role as gatekeepers of justice to preserve the integrity of the arbitration.[118] A restrictive appeal system does not harm the judicial non-intervention and party autonomy. On the contrary, it allows an effective and fair arbitral award to be reached. Besides this, this optional "opt-out" right to appeal mechanism, which is an essential factor of access to justice, can significantly reinforce parties' trust in the arbitral process by supporting overall legitimacy.[119]

The AA 1996's attitude towards providing a delicate balance between courts and arbitration promotes the preference of London as the arbitral seat. In addition, since the grounds for challenging an award under the AA 1996 (particularly regarding section 69) are distinct from other jurisdictions and UNCITRAL Model Law, the attractiveness of London as the arbitral seat has increased.

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BOOK REVIEW / KİTAP DEĞERLENDİRMESİ

Sixty Years of the European Integration: How Resilient is the European Integration Project against the backdrop of Global Power Shifts?

Avrupa Entegrasyonu'nun Altmış Yılı: Avrupa Entegrasyon Projesi Küresel Güç Değişimleri Karşısında Ne Kadar Dirençli?

Julien Chaisse (ed), Sixty Years of European Integration and Global Power Shifts: Perceptions, Interactions and Lessons (Hart Publishing, 2019), 538 p, 9781509933723.

Deniz Baran*

Keywords
European Union, European integration, global governance, regional cooperation, Euroscepticism

Anahtar Kelimeler
Avrupa Birliği, Avrupa entegrasyonu, küresel yönetişim, bölgesel işbirliği, Avrupa şüpheciliği

The book, edited by Professor Julien Chaisse, discusses the most important topics of the present and future of the European integration project which, as Chaisse states accurately, has transformed the European continent and the world since its inception.[1] The European integration project is currently embodied in the European Union (EU), so the book aims to assess the EU's role in global governance.

There is no doubt that the prospects regarding this topic are highly important for Turkey as a member of Customs Union, the European Council, and a candidate for membership of the EU. Particularly, the Turkish decision-makers and academics must be well aware of the ongoing challenges and future prospects for the European integration project. This fact

1 Julien Chaisse (ed), Sixty Years of European Integration and Global Power Shifts : Perceptions, Interactions and Lessons (Hart Publishing, 2019) p. 1.

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inevitably draws our attention to Chaisse's work examining its subject matter from various aspects, which will be introduced later.

It is apparent that various global crises in recent years have shaken the global system and the EU is not an exception in this regard. Even though the EU is one of the greatest regional cooperation models in history, probably the best one, it is now in decline. Even during the COVID-19 pandemic crisis, the capabilities of the EU have frequently been questioned.

In spite of all doubts about the role that the EU can play in responding to the current crises, it is still true and crucial that the EU has the capacity to turn diverging interests of its member states into common policies, even if some fields such as foreign and military policies often fall outside the scope of its current capacity. The EU is the only supranational body in the international community with a solid institutional architecture. Furthermore, the EU's governance system involves multiple actors other than the member states which integrates public and private domains into the decision-making process. Therefore, Chaisse describes the EU as a "*fantastic laboratory for building a new form of political unity despite its weaknesses*" in the contemporary global system.[2] It is a "*true community of nations, dedicated to ensuring the security and prosperity of its members*".[3] Therefore, Chaisse does not hesitate to present the EU as a model of governance for the world.

The book has twenty chapters written by distinguished experts and academics across the world. After the introductive first chapter, the editor divides the book into three parts, namely "European Legal Integration: Process, Difficulties and Achievements", "The European Union as a Global Actor: Issues and Partners" and "European Union's Trade Policy: Global and Regional Trade Challenges."

In the first chapter, Chaisse highlights the importance of the EU as an unprecedented political entity and explains its role in the global governance system. Accordingly, the EU's integration has a progressive character which can be defined as "*functional integration*".[4] According to this theory of integration, the more the authority of an organization increases, the less power the states will have. Chaisse also underlines the main weakness of the EU as an "*economic giant but political dwarf*".[5] That said, the fact that he connects those weaknesses with the historical background of the EU definitely gives the reader a better comprehension of the topic.

2 Ibid, p. 2.

3 Ibid

4 Ibid, p. 11.

5 Ibid, p .3.

In the first part of the book, which starts with the second chapter, there are eight chapters which handle the issue of the integration of EU. In the second chapter of the first part, Judge Ian Forrester addresses the role of rule of law in the integration of EU. Forrester draws attention to the success of the EU which established treaties to make war impossible. Also, he points out the significance of one of the main actors of the continental legislation process which is the Court of Justice of the EU (CJEU). The CJEU that has decisions on many different fields such as trade, equality, data protection, and fundamental rights also gave the right to EU citizens that they could invoke EU law rather than inconsistent national laws before their respective national courts. Although the EU has been facing one of its worst crises right now and losing enthusiasm among its members, it can not be denied that the member states aim to ensure at least minimum living standards for their citizens and they are still in strong cooperation in many fields.

In chapter three, Rostam J. Neuwirth tries to state why Euroscepticism turned into a stagnate process by mentioning oxymoronic concepts that took place in the process of EU integration. According to the Neuwirth, the EU was born as an oxymoronic concept but was perceived as a contested project. It has matured since then, shifting from contestation to contradiction. To overcome this situation, Neuwirth argues that the EU should adopt an EU Constitution. Therefore, the apparently contradictory tensions within the EU can mutually enhance each other to set off a mutually beneficial virtuous cycle toward a peaceful destiny for the entire Union.

In chapter four, Manfred Weiss analyses the social dimension of the EU. At the beginning, although gaining a European character to the social policy and labour law was not on the EU's bucket list, vigorous problems have arisen over the course of time and the EU started to take precautions against them by amending important treaties, charters, and legislations. However, these steps did not reach the level of hard law. Weiss, therefore, presents some possible strategies to overcome this situation.

In chapter five, Trygve Ben Holland examines the EU rules regarding public procurement in terms of their geographical scope and diversity. It is known that the EU public procurement laws cover 28 member states and outermost regions especially overseas countries and territories. While elaborating his examination, Holland also refers to important agreements and regulations between member states and third states such as Canada, Chile, Israel, Japan, Korea, Mexico, Switzerland, Turkey, South Africa, and the USA which aim to ensure that there is impartiality and transparency in public procurement procedures.

In chapter six, Irene Sobrino Guijarro attempts to explain how cross-border healthcare operates in the EU. It is underlined that the CJEU, which created the

procedure through case law and treaty provisions regarding free movement of services, also promotes patient mobility in the EU. Guijarro also emphasizes the significance of the Directive 2011/24 which gave rise to interesting legal and policy related matters. Through this Directive, more advanced patient rights have been introduced from which both patients seeking healthcare across borders and patients receiving healthcare in their own member state of affiliation can benefit. However, Guijarro states that the current state of national diversity and inconsistencies among the specific transposition, transparency, and interpretations of the unification of cross-border healthcare mobility weaken the utility overall impact of the Directive.

In chapter seven, Panagiotis Delimatsis examines the Services Directive comprehensively. The Directive aims at the removal of barriers for the achievement of a single market for services. According to Delimatsis, it is not sufficient to establish a single market in services and its impact will depend on the member states' compliance with the single market principles and capacity of regulators to put trust on the table despite regulatory competition within the EU.

In chapter eight, Susana de la Sierra aims to find out the existence of the common understanding from a European perspective. One of the main achievements of the EU is clearly making itself a "*Community of Law*" which was also stated by the CJEU. Despite its weaknesses, the story of the EU is a success story in this aspect and de la Sierra develops this idea by focusing on some critical points such as the role of national judges, the role of national Supreme Courts and the system of preliminary rulings.

In the second part of the book, there are six chapters which focus on the role of the EU at the global level. In the chapter nine, Jan Wouters and Akhil Raina consider the conflicting policies of the EU which have contributed to multilateralism but also continue to pursue bilateral negotiations. According to the authors, the EU's support for multilateralism needs clarification and a well-coordinated strategy.

In chapter ten, Ernst-Ulrich Petersmann answers what should be understood from European constitutionalism for reforming multilevel governance of transnational public goods in Asia. Also, he states that European constitutional law offers some lessons for extending "*republican and cosmopolitan constitutionalism*" beyond national borders.

In chapter eleven, Helen E Hartnell focuses on the civil justice policy of the EU by considering the changing institutional environment in Brussels and its impact on civil justice matters. Besides, some current projects being mentioned and finally the author questions the significance of these developments in the civil justice era for the integration process.

In chapter twelve, Katharina L. Meissner, analyses the potential consequences that the EU is turning its face to the bilateral strategic partnership with Brazil rather than interregional negotiations with MERCOSUR. In this chapter it is highlighted that the EU shifted from interregionalism with MERCOSUR to bilateralism particularly with Brazil. When the EU was faced with mounting tensions and divergences within MERCOSUR, it switched its direction to a bilateral approach. Meissner states, thus, that the EU can deviate from its normative commitment to assist regional integration in other regions of the world when this strategy seems to be in conflict with its own material interests.

In chapter thirteen, Chien-Huei Wu looks at the EU – China relations in terms of EU-China Partnership and Cooperation Agreement (PCA) dated 2006 and its successor Compherensive Investment Agreement (CAI) .The strategic partnership between the EU and China, according to this chapter, represents the two great powers' efforts to engage with other major powers. Wu sheds light on the development of negotiations between two parties and the challenges they faced for the successful completion of the negotiations. He mentions that the divergences between the EU and China on the concepts of self-perception, national sovereignty, human rights and the global order introduce some serious challenges to this strategic partnership, especially in terms of PCA negotiations. This is why these great two powers decided to pursue the "Compherensive Investment Agreement"(CAI) as an alternative for the Partnership Cooperation Agreement. Wu finally states, however, that the same difficulties that plagued PCA negotiators will plague the CAI negotiators if the European Parliament's human rights and sustainable development clauses are incorporated into the CAI's legal text. In conclusion, Wu states that the CAI will be unable to achieve the goal of improving the EU-China relations and sustaining the EU-China strategic partnership, in a way no different than PCA.

In chapter fourteen, Shintaro Hamanaka contributes to the comparative studies of regional economic integration by taking into account the legislation of economic relations. In this chapter, Hamanaka points out the differences between the ASEAN and its Western equivalents in terms of legalisation processes. While the ASEAN accepts an informal method of problem solving formally, the Western world only informally accepts that the informal method is required to solve problems. The reason behind the fact that the ASEAN always puts the non-legal methods on the table is that it is in fact a security institution and prioritizes to solve problems in an amicable way. In a nutshell, the author underlines in this chapter that the legal and non-legal methods always go hand in hand in the ASEAN economic cooperation mechanisms.

In the last part of the book, there are six chapters which delve into the most important foreign policy of the EU: International trade policy. In chapter fiteen, Fernando Dias Simões successfully points out the importance of the transparency in the EU's trade policy. On the one hand, there has been a controversy regarding investment and trade

agreements, on the other hand, increasing anti-trade rhetoric in campaigns and political discourse, and the mobilization against agreements such Transatlantic Trade and Investment Partnership (TTIP) and Comprehensive Economic and Trade Agreement (CETA). Simões also discusses some specific challenges that Common Commercial Policy brings about for the European integration project. These discussions present a deeper understanding of the issues covering EU's commercial policy.

In chapter sixteen, Kirstyn Inglis and Daniele Bianchi examine investor-to-state dispute settlement (ISDS) mechanisms and make a comparison of evolving legal approaches in Brazil and Latin America with those in the EU. The authors try to find the answer for the question of whether the Latin American approach can be an alternative possibility for the modernization of ISDS system or if this approach would be insufficient.

In chapter seventeen, Olga Boltenko evaluates the Regional Comprehensive Economic Partnership (RCEP) which is a free trade agreement between the 10 ASEAN members. She addresses China's different positions in terms of RCEP. Boltenko also states that China will abandon its stance on traditional issues, which has had a negative impact on the RCEP negotiation processin the China-EU BIT negotiations and makes predictions regarding how the RCEP perspective will be reflected in this BIT. Boltenko points out that at least a RCEP-inspired expropriation provision which is intended to protect matters of public policies and a RCEP-inspired FET (fair and equitable treatment) standard will be included in the China – EU BIT.

In chapter eighteen, Sufian Jusoh examines what kind of impact that Comprehensive and Progressive Agreement for Trans-Pacific Partnership's (CPTPP) intellectual property provisions have over research and developments in the biotechnology. He also explains what can be learnt from the EU approach towards research in the biotechnology and prices of medicines it sets. The author presents useful data about the biotechnology in the EU.

In chapter nineteen, Danny Friedmann confronts the geographical indications in the EU, China, and Australia. Finally, in the last chapter, Debashis Chakraborty and Nilanjan Banik consider the lessons which India learnt from the negotiations with the EU with respect to its pharmaceutical sector, which is third largest in terms of volume and tenth largest in terms of value. The author emphasizes that India's aim is to become a global manufacturing hub and this goal requires the review of the protection of intellectual property rights in India.

As reviewed, the book presents important explanations and discussions over sixty years of the European integration process. The book touches upon the important aspects of the EU integration process by explaining how the integration process and the role of

the EU in global order have developed. The impact of EU's trade policy on the global and regional trade relations is also proven excellently. The book is particularly important today because it presents a detailed analysis of EU law, explains in detail how such a regional collaboration has been achieved and what challenges have been overcome to achieve it from different perspectives. Currently, not only the EU but the entire global order is facing many challenges such as trade wars and a global pandemic. All of these challenges have profound impacts on the interstate collaboration mechanism. Hence, analyzing the greatest international collaboration instance in history in terms of the level of its internal integration seems to be more meaningful at the moment.

Some points in this work can be criticized. First, the book does not focus on the impacts of Brexit on the EU as it should have. Second, the accession to the EU process might have been further discussed in the book. Countries such as Turkey have a long negotiation period and still ongoing. The implications of this accession process might have been elaborated. Third, even though there was a brilliant comparison between EU and Latin American relations in the ISDS mechanism, it might have been more specific by containing a separate chapter to demonstrate tensions between the ISDS regime and EU law. Especially after the Achmea case,[6] the tension between the ISDS regime and EU law has never ceased and a chapter specific to the incompatibility between EU law and the ISDS regime might have raised interesting discussions for readers. Nevertheless, the book is a fresh contribution to literature on EU law with excellent discussions and suggestion as it is presented. The chapters present a comprehensive analysis of the issues, and the useful insights given in the book are illuminating to the readers.

In conclusion, Professor Julien Chaisse has edited the book so timely while the EU regulations and integration process is being questioned by some skeptical groups and politicians, especially after Brexit. By bringing together experts on each specific topic they examined, the book provides a comprehensive analysis of the EU integration process and power shifts over the recent trade war and developments in the world. Due to its importance and excellent discussions, Professor Chaisse's book is going to be consulted as a reference book on EU law and EU integration.

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