

New Procedural Rules Of The Turkish Commercial Code

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Abstract

Despite criticism questioning the suitability of having procedural rules within a code providing for substantive norms of law, the introduction of procedural rules into the Turkish Commercial Code has pragmatic aspects: regulating its institutions, making room for current preferences of law policy and contextually specifying how a right would be put into effect. The provisions of the new Turkish Commercial Code will continually be construed by various actors taking into account also the case-law on how an issue should be heard and resolved by the courts. In disputes related to commercial law, generally a lot is at stake such that not only an applicable norm, but also any “relevant” norm needs to be interpreted in a sound manner. The belief underlying this article is that comprehension of the 2011 Turkish Commercial Code in respect of the amendment to rules related to civil procedure supports clarity in commercial law; those rules govern whether and how a right is enacted upon

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in a judicial avenue and the manner in which a court intervenes to the institutions of commercial law.

Introduction

News of planned amendments to an act, especially to an entire code, generally provoke resistance, expectations from the legislature, a sense of righteousness among the critics of such long-established codes and initiatives in order to influence the course that such amendments could take. In the sequel of amendments, besides the wording of a provision, its legislative clarifying statement has significance while interpreting a statutory provision.¹ While various actors construe the law more or less accurately and establish common practices when taking judiciary steps, practice shapes the black letter of the law to adapt to pragmatic approaches.

Scope Of Analysis

In essence, statutory changes introduced into the commercial law in Turkey chronologically stem from (1) the revised codification of the Turkish Commercial Code as Act no. 6102², (2) an Act no. 6103³ for the Implementation of the (new) Turkish Commercial Code, (3) an Act no. 6335⁴ amending the (new) Turkish Commercial Code no. 6102 and the mentioned Act no. 6103, (4) an Act no. 6455⁵ yet again amending the (new) Turkish Commercial Code no.6102.

¹ Where legislative clarifying statements are referred to, the texts have been accessed through the official site of the Prime Ministry (of the Republic of Turkey) www.basbakanlik.gov.tr, latest on 23 March 2014.

² The Turkish Commercial Code no. 6102 was published in the Official Journal (of the Republic of Turkey) dated 14 February 2011, numbered 27846.

³ Act no. 6103 was published in the Official Journal (of the Republic of Turkey) dated 14 February 2011, numbered 27846.

⁴ Act no. 6335 was published in the Official Journal (of the Republic of Turkey) dated 30 June 2012, numbered 28339.

⁵ Act no. 6455 was published in the Official Journal (of the Republic of Turkey) dated 11 April 2013, numbered 28615.

While the Implementation Act of the (new) Turkish Commercial Code does not introduce or imply a change into areas of intersection between commercial law and the law of civil procedure, mentioning the Revision Act no. 6335 related to the (new) Turkish Commercial Code and its Implementation Act or the Act no. 6455 could blur the reading of the present article; it is the final version of the (new) Turkish Commercial Code which is covered by the present article. Its object of analysis comprises of the amendments introduced into the 2011 Turkish Commercial Code as far as they concern the rules of civil procedure.

New provisions within the 2011 Turkish Commercial Code are enlisted and further clarified as far as they relate to procedural law.⁶ That being said, it is noteworthy that the present article is in line with the tradition to cover the commercial act, commercial enterprise companies, unfair competition and commercial agency as the main axes of commercial law rather than the entirety of the 2011 Turkish Commercial Code which includes other legal disciplines albeit related to commercial law. Many novelties have been introduced by provisions regulating the joint-stock corporation. In the article, it is mentioned when such a provision applies also in respect of the limited liability company besides a separate section related to the limited liability companies.

⁶ For a formalistic description of procedural rule especially within the context of the 2011 Turkish Commercial Code, see Deliduman, Seyithan, “*Ticari Davalar*”, Marmara Üniversitesi Hukuk Fakültesi, Hukuk Araştırmaları Dergisi, v. 18 (2), p. 100.

List Of New Procedural Rules

Certain rules of procedure and competence of commercial courts -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Evidencing and submission of proofs	Article 4, para. 2
General scope of competence of commercial courts	Article 5, para. 1 and 3
Attribution of competence to commercial courts as concerns noncontentious matters	Article 5, para. 1
In jurisdictions where there is no commercial court, sustained competence of the civil courts due to the absence of a commercial court	Article 5, para. 4
Reduction of the old rule for transmission means of certain notifications from a “requirement of validity” to a “condition of proof”.	Article 18, para. 3
Commercial books, registries and introduction of electronic format for acts -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Suitability of electronically signed mail to draw notices and other notifications for default, to abide by a dead-line, to terminate a contract or disengage from a contract	Article 18, para. 3
Suitability of electronic format as concerns mandatory storage of copies of received documentation, and keeping of mandatory commercial books and records	Article 65, para.4 and Article 64, para. 2 and 3 in conjunction with Article 1526, para.3

Suitability of electronic format for acts (i) upon parties' agreement, (ii) for all acts which are mandatory according to the Turkish Commercial Code	Article 1525, para. 1 and Article 1526, para. 3
Proceedings in case of noncompliance to the registrar's reminder for conformity to requirements of commercial registry	Article 33
Evidentiary value of commercial books and records no longer regulated by the Turkish Commercial Code, but by the (new) Code of Civil Procedure, Article 222	(not applicable)
Mandatory storage of commercial books and other documentation by the civil district courts for a term of ten years in case the corporate entity of the commercial enterprise is dissolved	Article 82, para. 8
Unfair Competition -	
Subject	Turkish Commercial Code
Actors who may have recourse to courts for unfair competition	Article 56, paragraphs 1 and 2
Proscription to sue the service provider in case of unfair competition via communication or information technology routes	Article 58, para. 4
"Critical risk exception" for judiciary measures to be taken against a service provider in case of unfair competition committed via communication or information technology routes	Article 58, paragraph 4
Provisional seizure of goods at the customs in case of unfair competition	Article 61, para.2 <i>et seq.</i>

Competence of Commercial Agents -	
Subject	Turkish Commercial Code
Possibility for Turkish parties to contract out of the rule for representative authority of an agent	Article 105, para. 2
As concerns a court decision against a principal obtained as a result of a lawsuit initiated in Turkey, impermissibility of implementing it against its commercial agent even if the agent is – in principle- authorized to act on behalf of and for the account of the principal.	Article 105, para. 3
Regulation of group companies -	
Subject	Turkish Commercial Code
Statutory deadline of two years to file lawsuits for a subsidiary’s unreasonable act or omission due to the influence of a company holding a dominant position	Article 202, para. 1, alinea (e) ; Article 202, para.2
Court’s assignment of an <i>ad hoc</i> auditor for investigation of allegations re undue influence exerted by the dominant company over a subsidiary company	Article 207
Attribution of jurisdiction to the commercial court within the region of the subsidiary company’s headquarters if the dominant company’s headquarters is out of Turkey	Article 202, para. 1, alinea (e)

As concerns acts requiring a general assembly decision, requirement to deposit a caution equivalent to the "potential" loss of the shareholder or the true value of his stock, especially for the dubious act to take effect despite pleadings	Article 202, para. 2
Possibility for the defendant to ask for the plaintiff to deposit a caution for potential harm in case of ill intention	Article 202, para. 2,
Division of costs arising from the dispute among the plaintiff and the subsidiary company in case such cannot be borne by the defendant if the plaintiff's pleadings have legal and material grounds	Article 202, para. 1, alinea (e)
Control Exercised by the Ministry of Customs and Trade over companies -	
Subject	Turkish Commercial Code
Termination of a company upon dubious operations by a lawsuit to be initiated by the Ministry before the commercial court	Article 210, para. 3
Joint-stock corporations -	
Subject	Turkish Commercial Code
Objections before the court to the expertise report's valuation of non-liquid assets deposited	Article 343
For the company to be legally released from an act signed by a company's signatory outside the scope of the company's objects, burden of proof that such trait should have been evident to the other transacting party on grounds other than a mere publication of the company's memorandum of association	Article 371, para. 2

(Joint-stock corporations) Judiciary intervention to the function of the general assembly -	
Declaring a general assembly decision null and void	Article 447
(Joint-stock corporations) Judiciary intervention to the management function -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Duty to notify a negative company balance to the court	Article 375, para. 1, alinea (g)
In order to avoid bankruptcy during bankruptcy proceedings, possibility to submit letters of creditor acceptance enabling rearrangement of dates for debt payments	Article 376, para. 3
Filing of an improvement project during bankruptcy proceedings	Article 377
Judiciary intervention in respect of directors' right to information and right of examination	Article 392, para. 4
Rescission of a board resolution for increase of capital at private companies with registered capital	Article 460
Declaring a board resolution null and void	Article 391
(Joint-stock corporations) Judiciary intervention to the audit function -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Judiciary intervention for assignment of an independent auditor	Article 399
Judiciary intervention upon dissidence between the auditor and the company about the opinion issued by the auditor	Article 405

(Joint-stock corporations) Judiciary intervention re amendments to the memorandum of association	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Upon an amendment of the memorandum of association affecting the privileges of owners of privileged stock, possibility for judiciary intervention if the assembly of privileged stockholders has not been voluntarily convened	Article 454, para. 2
Possibility to request the rescission of the special assembly's decision from the court if the assembly of privileged stockholders votes unfavorably to an amendment	Article 454, para. 7
Possibility for the related creditor to request rescission of the related general assembly decision in case the equity capital was decreased without due prior notification to the creditors or if the company has not provided sufficient guarantee for a receivable	Article 475, para. 1
Dissolution of a joint-stock corporation -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Dissolution of a nonfunctional company due to the absence of a corporate organ upon pleadings lodged by (i) a shareholder, (ii) a creditor of the company, (iii) the Ministry of Customs and Trade	Article 531
Dissolution of a joint-stock corporation for rightful reasons upon the minority's pleadings	Article 531

Liquidation of joint-stock corporation -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Judiciary intervention for assignment of a Turkish liquidator resident in Turkey to take charge of liquidation	Article 536, para.4
Supplementary liquidation and temporarily registering the company anew to enable measures especially initiating a necessary lawsuit	Article 547
Reverting from liquidation	Article 548
Liability for prejudice due to corporate misconduct -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
A founder of the company, member of the board of directors, director/manager or agent in charge of liquidation can be held liable for an act or omission consequential to others' prejudice if any "fault" can be imputed to such a person while conducting his duties or using his powers	Article 553
For prejudice incurred by the company, the company and/or a shareholder is entitled to initiate a lawsuit; the shareholder can request that damages be awarded only to the company	Article 555
If a lawsuit initiated by a shareholder had legal and substantial grounds and yet any cost or the attorney fee could not be imposed on the defendant, any such cost would be divided between the plaintiff and the company according to a fair ratio.	Article 555, para. 2

In case bankruptcy is applied to a company, a shareholder or a creditor can initiate a lawsuit of liability under Article 553 only if the bankruptcy administration fails to initiate such a lawsuit	Article 556, para. 1
If a creditor’s Article 553 case succeeds, the amount of the creditor’s receivable is to be paid from the amount awarded.	Article 556, para. 2
In case more than one person is responsible to compensate the same prejudice, each is “severally” and “jointly” liable for the same prejudice in varying degrees depending on the extent the consequential damage can be imputed on each.	Article 557
Limited Liability Companies -	
<i>Subject</i>	<i>Turkish Commercial Code</i>
Voluntary dissociation of a partner from the company by requesting intervention of the court	Article 638
Joinder to a lawsuit for dissociation from a limited liability company	Article 639

Analysis

I. Competence of Commercial Courts and Certain Fundamental Rules of Procedure

A. Competence of commercial courts

A1. It is asserted in the 2011 Turkish Commercial Code that, regardless of the value of the subject-matter, the civil commercial courts have predominant competence over commercial issues unless provided otherwise by law.

A2. No reference is any longer made to the presumption of “commercial issue” to which the older Turkish Commercial Code used to refer to such that all parties could have been to the commercial court even though the issue could be considered to be commercial only for one of the parties. Such reduces the scope of issues falling under the competence of commercial courts.⁷

A3. Further, the 2011 Turkish Commercial Code provides for noncontentious albeit legal issues to be heard also by commercial courts when such issues are commercial, i.e. characterized as commercial primarily according to the Turkish Commercial Code. Further, in the 2011 Turkish Commercial Code, it is stated that whether the commercial court is authorized to hear a certain matter or not, is an issue concerning the “competence” (over the subject-matter) of a court. Analysed under the light of the Rulings for Harmonization of Precedents of the (Turkish) Court of Cassation in 1959, 1965, 1971 which provide that “competence” is an issue related to public order⁸, according to Article 5, para. 3 of the 2011 Turkish Commercial Code, not only any of the parties

⁷ Deliduman, “*Ticari Davalar*”, p. 102

⁸ (Turkish) Court of Cassation, Ruling for Harmonization of Precedents, decision dated 4 February 1959, numbered 13/5; (Turkish) Court of Cassation, General Assembly of Civil Chambers, decision dated 8 December 1965, numbered 1259/73; (Turkish) Court of Cassation, General Assembly of Civil Chambers, decision dated 13 February 1971, numbered 623/73.

(or interested persons) may assert during the proceedings that a matter needs to be heard by the commercial court, but also the judge is obliged to review *ex officio* whether it is competent over the subject-matter to hear a commercial matter.

A4. From another aspect, competence of commercial courts expanded because, according to Article 4 and Article 5, para.1 of the 2011 Turkish Commercial Code, competence to hear noncontentious commercial matters is also attributed to commercial courts. The expansion of the scope of commercial courts' competence as to cover noncontentious commercial matters was an explicit legislative move by amending the title of the referred Article 5 and the content of Article 5, para. 1. It is noteworthy that, according to the Turkish Code of Civil Procedure, Article 383, alinea 1, the civil courts of peace are competent to decide on noncontentious matters unless provided otherwise by law. The 2011 Turkish Commercial Code, Article 5, paragraphs 1 and 3 concern competence on both contentious and noncontentious matters if they are commercial. It is not only the 2011 Turkish Commercial Code which constitutes *lex specialis* on commercial law, but also the specific provision which is specific on the subject of competence to decide on noncontentious commercial matters. Moreover, the 2011 Turkish Code of Civil Procedure has been published in the Official Journal (of the Republic of Turkey) on 4 February 2011 while the Act no. 6335 amending the 2011 Turkish Commercial Code was published later in time, more precisely as of 30 June 2012; the chronological order of publications favors the latter act to govern the matter.

A5. Within jurisdictions where there is no commercial court, the competence of the civil courts is sustained by the 2011 Turkish Commercial Code, Article 5, para. 4 even if such competence has not been challenged. For long time, civil courts of first instance have been hearing commercial disputes at jurisdictions where no commercial court was instituted; such pragmatic approach is sustained by law.

A6. Finally, despite the curious wording of the the 2011 Turkish Commercial Code, Article 5, para. 4, the provision does not rule out for

a noncontentious matter to be brought before a civil court of peace if there is no commercial court within an area.

B. Application of the simplified trial procedure

B1. Where the new Turkish Commercial Code provides that the court is to resolve an issue by mere examination of a file before the court, then applies the 2011 Code of Civil Procedure⁹, Article 316, para. 1, alinea (b) according to which a provision enabling trial by examination of the file before the court is conducive to the conduct of the trial through simplified trial procedure.

B2. Within the context of regulating the general assembly of joint-stock corporations, where the 2011 Turkish Commercial Code provides for the shareholder's right to information and the right to examine various company records (*see, n. IX.A*), the said rights are explicitly reinforced by a right to assert any such before the competent court within a period of 10 days in case the shareholder's related request has been rejected, otherwise within a reasonable time period if it has been left unanswered or subjected to a delay without legitimate grounds. According to the relevant 2011 Turkish Commercial Code, Article 437, para. 5, such request would be heard according to the simplified trial procedure.

B3. Where the 2011 Turkish Commercial Code regulates the liquidation of joint-stock corporations, its Article 546, para. 1 subjects the disputes between a shareholder and the liquidator(s) to the simplified trial procedure. Furthermore, the dispute must be resolved within a period of thirty days. According to the referred article, while the court could decide whether it is "necessary" or not to hear the parties before deciding on the assertion, the legislative clarifying statement in relation to the provision does not leave room to the discretion of the court and asserts for hearing the parties for the resolution of the dispute.

⁹ The Turkish Code of Civil Procedure no. 6100 was published in the Official Journal (of the Republic of Turkey) dated 4 February 2011, numbered 27836.

B4. As a general rule in relation to commercial companies, is subject to simplified trial procedure (i) a lawsuit arising from partnership or shareholding between a stockholder on one hand, and another stockholder or the company on the other hand, (ii) a lawsuit initiated against a company director, member of the board of directors, manager, liquidation officer or auditor according to the 2011 Turkish Commercial Code, Article 1521. That being said, for assignment of a new auditor by the court, it is explicitly required for the court to hear those involved as well as the current auditor before deciding on the dispute.

C. Submission of evidence

C1. In relation to the procedure of proving one's case and submission of evidence, the 2011 Turkish Commercial Code has kept its stance to be unified with the Code of Civil Procedure simply by providing that the Code of Civil Procedure would apply for resolution of commercial issues.

C2. The previous rule for means of drawing notices and notifications conducive to default in discharging an obligation, to terminate a contract or disengage from a contract is reduced from a requirement of validity to a condition of proof by the 2011 Turkish Commercial Code. According to its Article 18, para. 3, the said types of notification may be served through the notary public, by telegram, by registered mail and not necessarily by certified mail, or via registered electronic mailing to be signed by secure electronic signature

D. Suitability of electronic format for commercial acts

D1. It was time for the law to provide for alternative forms of notifications for various reasons, *inter alia*, ever increasing notary fees and due to occurrences where notifications in interest more than one addressee: according to the 2011 Turkish Commercial Code, Article 18, para.3, notices or notifications for default, for termination of contract or in order to disengage from a contract may not only be served through traditional

means for notification, but can also be communicated via registered electronic mailing to be signed by secure electronic signature.¹⁰

D2. Electronic format is suitable for acts if the parties have explicitly agreed on such format. (Article 1525, para. 1)

D3. Moreover, the 2011 Turkish Commercial Code enables all commercial companies, corporate and individual entrepreneurs to use electronic format for all acts which are mandatory according to the Commercial Code. (Article 1526, para. 3)

D4. Adequate means of using electronic format by corporate companies is subject to regulations issued by the Institution for Information Technologies and Communication.

D5. For acceptability of electronic format in signatures, due regard must be paid to the 2004 Act on Electronic Signature which describes acceptable electronic signatures and regulates various topics concerning electronic signatures.

II. Commercial books

A. Submission of commercial books

A1. The 2011 Turkish Commercial Code, Article 64, para. 4 asserts that commercial books concerning the commercial enterprise in question, e.g. the book of resolutions of the company's board of directors,

¹⁰ Problems which are being encountered in relation to submissions of electronic communications to courts are however distracting: inaccuracy or incompleteness during communications or as they are submitted to the court, the ease in altering information during reproduction of electronic communications especially if a formal agency is not involved in the transmission of the message, and necessity to distinguish formal notifications from informal communications. A genuine and independent evidentiary value could not be attributed by the courts to electronic communications unless such risks are rendered highly improbable. Those being said, if the receiving electronic system is in accordance with the applicable regulations and seeks recognition of the sender's implanted electronic signature, the addressee has hardly any acceptable reason to deny proper receipt of the related message's content.

are indeed among commercial books albeit not directly related to the company's accounting.

A2. Small or otherwise, firms of which the activities have not necessarily been in line with the laws or in frequent disputes with other market actors, may end up being dissolved, sometimes leaving an unfortunate commercial legacy. The general rule put forth by the 2011 Turkish Commercial Code, Article 82, para. 8 is noteworthy also in this vein: for a term of ten years starting upon the dissolution of a commercial corporate entity, commercial books and other documentation are to be stored by the civil courts of peace¹¹ rather than by a notary public or a former firm partner

B. Evidentiary quality of commercial books

B1. Submission of commercial books is a significant subject directly related to the eventual resolution of commercial issues. A party may submit its/his commercial books to prove his own assertions or according to the decision of the court which acts upon the demand of the other party or in an *ex officio* manner. That being said, the evidentiary quality of commercial books is no longer a subject regulated by the Commercial Code, but by the new Code of Civil Procedure where a full provision Article 222 regulates this subject.¹²

¹¹ *Sulh hukuk mahkemeleri*

¹² According to Article 222 of the Code of Civil Procedure, the court may rule for submission of commercial books at commercial cases upon demand or *ex officio*.

Requirements related to the evidentiary quality of commercial books are sought and must be sought mainly because a party is trying to prove its/his own assertion or defence by own records.

- a) The favorable evidentiary quality of a commercial book depends on the commercial book's conformity with a number of norms: (i) completeness, (ii) propriety according to the laws and regulations, (iii) formal approval of commencement and closing, and (iv) consistency between entries, in the meaning that noncompliance to the mentioned requirements is interpreted such as to evidence the opposing party's assertion or defence. ("norms for commercial books").
- b) Records in a commercial book in compliance with the above-mentioned norms for commercial books may still be refuted by definitive proofs such as documentation including a commitment if they are duly signed or otherwise in accordance with formal

B2. According to the 2011 Turkish Commercial Code, the audit function as well as the auditor has gained independence and carrying out the audit function is subject to a contract applicable for a financial year. (n. XI) Although an audit report's object is the commercial books, can an audit report be relevant to a court's examination and required for submission to a court *ex officio*?

In a general manner, it is stated in the new Code of Civil Procedure, Article 219, para.2, that only related sections of commercial books are to be submitted to the courts.¹³ Although audit reports are less specific as concerns a certain commercial act or transaction, "independent" audit reports can be indicative of the degree of compliance with the above-mentioned principles to the extent they are persuasive of their objectivity. That being said, in its final version, the 2011 Turkish Commercial Code Article 84 does not even contain a former phrase which was meant to enable examination of unrelated sections of the commercial books if

requirements for its validity.

- c) The records in the plaintiff's commercial book(s) should evidence or otherwise support its assertion especially if it has been declared by the relevant party as evidence of own assertions or defence.
- d) If a commercial book's commencement or closing has not been approved, and if there is inconsistency between records (or between own commercial books), then such situation is evaluated as supportive of the other party's assertion or defence.
- e) Incoherence would not arise if the company's commercial book is in accordance with the norms for commercial books while underpinning the assertion or defence;
- f) If the other party's commercial book is also in accordance with the norms for commercial books, due regard is to be paid whether there is any record in that second party's commercial book on the issue. If there is any record contradicting the first party's assertion or defence, then there is an explicit contradiction between the parties' commercial books such that the commercial book of one of the parties is in fact erroneous or incomplete.

Finally, if one of the parties, while proving that the issue is not related to his commercial activity or otherwise not acting as a commercial enterprise, asserts to rely on the commercial books of the opposing party, but the opposing party fails to submit its/his commercial book(s), then the first party has proved his assertion or defence.

¹³ An exception is specified by the 2011 Turkish Commercial Code, Article 85 according to which the entirety of commercial books can be examined if the subject-matter is related to property law including issues related to heritage, property partnerships or dissolution of such.

such extended examination was necessary for evaluating the degree of compliance with the Turkish Accounting Standards.

The 2011 Turkish Commercial Code, Article 83, para. 2 explicitly adopts the provisions of the Code of Civil Procedure concerning the court's preparatory acts for contentious lawsuits and concerning mandatory submission of transaction documents. Therefore it is noteworthy that the new Code of Civil Proceedings, Article 222, para.1 authorizes the judge to compel a party to submit only the commercial books *ex officio* such that the provision is not concerned with an audit report. That being said, can an independent auditor be compelled by the court to submit documentation in accordance with the new Code of Civil Procedure, Article 221 concerning submission of documents by third parties?

Audit reports are evaluation reports¹⁴ focused mainly on financial reports and yearly activity reports, drafted upon an "assumption of strong commercial confidentiality", and meant to be leading to corrections, corrective actions, preventive actions; the object of the audit may subsequently change. In addition, according to the 2011 Turkish Commercial Code, Article 404, para. 1, the auditor is bound to keep the secrets related to the business and the company confidential unless permitted to reveal such. The auditor is not in a statutory position of personal responsibility to formally keep track of all changes made upon an audit report. Moreover, the commercial confidentiality of auditable documentation and other information is highlighted and sanctioned by the Commercial Code Article 404 in a strict manner for auditors, and by Article 527 in a general manner. On the other, it is not either very realistic to see the accurate history of a company during proceedings focused on the facts of a certain specific issue before the court.

¹⁴ It is incumbent on the board of directors to present the company's financial reports along with the board's yearly activity report for independent audit. According to the 2011 Turkish Commercial Code, Article 398, para. 1, Article 515 and Article 516, para. 1, maintaining a "true and fair view" of accounts in the financial reports and yearly activity report is a "statutory" principle binding rather for the "board of directors" and others involved in financial reporting. Moreover, independent audit to control, *-inter alia-* whether a "true and fair view" is reflected or not, is limited to the financial reports and the yearly activity report.

For all the above-mentioned reasons, it cannot be said that requiring submission of an audit report *ex officio* or upon a contending party's request would be effective or legally permissible. A court's general review of commercial books as concerns compatibility with statutory requirements, accounting standards and principles on book-keeping is limited to observations on accuracy and transparency of records rather in respect of sections of commercial books related to the subject-matter, consistency between various commercial books on the matter and current fulfillment of formal requirements as concerns book-keeping.

C. Commercial Registry

C1. Commercial registries need to reflect the reality of a commercial enterprise. To attain such, besides other measures, according to the 2011 Turkish Commercial Code, Article 33, the commercial registrar can formally call the related parties to have a certain point registered or put in conformity with the principles of commercial registration. Those principles comprise of accuracy, competeness, conformity with principles of public order and statutory requirements.

C2. The commercial registrar is authorized to require registration or correction of entries because if the related party is reluctant to act in accordance with the instruction without any solid grounds, then, according to the 2011 Turkish Commercial Code, the chief official representing the State in the area is authorized to impose an administrative fine.

C3. If the issue becomes contentious, then the Commercial Court will decide on the registration. While such decision is subject to appeal, the 2011 Turkish Commercial Code does not state that such appeal would suspend execution. Therefore, the Code of Civil Procedure would apply, and appeal would not automatically suspend execution of the decision.¹⁵

¹⁵ The difficulties in the wordings of the 2011 Turkish Commercial Code, Article 33, paragraphs 2 and 3 are critical since they regulate when the court should intervene and impose an administrative fine.

III. Unfair Competition

Unfair competition has been an area where corporations have been eager to lodge not only complaints but also substantial private law claims, sometimes only to be later discouraged by the modest amount of damages awarded by the courts even after extended periods of time that full-blown cases take to be resolved.

A. Array of recourses against unfair competition

The general provision of the Commercial Code to the effect that "anyone" whose economic interests are (adversely) affected or at risk, could have judiciary recourse against unfair competition has got more specific as concerns "customers", thanks to the explicit wording of the Article 56, para. 2. Since the 2011 Turkish Commercial Code, more acts are defined as unfair competition such as to expand the ambit of the Commercial Code's Article 56. Having described unfair competition as an unlawful act, a revised array of judiciary recourses against unfair competition is provided also in the 2011 Turkish Commercial Code.

A1. Besides requests to have the incidence of unfair competition established by the court, recourses exist to have unfair competition prevented or ceased, for restitution, correction of any unfair declaration or, in case of the defendant's fault, in order to coerce the party in fault to pay an amount equivalent to benefits which could eventually accrue from unfair competition. Moreover, according to the 2011 Turkish Commercial Code, individuals or corporations can avail of an array of judiciary recourses not only upon the commission or concrete threat of unfair competition, but also when there is a "possibility" for unfair competition to occur, that is specifically asserted at Article 56, para.1.

A2. The court to which the new Code of Civil Procedure, Article 16 attributes specific jurisdiction is the court which sits in the region where (i) an act of unfair competition is committed, (ii) an act of competition could occur, or (iii) the injured party is resident (or established). The

statutory procedural rule attributing general jurisdiction to the court where the defendant is resident (or established) still applies.

B. According to the 2011 Turkish Commercial Code, it is also possible to aim at destruction of equipment operated in order to commit acts of unfair competition as well as goods involved, but only if such destruction is necessary to prevent unfair competition. However customers cannot ask for equipment or materials to be destructed; the economic interests of customers are considered too indirect and distant by comparison to others who may be adversely affected by an act of unfair competition.

C. Unfair competition via communication or information technology routes

The boost in communication and information technologies challenges traditional considerations on liability for wrongdoing and also specifically as concerns unfair competition.

C1. In its Article 56, para.4, the 2011 Turkish Commercial Code explicitly asserts that service providers cannot be aimed at by lawsuits or by judiciary measures against unfair competition in case the service provider does not have any such role as to initiate transmission, select or change content.

C2. That being said, if a critical risk could occur, judiciary measures could be taken against a service provider even if unfair competition was committed via communication or information technologies.

D. Interim judiciary measures

D1. *A posteriori*, cases require various actors' serious investments of time, energy, skills and money. For the effectiveness of the legal norm, sanctions imposed as a result of cases are necessary, but not sufficient. In the interim, interested persons are enabled to have recourse to judiciary measures including injunctive reliefs and other measures according to the Code of Civil Procedure and the Commercial Code's Article 61 es-

establishing recourse to judiciary measures particularly in order to prevent unfair competition.

D2. The 2011 Turkish Commercial Code further provides in its Article 61, para. 2, another type of measure, "provisional seizure" of any good at the customs by the customs administration during its export or import, although such measure is reserved for criminal unfair competition and can be issued if a legal title is injured: according to the wording of the stated provision, the applicant for such an administrative measure can only be the owner of a legal title which is allegedly injured by such unfair competition. The provision is rather an extension of repression of unfair competition. Indeed, a regulation which aims at repression of certain economic conduct provide for judiciary means in addition to administrative measures such as the mentioned statutory provision enabling a type of administrative measure against criminal unfair competition. Therefore, the provision should be accordingly construed. As such, since the 2011 Turkish Commercial Code, Article 61, para. 4 asserts that such a administrative preliminary measure would remain in effect if, either a lawsuit is "filed", or a judiciary measure is obtained within ten days following receipt of the notification about the measure in concrete, commencement of a lawsuit before the competent court is necessary. The law attaches importance to have the competent court intervene on the subject-matter; according to the new Code of Civil Procedure, not only jurisdiction, but also competence is sought for a court to hear even a request for an interim judiciary measure¹⁶.

IV. Competence of Commercial Agents

Activities of commercial agents are regulated under the Commercial Code in a general manner.

D1. A commercial agent who acts on behalf of and for the account of a foreign principal is, for the protection of the principal's rights, authorized to draw and receive all types of notifications, initiate litigation and become a party to litigation arising from the transactions to which the

¹⁶ *İhtiyati tedbir*

commercial agent participated. The 2011 Turkish Commercial Code, Article 105, para. 2 now makes a distinction between principals established in Turkey and abroad.

- a) As far as foreign principals are concerned, the 2011 Turkish Commercial Code resubscribes to its former mandatory rule as far as a local agent of a foreign tradesman is concerned: a commercial agent which acts on behalf of and for the account of a foreign principal, for the protection of the principal's rights, should be authorized to draw and receive all types of notifications, initiate litigation and become a party to litigation arising from the transactions to which the commercial agent participated.
- b) It is possible to contract out of the stated rule such as not to authorize the relevant agent to receive notifications on behalf of a Turkish principal.

D2. As concerns a court decision obtained as a result of a lawsuit initiated in Turkey against a principal, according to the 2011 Turkish Commercial Code, Article 105, para. 3, it is not permissible to implement such a decision against a commercial agent even if the agent is – in principle- authorized to act on behalf and for the account of the principal or indeed acted as such during the proceedings.

Although, the Commercial Code regulates commercial activities within the Republic of Turkey and the Turkish legislature has intended to make a choice of commercial law policy, the wording of the specific provision is curious¹⁷. Since a State's sovereignty is reflected through and

¹⁷ E.g., the instance of a principal being "foreign" rather than a reference to the place of establishment or residence is critical for the application of the related provision. A trait which is curious to the wording is the choice of the term "foreign" in the face of occurrences such as an individual tradesman of foreign nationality who's established in Turkey or, vice versa, a Turkish tradesman who's established abroad. In the final analysis, the territorial effect of the Commercial Code is such that commercial activities within the Republic of Turkey are subject to the Turkish Commercial Code such that the nationality is rather an issue of the international private law policy. Moreover, the usage of the term "foreign" as concerns a principal in the Commercial Code (rather than

limited to the jurisdiction of the courts within its territory, the Turkish legislature appears to have asserted an issue of commercial law policy for application within Turkey. It is noteworthy that enforcement of a decision of the courts in Turkey obtained as a result of a lawsuit initiated abroad or of a foreign arbitral decision obtained abroad is governed by the rules of international private law. As concerns the enforcement of a foreign court's decision against an agent in Turkey, whether the provision of Article 105, para. 3 pertains to protection of public order or not may constitute a significant issue: according to the Code of International Private Law and Procedural Law, Article 54, alinea (c), a request for the execution of a foreign court's decision in Turkey can be challenged if the decision is clearly not in conformity to public order. The same exists also in respect of execution of a foreign arbitral decision. Execution against the commercial agent in Turkey could have been a concern for public order since States are interested in regulating economic activities for various reasons, including the protection of contractors who are relatively ineffectual. Therefore, the court would decide taking into account a number of points. Conformity in respect of "implementation" rather than conformity of the "decision" to public order can be discussed to a degree if the principal has a residence in Turkey. That being said, given the mandatory rule that agents of "foreign" principals cannot contract out of the rule for representative power of the agent, public order concerns cannot be realistically asserted in the present context.

V. (Regulation of group companies) Lawsuits arising from acts due to use of a company's dominant position over subsidiary companies

A. Introduction of two types of lawsuits into the Commercial Code, depending on the operation in dispute

A1. The 2011 Turkish Commercial Code recognizes and regulates in its Article 195, *et seq.* group companies in order to protect the legiti-

by reference to the principal's establishment or residence) does not necessarily observe acceptable concerns related to public order.

mate interests of the shareholders and creditors of a subsidiary company from commercially risky, unreasonable acts or omission to take a certain measure due to the influence of a dominant company even if a relevant act was otherwise permissible. The notion of “dominance” has been defined by the doctrine, as “the power to determine and control the investment, operation and finance policies of a company”.¹⁸ The principle newly asserted by law is that a company holding a dominant position over another company is not permitted to unduly use its position such that a subsidiary incurs a loss due to an act committed or omission to take a certain measure under the influence of the company holding a dominant position over the subsidiary company.¹⁹

A2. For an act to be as such legally impermissible within the framework of the 2011 Turkish Commercial Code, Article 202, the following conditions should occur:

- a) there should be a company holding or presumed to be holding a dominant position within a group of companies²⁰;
- b) a subsidiary company should directly or indirectly commit risky, unreasonable acts or fail to take certain measures due to the influence exerted by the company in a dominant position;
- c) the company should have incurred loss from such an act or failure to take a certain measure;
- d) the loss was not compensated (from within the group) by various means, e.g. granting of an advantage, a benefit, a concrete right to receive various benefits.

¹⁸ Okutan Nilsson, Gül, “*Türk Ticaret Kanunu Tasarısı’na göre Şirketler Topluluğu Hukuku*”, Oniki Levha Yayıncılık, 2009, p. 98

¹⁹ If a company is directly or indirectly holding the entirety of the shares of the subsidiary company “and” all of the voting rights at the subsidiary company, then a different and more accommodating set of provisions of the 2011 Turkish Commercial Code would apply.

²⁰ Two companies may well form a “group” of companies.

Thereupon, the company holding such dominant position along with the members of its board of directors due to whose acts loss has occurred, shall be exposed to liability. If it is the subsidiary company that is to address liability, the court could decide for restitution upon demand or, decide *ex officio*, for acquisition of the plaintiff's shares by the company holding a dominant position, or resolve the dispute by other means.

A3. By way of explicit reference of the 2011 Turkish Commercial Code, Article 202, para.1, alinea (1):

- a) the 2011 Turkish Commercial Code, Article 560 applies as concerns the statutory period to file such pleadings: pleadings may be lodged within two years starting from the date of gaining knowledge of the loss and the person liable for the loss, but not if five years have passed after the incidence creating such a loss has occurred;
- b) the 2011 Turkish Commercial Code Article 555, para. 2 shall apply which provides that if the pleadings have legal and substantial grounds, but the defendant cannot be required to reimburse (or pay) the expenses and attorney fees arising from the conflict, then the court may decide for such costs to be borne by both the plaintiff and the (subsidiary) company to be divided according to a fair ratio.

A4. However, the wording of the 2011 Turkish Commercial Code Article 202, paragraph 2 in conjunction with its paragraph 3 is such that the condition for a substantive loss to have occurred would not be sought if the objectionable act was a decision for the subsidiary company's merger, division, type conversion, dissolution, issuance of securities, a significant amendment of its memorandum of association, then the shareholders of the subsidiary company who have objected in written to such decisions or voted against such proposals would be entitled to request restitution or acquisition of his shares at the true value his stock by the company holding a dominant position. According to the 2011 Turkish Commercial Code, the relevant pleadings should be filed within a period of two years starting from the date that the general assembly has

taken the objectionable decision or starting from the announcement of the relevant resolution of the board of director.

B. Cautions to be deposited upon a lawsuit within the framework of regulation of group companies

B1. The 2011 Turkish Commercial Code Article 202, para.3 provides that a caution equivalent to the “potential” loss of the shareholder or the true value of stock to be deposited upon such pleadings. The act in dispute cannot take effect until such caution is deposited.

B2. According to the 2011 Turkish Commercial Code, Article 202, para. 2, for both type of pleadings, e.g. against operations from which the subsidiary company incurs loss or against acts like legal restructuring or issuance of securities for no apparent reason (although generally requiring a general assembly decision), if the defendant asserts that the filing of pleadings is based on ill intentioned, then it is possible to require the plaintiff to deposit a caution for potential harm upon demand.

In practice, when a party requests the other party to deposit a caution according to the general provisions of the Code of Civil Procedure, the courts display reluctance; at some cases, deciding for deposit of a caution and the amount of such caution may be considered as revealing evaluation on the subject-matter in a precece manner while for some others, it may really require a prior albeit serious evaluation phase. On the other hand, the provisions of the 2011 Turkish Commercial Code for deposit of cautions are noteworthy. Therefore, such specific provisions in the Commercial Code could encourage courts to rule for deposit of cautions when suitable and without paying undue attention to other considerations.

C. Assignment of an *ad hoc* auditor

Each shareholder is entitled to request assignment of an *ad hoc* auditor for investigation of an allegation made by an auditor, by a *ad hoc* auditor or a by a committee of risk assessment and management as concerns

deceitful relationships between, the subsidiary company on one hand,, and another subsidiary company or the company holding a dominant position on the other. According to the 2011 Turkish Commercial Code, Article 207, such a request for clarification may be filed by the competent court.

D. Regulation of Legal Restructuring: Mergers, Divisions, Type Conversions

A significant novelty introduced by the 2011 Turkish Commercial Code into the law of companies is the detailed regulation of mergers, divisions and type conversions.

D1. Legal restructuring by way of merger, fusion or type conversion requires the decisions of the general assemblies or partners of the companies involved. As a rule, it is possible to initiate litigation for the annulment of general assembly decisions. While the prescribed period of time to make such a request is a three months' period starting from the related announcement at the Commercial Registry Gazette, for a general assembly decision as concerns a merger, fusion or type conversion to be annulled, such should be requested within a period of three months. If the decision was not announced at the Commercial Registry Gazette, e.g. announcement has not been a requirement, then the said period starts from the date of registration at the Commercial Registry. The court is authorized to order fulfillment of a certain requirement, settlement of an issue which can especially be characterized as lack of conformity with the principles of restructuring like preservation of rights, continuity of the company²¹, therefore for conformity of the restructuring with the law and regulations.²² If it is impossible to resolve the issue brought before it

²¹ The general principle about the "continuity" of the company during and after a merger, division or type conversion as categories of legal restructuring under the 2011 Turkish Commercial Code is different from and exceeds the principle on "continuation of operation" applied especially during liquidation of a company.

²² An exception to the principle on "continuity of the company" is the new permissive norm within the context of mergers, as to enable a settlement to be paid to a shareholder (or partner) in consideration of the shares if a shareholder is to leave the company that

or the issue is not resolved within a period of time to be prescribed by the court, then the court would annul the relevant general assembly decision and rule for measures.

D2. For all types of restructuring, the general principle of the preservation of stock and rights of the shareholders assumes prior importance. Such rights comprise of the rights of participation to the company and other rights of shareholding, i.e. right to assets, right to manage, rights of audit and examination.

D3. In practice, during mergers, divisions and type conversions, remainders from re-evaluations of previous shares need to be dealt with fairly; in all cases, the 2011 Turkish Commercial Code, Article 191 permits the shareholder to have recourse to the competent court to decide on an equalization payment to compensate the difference left over from re-evaluation of shares during corporate restructuring. Such recourse should be made within a two months' period following the publication in the Turkish Commercial Registry Gazette of the decision on the specific corporate restructuring. The court is not bound by the restraint in the 2011 Turkish Commercial Code, Article 140, para.2. as concerns the maximum "amount" of payment. The judgment of the court is to be binding for all shareholders and not just for the plaintiff.

VI. Valuation of any non-liquid asset to be deposited as capital

Registration of a joint-stock corporation by the commercial registry as well as acquiring title over its shares require the deposit of liquid or non-liquid assets.

D1. According to the 2011 Turkish Commercial Code, Article 342, enterprises and assets (including rights) of which neither the liquidity

is the object of the merger; such leave can be forced by the affirmative vote of a majority representing ninety per cent of the capital or voluntary such that it can be requested from the court.

nor the transferrability is restricted can be deposited as capital.²³ Different from liquid assets as capital, assets which are not liquid are subject to valuation by experts to be assigned by the competent court. The 2011 Turkish Commercial Code, Article 343 requires that an expertise report includes the following:

- a) verification that the asset in question is real, valid, and that neither its liquidity nor its transferability is restricted;
- b) affirmation that the asset in question is receivable;
- c) clarifications as to the applied method of valuation, especially as to why that certain method of valuation is considered to be the fairest and most suitable method considering (the rights of) everyone involved;
- d) value of the asset in question;
- e) indication about the number of shares to be allocated in consideration of the asset deposited and the value of the shares in Turkish Lira .

D2. The 2011 Turkish Commercial Code, Article 343 explicitly provides that the corporate founders as well as others who hold an interest from the valuation may object to the expertise report before the competent court.

D3. The function of the court is to approve an expertise report for it to get definitive if it is appropriate to do so; a timely flow of formal steps is necessary for the incorporation to take place within a reasonable period of time. Valuation of non-liquid assets in concrete at an expertise

²³ As such, labor or other types of services, commercial prestige or undue receivables cannot be deposited as capital to a joint-stock corporation; the 2011 Turkish Commercial Code, Article 342, para.1 explicitly enumerates the mentioned values among non-depositable values which therefore do not even qualify as (non-liquid) asset. That being said, it is further explicitly specified that the 2011 Turkish Commercial Code, 343 is without prejudice to its Article 128, therefore applicable also for joint-stock corporations such that a promise for imposition of rights over immovable property is a valid value as an asset which does not require a related entry to the registry office.

report is a requirement and it needs to get definitive before the signatures at the memorandum of association are validated by the notary public; the 2011 Turkish Commercial Code, Article 339, para. 2, alinea (e) requires for the values of non-liquid assets to be stated in the memorandum of association of the joint-stock corporation.

VII. Termination of a company upon dubious operations

While the 2011 Turkish Commercial Code regulates the control which the Ministry of Customs and Trade can exert over commercial companies, its Article 210, para. 3 states that the mentioned Ministry is authorized to request termination of a company if one of the following occurs:

- a) operation in contravention of the public order or of the company's object of activity;
- b) preparations for an operation in contravention of the public order or of the company's object of activity;
- c) conducting fictitious operations.

The Ministry can file such a lawsuit within a period of one year after having gained knowledge that such an operation was undertaken. There is a parallelism between the said provision and Article 353 which enables the Ministry to lodge for termination of a company for critical failures in contravention of statutory requirements as concerns its process of establishment.²⁴ By analogy, such a lawsuit would be initiated also at the commercial court within the area where the headquarters of the relevant company is established.

²⁴ See Korkut, Ömer "Anonim Şirketlerin Kuruluşundaki Eksikliklerin Hukuki Sonuçları ve Tescilin Sağlığa Kavuşturucu Etkisi", Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 2012/2 (Special Issue) p. 425

VIII. Legal capacity of the company

The joint-stock corporation is subjected to a new set of material and procedural provisions by the 2011 Turkish Commercial Code. One of the most striking novelty is the reinforcement of the company's legal capacity such that the legal capacity of the company is no longer determined by the scope of the company's objects. While the 2011 Turkish Commercial Code, Article 125 asserts that all commercial corporations as companies within the meaning of the Code enjoy legal capacity, it is added that such is conducive to entitlement to rights and assumption of obligations without prejudice to exceptions by law. In other terms, the validity of a transaction is not called into question by anything in the memorandum of association without prejudice to the exceptions provided by law.

On the other hand, its Article 371, para.1 delimits the signatory power of those with representative authority to bind the corporation by the purpose and object of the enterprise (i.e. the scope of the objects of the company).

Therefore a distinction is made between the legal capacity of the company and the power of the signatory. Indeed, capacity, authority and reliance in contracting are distinct matters²⁵. Moreover, according to the 2011 Turkish Commercial Code, Article 371, para. 2, transactions entered into by the organs of a company and which are yet irrelevant to the company's object of enterprise shall still be binding upon the company. That being said, the company can revert for liability as concerns transactions in breach of the law and the company's memorandum of association. The specification which is noteworthy in the provision is the emphasis on the object of the enterprise in respect of the transactions which are entered into by those who are authorized to represent the company; according to the 2011 Commercial Code, Article 371, para. 2, it is possible for the company to be released from the binding effect of a transaction if the object of the transaction does not correspond to the "object" of

²⁵ Cahn, Andreas, with Donald, C. David, "Comparative Company Law", Cambridge University Press, 2010, p. 312

the enterprise (out of the scope of the objects of the company). For the company to be released from the binding effect of such a transaction, one of the following is required:

- a) proof that the other transacting party was informed of such irrelevance, or,
- b) based on the circumstances, proof that such irrelevance should have been obvious to the other party,

In relation to the last, according to the 2011 Turkish Commercial Code, a mere announcement of the memorandum of association is not sufficient to evidence that a certain transaction was irrelevant to the commercial activity of a joint-stock corporation.

IX. Judiciary intervention to the functioning of a joint-stock corporation's general assembly

A. Right to receive information and right of examination

Each shareholder is entitled to examine the financial tables, the yearly activity report, the audit reports, the proposal of the board of directors as concerns distribution of profits, fifteen days in advance of the general assembly and extend queries to the auditors during the general assembly.²⁶ Despite the statutory provision for financial tables to be exposed to the shareholder for a whole year, certain other records like the audit report or commercial books are held available for examination upon the permis-

²⁶ The French Court of Cassation has given a decision in 2010 to the effect that, in its essence, failure to sufficiently satisfy the shareholders' rights to receive information and documentation within the fifteen days' period in advance of a general assembly meeting would not necessarily constitute grounds for the rescission of the related general assembly decision, that is, at the absence of an explicit rule leading to such a consequence; see the mentioned decision of the French Court of Cassation, Commercial Chamber, dated 26 October 2010, numbered 09-71, 404, in Albarian, Alexis, *Actualite jurisprudentielle, 2010 - 2011: Droit commercial, Droit des sociétés commerciales*, Wolters Kluwer France, 2011, pp. 23 -26

sion of the general assembly or the board of directors. It is important not to restrict the right to receive information to simple requests for information: e.g., any formal requirement for a certain issue to be announced or otherwise communicated also establishes a right to receive information. Moreover, especially a requirement for an announcement to the public stems from legal security concerns. Even if certain documentation and some information could not be exposed due to commercial confidentiality to varying degrees, an unreasonable refusal to expose information could be taken before the court for it to resolve the issue especially if such refusal renders other rights of the shareholder ineffective. According to the 2011 Turkish Commercial Code, Article 437, para. 5, such recourse should be made within ten days upon an explicit refusal to give information or within a reasonable period of time, as applicable. The commercial court would settle the issue through simplified trial procedure and may well decide for information to be given outside of the general assembly, by indicating how the relevant information should be communicated. As such, in the affirmative, the provision does not explicitly state whether the information would be given to the plaintiff, to a group of shareholders, exposed to all shareholders or announced to the public. Therefore, the court is to weigh various concerns, - *inter alia*- confidentiality, right to information, right of examination and legal security while judging the means of communication and/or announcement.

The new Code of Commerce has provided the right to information and the right of examination also to partners of a limited liability company in a manner as to enable judiciary recourse.

B. Right to an ad hoc audit

B1. Each shareholder is entitled to request permission from the general assembly for the conduct of an *ad hoc* audit in order to have clarification on a certain incidence when such clarification is reasonably relevant for the shareholder to avail of rights stemming from his title over the share.

B2. Upon permission of the general assembly, the shareholder may have recourse to the competent court to have an *ad hoc* auditor assigned over the matter.

B3. If the request for permission is refused, the shareholder(s) whose shares' nominal value amount to a minimum one million Turkish Liras, or whose shares constitute ten per cent of the capital could avail of minority rights, thus be entitled to request from the competent court to have an *ad hoc* auditor assigned. Such request must be filed within a term of three months.

B4. If the court is convinced that some loss may have occurred due to a transgression, more than one *ad hoc* auditor may be assigned to carry out a more comprehensive audit. The company's bodies should give information to the auditor about the company and permit the auditor to examine the company's books, correspondence, assets and treasury.

B5. The *ad hoc* auditor should draft a report and submit it to the court which will notify the company of the report.

B6. If the company in question asserts that the report shouldn't be provided to the plaintiff shareholder(s) because such disclosure would transgress the commercial confidentiality or otherwise threaten legitimate interests of the company, the court needs to decide on this specific point.

B7. If disclosure is not contended by the company before the court, the *ad hoc* audit report would be submitted to the general assembly within a year's time and a copy of it would be presented to the shareholder who requests to examine it.

C. Restriction of voting privileges

Given the principle of "equality among shareholders under the same circumstances", granting privilege to certain shares as concerns voting (e.g. the number of votes per share) would require an explicit provision for such, as done by Article 479; generally, privilege in respect of vot-

ing rights occurs when an accrued number of votes to is attributed to a (type of) share although the related share's nominal value is equivalent to that of a plain share. It is noteworthy that, In practice, attribution of privilege to certain shares is a method for the success of an operation to increase equity capital. A novelty of the 2011 Turkish Commercial Code is the restriction to any such privilege according to Article 479, para. 2; the number of votes attributed to the privilege must be limited to "fifteen" (votes). That being said, upon the request of a company, the court can grant exemption from the mentioned restriction to a company if the court is sufficiently convinced that (i) the company can attain a projected restructuring for corporate development, (ii) on other well justified reasons. For such a court decision, the company must either submit a project of restructuring for corporate development, or explain other justified reasons to be granted an exemption from the above-mentioned restriction. According to the legislative clarifying statement of Article 479, para.2, the specific regulation is a preference of law policy principally aiming at professional improvement of family companies while the project or reasons for exemption should be carefully reviewed before an exemption could be granted. The provision is further noteworthy in that any change to be introduced into the project must be reviewed by the same court. As such, an exemption is granted to the company is not perpetual. If it becomes clear that the project's aim would not be attained, or that the grounds presented to the court as justified reasons for exemption do not persist, then the company would be denied of such exemption.

D. The minority's request for convention of an (extraordinary) general assembly or insertion of an item to the convening general assembly's agenda

D1. By law, the shareholder(s) of ten per cent of the equity-capital, or five per cent of the equity-capital at a listed corporation, as applicable, may request for the board of directors (i) to convene an (extraordinary) general assembly, or (ii) to insert an item to a convening general assem-

bly's agenda, by presenting clarifying statements and the related item in written.

D2. Are introduced by the 2011 Turkish Commercial Code, Article 411, paragraphs 2 and 3, the prerequisite formalities to (i) have such a request served via the notary public, and (ii) ensure receipt of such a notification for a new item of agenda before the deposit date of the fee for the then-current agenda's publication at the Turkish Turkish Commercial Registry Gazette.

D3. Another novelty is the possibility for the minority to convene the (extraordinary) general assembly if the board of directors fails to convene it within a period of forty five days despite having favorably responded to the request within a period of seven days. In this vein, if the board of directors fails to respond or responds unfavorably to the request, such minority is enabled to request from the court, the assignment of an agent who will, in the affirmative, implement the court's ruling for the convention of the extraordinary general assembly or insertion of an agenda item, as applicable. The court shall have applied the simplified trial procedure and its decision shall be definitive. The relevant new provision in the 2011 Commercial Code on this judiciary recourse is Article 412.

E. Challenging the substantial validity of a general assembly decision

E1. The 2011 Turkish Commercial Code provides in its Article 445 for rescission of decisions upon recourse to the court within a period of three months starting from the date by which the general assembly has issued the decision. It is noteworthy that not every shareholder can have a general assembly decision rescinded in this vein.

A novelty of the 2011 Turkish Commercial Code is the provision that a general assembly decision can be declared null and void, that is acknowledging the invalidity of a decision, in addition to situations where a general assembly is rescinded. Taking into account rather the "content"

of the decision, a general assembly decision can be declared to be null and void according to Article 447 “particularly” if one of the following transgressions has occurred:

- a) if the decision denies a shareholder of his right to participate to a general assembly, of a right to a minimum number of votes, of his right to have recourse to the court or of a core statutory right, otherwise renders availing of such rights ineffective, or makes it difficult to avail of such rights;
- b) if the decision restricts a shareholder from availing of his right to receive information, right of examination or right of audit to a degree exceeding that permissible by law;
- c) if the decision contravenes the main structural features of joint-stock corporations or the principle of conservation of equity capital.

Although there may be other reasons for a general assembly decision to be declared null and void, according to the legislative clarifying statement of Article 447, for other instances, first the instance must be tested as to whether a general assembly can be rescinded rather than being declared null and void,

E2. Despite the substantive and procedural differences between rescission of a general assembly decision and declaring it null and void, the 2011 Turkish Commercial Code regulates common points to both types of assertions. Upon pleadings to challenge a general assembly decision either for its rescission or for it to be declared null and void, the board of directors is required to duly announce the pleadings and the date of hearing, as such especially have that information announced on the internet site of the relevant company. After hearing the board of directors on the matter, the court may rule for suspense of the relevant decision.

As a matter of procedure, the court may order the plaintiff to deposit a caution for an eventual loss of the relevant company to arise due to the pleadings according to the 2011 Turkish Commercial Code, Article 448,

para. 3. If the court orders deposit of a caution upon the defendant's request, the court is to decide on the type and amount of caution.

The provisions concerning rescission of a general assembly decision and declaring a general assembly decision null and void apply also in respect of limited liability companies.

X. Judiciary intervention to the management function of a joint-stock corporation

A. Duty to notify an (interim) negative balance to the court

A1. The board of directors is required to notify to the competent court if the company's interim balance is negative, i.e. whenever it becomes evident that the company cannot pay for its short and long term debts and cannot fulfill its other liabilities, even if when the real values of the company's assets are taken into account. It is noteworthy that according to the 2011 Turkish Commercial Code, Article 375, para. 1, alinea (g), the mentioned obligation to notify a negative (interim) balance and to notify bankruptcy cannot be delegated to others, as such a strict duty of the board of directors. The same applies as concerns the director(s) of the limited liability company.

A2. Long-term debts and other liabilities are also included in the balance-sheet, therefore may cause the balance to prove negative. However, according to the 2011 Turkish Commercial Code, Article 376, para, 3, if a number of creditors of whose the total amount of receivables arises to an amount such that those creditors' acceptance of delay in payment and to receive their credits after other debts have been paid, sign such a letter of acceptance, then the notification of the board would not result in bankruptcy. It is required that the existence, suitability and validity of such written letters of acceptance have been verified in the expertise report to be submitted to the competent court to which the notification of bankruptcy has been addressed.

B. Filing of an improvement project during bankruptcy proceedings

B1. According to the 2011 Turkish Commercial Code, Article 377, if the board of directors of a joint-stock corporation or any creditor can develop a realistic project to improve the balance, thereby the financial status of a joint-stock corporation and submit such to the court, postponement of bankruptcy could be requested. The improvement project must include genuine sources and objective measures such as subsidizing cash from external resources.

B2. The 2011 Turkish Commercial Code, Article 377 provides that the Code of Execution and Bankruptcy, Article 179, alinea (b) would apply as to filing of an improvement project. According to the stated procedural rule, filings in order to receive credits from the company in question cannot be processed and those which have been initiated would be suspended. Therefore, if bankruptcy is postponed by the competent court, postponement of bankruptcy would produce a situation "similar" to that upon the voluntary written acceptance of delay in payment of receivables permitted according to the 2011 Turkish Commercial Code, Article 376, para.3, in respect of filings of claims, yet not the same: judiciary postponement of bankruptcy is rigid and the company in question has weak control over its sequel, e.g. the decision enabling postponement can well be reviewed while postponement is restricted to a period of one year according to the Code of Execution and Bankruptcy.

C. Judiciary implementation of the directors' rights of information and examination

C1. During the board meetings, each director is entitled to receive information, examine the commercial books and documentation in respect of the dealings of the company as well as to discuss such information without adherence to a preset agenda. If the director wished to avail of those rights at other times, he may request permission from the

president of the board to seek any information or documentation and also to examine them.

C2. If a director could not avail of his rights to receive information and of examination, then, according to the 2011 Turkish Commercial Code, Article 392, para. 4., he may have recourse to the competent court which would resolve the issue in a definitive manner through simplified trial procedure.

The provisions concerning the directors' rights of information and examination apply also in respect of limited liability companies.

D. Challenging the validity of a resolution of the board of directors

D1. At a private joint-stock corporation, if the board of directors has been authorized to increase the equity-capital of the company up to the registered amount of equity-capital, the 2011 Turkish Commercial Code, Article 460, para.1 enables the board to decide for increasing the equity-capital in accordance with the Code and within the limits of its power set forth by the company's memorandum of association. It is worth noting in this vein that the Code's Article 460, para. 5 provides for recourse to the court aiming at rescission of such a resolution. By explicit reference of the Code, its provisions from Article 448 to 451 relevant to the rescission of a general assembly decision (*re* joint-stock corporations) are applicable also in respect of the rescission of such a resolution of the board of directors. (*n. IX.E.2*)

D2. The 2011 Turkish Commercial Code, Article 391 enables the competent court to "declare" a resolution of the board of directors null and void "particularly" for lack of conformity with mandatory provisions and for lack of conformity with main principles in respect of the functioning of a joint-stock corporation. Such main principles are:

- a) Equality among the shareholders who are under the same circumstances;

- b) Acting in accordance with the main structure of a joint-stock corporation;
- c) Conservation of equity-capital;
- d) Protection of the core rights of each shareholder and enabling their effective usage in practice;
- e) Separation of functions among the company's bodies, as such, impermissibility to delegate any core function.

The provisions concerning dissolution apply also in respect of limited liability companies.

XI. (Joint-stock corporations) Judiciary intervention as concerns the audit function

Auditing of joint-stock corporations originally stem from the statutory provisions entitling the State to audit such, that is based on its regulatory role. It is traditionally the general assembly which is entitled to the most effective rights of audit.²⁷ As such, the auditor of the joint-stock corporation needs to be elected by the general assembly.²⁸

Since the 2011 Turkish Commercial Code, the joint-stock corporation's main (financial) audit function has gained independence. The main audit function is subject to a contract applicable for a financial year to be entered into according to the decision of the joint-stock corporation's general assembly. That being said, it may be requested from the court to intervene for assignment of an auditor. As such, the absence of an auditor does not justify a request for dissolution of the company. Taking also into account the "independence" factor introduced by the 2011 Turkish Commercial Code in respect of the audit function and the audi-

²⁷ Domaniç. Hayri "Anonim Şirketler Hukuku ve Uygulaması", Temel Yayınlar, 1988, p. 727

²⁸ Domaniç, *ibid*, p. 728

tor, it can be concluded that the “auditor” does not figure as a component of the corporation under the commercial law any longer.

It is noteworthy that the provisions of the new Code of Commerce as concerns the audit function of the joint-stock corporation apply also in respect of limited liability companies.

The provision enabling judiciary intervention leading to a definitive court decision for assignment of the auditor is Article 399 of the 2011 Turkish Commercial Code. If it is the court which finally assigns an auditor, then the court should decide on the remuneration of the auditor in addition to the amount of expected expenses to be advanced to the court’s cashier. It is possible to object to such amounts within a period of three days.

A. Court’s assignment of an auditor

According to Article 399, para. 6, an auditor could be assigned by the court upon the request of the board of directors, any member of the board of directors or any shareholder if one of the following occurs: (i) If an auditor could not be elected by the general assembly until the fourth month of an activity year, (ii) upon rejection or termination of the contract by the auditor, (iii) upon rescission of the relevant internal decision, (iv) if the auditor cannot carry out his tasks for various reasons, or (v) if the author is impeded from carrying out his tasks.

B. Court’s termination of a current auditor’s contract and subsequent assignment of a new auditor

This is a critical point because the effective termination of the auditor’s contract (by others else than the auditor) is only permissible upon a court decision and once a new auditor is assigned. Proceedings for replacement of the current auditor can be initiated on grounds (“rightful reasons”) stemming from the personal situation of the auditor, especially if doubt exists about the impartiality of the auditor. Grounds for termina-

tion of the auditor's contract must be different from grounds for rescission of the act electing the auditor.

B1. According to Article 399, para. 4, such pleadings can be lodged within a period of three weeks starting from date the auditor's election is registered in the Commercial Registry by either,

- a) the board of directors, or
- b) the minority²⁹.

B2. For the minority to initiate such a lawsuit, (i) the minority should be holding title since three months in advance of the general assembly during which the auditor was elected, (ii) must opposed to the election of the related auditor, and (iii) had such opposition recorded within the minutes of the general assembly. According to Article 399, para. 5, the minority's opposition to the election of the auditor is a prerequisite; therefore, from a simply rational point of view, the grounds of the pleadings in relation to the "personal situation" of the auditor should pertain to a condition or occurrence before his election rather than during the period of the current contract. That being said, if the legislator's clarifying statement on Article 399 is taken into account, then it can rather be concluded that consistency could be sought in the meaning that at least a logical relationship should exist between the opposition to election of the auditor and the grounds asserted at the pleadings.³⁰ While the legislature's intention in providing Article 399, paragraphs 3 and 4 could be rather strengthening the will of the minority during the general assembly, the court would need to weigh various considerations, in particular, the "rights" of the minority rather than the "will" of the minority in addition to the auditor's independence and objectivity.

²⁹ The shareholders holding ten per cent of the capital, or five per cent of the main or issued capital at a listed joint-stock corporation, as applicable, constitute the "minority".

³⁰ As concerns the reasons due to the "personal situation of the auditor", the legislative clarifying statement of Article 399 enumerates examples such as deficiencies in capacity as time, equipment or workforce to give for the company's audit which may have been evident before the auditor's election, but also attaches importance to assertions on lack of impartiality which might arise after the auditor has been elected.

B3. The court can rule for termination of the elected auditor's retainer by assigning another auditor.

C. Termination of retainer by the auditor

Although the auditor does not enjoy a freedom to terminate his retainer, according to the 2011 Turkish Commercial Code, Article 399, para. 8, if one of the following occurs, the auditor is entitled to terminate the relevant retainer by a written and reasoned notification:

- a) If the auditor has rightful grounds to terminate although dissidence as concerns the auditor's opinion, a restriction imposed by the company to the subject of audit or reluctance to issue any opinion would not constitute rightful grounds for termination;
- b) If pleadings have been lodged by the court to terminate the relevant retainer.

D. Judiciary intervention upon dissidence between the auditor and the company

According to the 2011 Turkish Commercial Code, Article 405, para.1, if the company dissents from the auditor about the interpretation or the application of laws, regulations or the memorandum of association in respect of the company's yearly accounts, financial tables or the yearly activity report, the competent court will resolve the dispute. Such request may be filed by the auditor or the company's board of directors.

D1. While the court should decide on the request through simplified trial procedure, the court's decision would be definitive.

D2. The costs of litigation would be borne by the related company.

XII. (Joint-stock corporations) Judiciary intervention pertaining to amendments of the memorandum of association

Only the general assembly of a joint-stock corporation is authorized to introduce amendments into its memorandum of association.

A. Amendments affecting privileges

A1. If a planned amendment (i) affects the rights of the owners of privileged stock, or (ii) authorizes the board of directors to increase the equity-capital along with a resolution of the board to increase the equity-capital, such change should be the subject of a favorable vote by the majority of those shareholders holding sixty percent of the total of such privileged stock. The main provision in this vein is Article 454, para.2 If the assembly of shareholders of such privileged stock has not been convened within thirty days starting from the date of announcement of the related general assembly decision, any shareholder may have recourse to the court within a period of fifteen days for the court to convene an assembly of such shareholders of privileged stock.

A2. The 2011 Turkish Commercial Code, Article 454, para. 7 provides that if the amendment has not been voted favorably, the board of directors may initiate a lawsuit

(1) on grounds that the decision in question does not affect the rights of those shareholders;

(2) against those shareholders who have not voted in favor of the general assembly decision by notifying the pleadings to the mutual address which should have been communicated to the board of directors along with the minutes stating the reasons for rejecting the decision in question;

(3) to request rescission of the relevant decision given by the assembly of the privileged stockholders,

(4) in addition, to request the registration of the former general assembly decision by the commercial registry office.

A3. Increasing the equity-capital requires amending the memorandum of association. Moreover, it is subject to a process similar to that carried out during the incorporation of a joint-stock corporation. As such, an auditor must be assigned to review the act. Therefore, the procedures of judiciary intervention during incorporation, especially as concerns valuation of capital apply also for increase of capital.

A4. Decrease of capital also requires amending the memorandum of association and assignment of an auditor to review the act; in addition, a prior formal process of announcements is in place to safeguard the rights of the company's existing creditors.

XIII. Dissolution of a joint-stock corporation

A. Dissolution of a nonfunctional company due to absence of a corporate organ

If a component of the corporation, generally the board of directors, is either not existing or not functioning for a "long time", or otherwise, if the general assembly has not convened for a "long time", then this may be conducive to dissolution of the company. Upon pleadings lodged by (i) a shareholder, (ii) a creditor of the company, (iii) the Ministry of Customs and Trade before the court, the court could rule for necessary measures upon a party's request and would decide on the case after hearing the board of directors. If suitable, the court could determine a period of time for the company to comply by the law. Failure to do so would be conducive to the court's decision for dissolution of the company according to Article 531. Different from the provisions applicable to the absence of an auditor and governing the assignment of an auditor by the court, the title of this provision as well as its section's title is "(d)issolution". The intervention of the court in the absence of an auditor is not for dissolution of

a company. Therefore, the auditor cannot be considered as a component of the corporation.

Dissolution of a limited liability company can be similarly requested from the court although the Ministry of Customs and Trade is not explicitly empowered to initiate such a lawsuit.

B. Dissolution of a joint-stock corporation for rightful reasons upon the minority's pleadings

Another situation newly governed by the 2011 Commercial Code as to be conducive to dissolution of a joint-stock corporation is upon pleadings on justified grounds filed by the minority shareholder(s). The grounds should be different from the situations provided at other provisions of the 2011 Commercial Code, mainly (I) termination of the period of activity coupled with cease of activity, (ii) dissolution because the object of the enterprise is achieved or has become unattainable, (iii) dissolution due to any reason asserted by the memorandum of association .

As such, the relevant Article 531 of the 2011 Turkish Commercial Code could cover a number of situations in practice. Recurrent abuse by majority shareholder(s), continuous argument between the shareholders as to sabotage the achievement of the company's object of activity, systematically violating – *inter alia* - a financial right, a voting right or privilege, the rights to information or the rights of examination could be conducive to pleadings to be lodged by the minority shareholder(s). However, the court has discretion to decide for the sale of the plaintiff's stock at its true value valid at a time close to the expected decision date of the court, or to resolve the dispute by any other suitable and acceptable means adequate to the situation reflected by the pleadings and the defense. The court would decide for dissolution or pull the plaintiff shareholder out of the company depending on whether the situation affects rather the plaintiff or the freezes the company's functioning, otherwise more pragmatically by considering whether a pull out of the plaintiff shareholder from the company would retrigger the company's functioning in conformity with the law.

As concerns a limited liability company, each partner is entitled to request dissolution of the company, and the same procedure would be applied.

XIV. Liquidation

Liquidation can be conducted either as voluntary liquidation or judiciary liquidation. A joint-stock corporation which is dissolved is a company with a diminished legal capacity such that it only serves the needs of the following liquidation during its process which would be governed by the board of directors or the liquidator(s).

A. Judiciary intervention for assignment of suitable liquidator(s) in charge of liquidation

When it is the court of which a decision is for the dissolution of a joint-stock corporation, such decision is also conducive to judiciary liquidation and the court is also to assign liquidator(s) in charge of liquidation according to the 2011 Turkish Commercial Code, Article 536, and para.3.

A novelty of the new Code of Commerce is that there must be at least one agent who is of Turkish nationality and resident in Turkey. Otherwise, the court would intervene for the assignment of a Turkish liquidator resident in Turkey upon request of a shareholder, a creditor or the Ministry of Customs and Trade according to Article 536, para. 4.

B. Supplementary liquidation

Liquidation is formally governed process which is followed by deleting the corporation from the commercial registry. A novel institution of the new Code of Commerce is supplementary liquidation. According to Article 547, further to closing of the liquidation process, if it is necessary to take new measures or acts, it is possible to request from the commercial court for the joint-stock corporation to be registered anew.

Such request can be filed by the liquidator(s) in charge of liquidation, a member of the board of directors, a shareholder or a creditor. The reasons to decide favorably to such a request could be various, but especially in case of a certain significant omission, nonconformity to the laws during the partition phase, or if there are grounds to start litigation to recover an amount unduly paid to a former shareholder. According to the legislative clarifying statement related to this provision, the court is expected to reject the request if it is more suitable to request rescission of the commercial registry's decision to delete the company's registry. Otherwise, in the affirmative, the court would also assign the former agents anew, or another agent to govern the supplementary process of liquidation.

C. Reverting from liquidation

C1. Liquidation would regularly be followed by a final partition phase which involves repayment of capital to the shareholders, and if there is any, distribution of the remaining cash. If the partition phase has not yet started, it is possible to revert from liquidation, that is according to the favorable vote of shareholders representing sixty per cent of the equity-capital and sustain the corporation. The related provision is the new Article 548 of the 2011 Turkish Commercial Code.

C2. In case of bankruptcy proceedings which would be followed by judicial liquidation, cease of bankruptcy or a bankruptcy arrangement is conducive to reviving the company; the company must be registered anew to the commercial registry upon the instruction of the liquidator(s) in charge of liquidation. Must be presented to the commercial registry, documentation evidencing that the partition phase has not started.

XV. Liability for prejudice due to corporate misconduct: Newly introduced rules governing pleadings for liability

A. Liability arising from establishment, administration or liquidation

According to the 2011 Turkish Commercial Code, Article 553, a founder of the company, member of the board of directors, otherwise a director/manager or agent in charge of liquidation can be held liable for an act or omission conducive to others' prejudice if any "fault" can be attributed to such a person while conducting duties or using powers. Since such liability can be addressed by the company or a shareholder, it is necessary to distinguish between (i) the prejudice of the company, a shareholder or a creditor of the company, and (ii) the prejudice incurred by the company, but for which liability can be addressed by the company or a shareholder. Due regard should be paid to the general proscription against multiple damages for the same prejudice.

The specific provision has been amended several times before its final version. While according to the earlier draft of the new provision, the burden of proof lied on the defendant to evidence that there is no fault which can be attributed to it/him, the final wording imposes the burden of proof on the plaintiff as to evidence that the defendant has been in fault.

Article 553 applies also in respect of limited liability companies.

A1.A novelty is contained in Article 555 that, as concerns prejudice incurred by the company, the company and/or a shareholder is entitled to initiate a lawsuit. Therefore, in addition to the company, any shareholder may initiate such a lawsuit. However, in accordance with the general legal proscription against awarding multiple damages for the same prejudice, the shareholder could request that damages be awarded to the company in question.

A2. In line with the aforementioned provision, Article 555, para. 2 states that if a lawsuit initiated by a shareholder had legal and substantial grounds and yet, any cost or the attorney fee could not be imposed on the defendant, any such cost would be borne by the plaintiff and the company in accordance with a fair ratio. Such situation arises especially when some of the defendants were liable from the prejudice but, for instance, a member of the board of directors was held only partially liable or not liable, depending on the control he had over the incidence.

A3. According to the new Code of Commerce, in case bankruptcy is applied to a company, a shareholder or creditor of the company can initiate a lawsuit of liability under Article 553 only if the bankruptcy administration fails to initiate such a lawsuit. If the case succeeds, first the amount of the creditor's receivable is to be paid from the amount awarded. Any remaining amount will be distributed between the plaintiff shareholders according to the ratio of their stock to the equity-capital. If there is still a remaining amount, such will be added to the bankruptcy estate.

B. Introduction of joint and several liability at varied degrees

B1. According to the 2011 Commercial Code, Article 557 which sets forth a rule of variable (differentiated) joint liability, "(i)n case more than one person is responsible to compensate the same prejudice, each is severally and "jointly" liable for the same prejudice in varying degrees depending on the extent the consequential damage can be imputed on each." The provision sets forth joint and several liabilities at varying degrees. The plaintiff is entitled to initiate an action holding more than one person liable for the entirety of the claim and request the court to determine the extent of liability for each defendant.

B2. According to the legislative clarifying statement of 2011 Commercial Code, Article 557, the group of persons who are imputed liability for the same prejudice are to be considered as a party in a joint manner.

It is further stated that a result of such interpretation, the plaintiff would not need to assume the expenses if the action was rejected in respect of a number of defendants, but others were still held liable. However, the provision's wording is consequential not only as concerns judiciary expenses, but in order to qualify the type of co-existence between the parties in a more general manner. In general joint action/joint defense (*dava arkadaşlığı*) is founded and the types vary according to three elements: (i) whether the joint nature is mandatory according to the law or is optional, (ii) the procedural stage at which joinder can be effected, (iii) the type of procedure. The provision does not set forth a strict substantive rule of codependency between defendants. Considering the two main types of joint action, i.e. mandatory joint action and joint action by choice, the mandatory joint action under the first type arises from substantive law. Mandatory joinder by reasons of substantive law requires a connection between grounds of action which appears as a prior relationship between the defendants, generally independent of the dispute; it is enabled in order to prevent incoherence and leads to a strict procedural codependency. On the other hand, joint action by choice is a type of joinder instituted for reasons of procedural economics. Overall, due to potential conflicts of interest, Article 557 cannot be construed as to allow mandatory substantive codependency³¹ between such defendants, but can well require procedural codependency for the facts of the case to be revealed in a complete and accurate manner. Article 557 of the Commercial Code is built on a norm of substantive law, namely "joint liability" for joinder, but suggests a connection rather for procedural reasons and means for the facts of the dispute to be revealed in a complete and accurate manner. Moreover, it would be risky to allow the possibility to allow such inter-related disputes to be heard at different times by separate courts. On the other hand, if there is a prejudice and if the plaintiff requests that prejudice to be recognized, assessed and compensated for, every person who can be held liable jointly with others even if severally, but in varying degrees, conflicts of interest may arise between defendants; each defendant should be able to act independently throughout the same proceedings for efficiency in attaining justice. However, within the framework of joint

³¹ *Maddi zorunlu dava arkadaşlığı*

action by choice, the defendant can refer to reasons for the relevant part not to be heard by the court especially on reasons of competence or jurisdiction. The provision does not accommodate such an individual reason against co-action except that it stems from requirements of substantive law for liability, such as absence of consequentiality between the act and the prejudice. Joint action by choice is a type of joinder instituted for reasons of procedural economics. Taking into account the general principle of enabling parties' control under the law of procedure, the Commercial Code, Article 557 can be conducive both to mandatory procedural dependency³² and joint action by choice³³ between defendants. Under both types of joinder, each defendant may still appeal the first instance court's decision in an independent manner.

The provisions referred to hereinbefore concerning liability apply also in respect of limited liability companies.

XVI. Limited Liability Companies: Voluntary dissociation of a partner from the company

A limited liability company may provide in its memorandum of association means for dissociation of a partner while subjecting such dissociation to various conditions. If an incidence conducive to dissociation occurs, it is required that the related partner notifies the company of the occurrence. In the failure of the company to proceed as provided most generally by the memorandum of association, the partner may file a request by the court for dissociation according to Article 638, para.2.

On the basis of the said statutory provision, it is permissible according to the new Code of Commerce to request from the court to decide for its/his dissociation from the company on the basis of a "rightful reason". The new Code of Commerce provides that the partner's rights in addition to a part or entirety of the partner's obligations arising from partnership could be suspended upon demand. Another type of measure is also

³² *Usuli zorunlu dava arkadaşlığı*

³³ *İhtiyari dava arkadaşlığı*

permissible under law by the objective to keep the partner's partnership status at the company intact.

Whether based upon the memorandum of association or for a rightful reason, upon such a lawsuit, the director of the limited liability company is required to notify other partners of the pleadings. A novelty of the 2011 Code of Commerce is the possibility of joinder for another partner to lodge its/his own request for dissociation to the initial plaintiff within a period of one month upon receipt of the director's notification. If the lawsuit is based on a condition mentioned in the company's memorandum of association, then joinder is possible if the case to join is based on the same condition. Otherwise, Article 639 does not give further detail about joinder to a lawsuit for dissociation on rightful reasons, more specifically, whether the joining plaintiff is required to assert the same grounds as a rightful reason for joinder to occur; the provisions of the 2011 Code of Procedure apply.

Conclusion

Expansion of competence in favor of commercial courts provided in the 2011 Turkish Commercial Code is positive since the judges sitting at the commercial courts are of legal background rather than formerly being market actors. In addition, the commercial courts have been gaining serious experience on commercial legal issues.

Under the 2011 Turkish Commercial Code, it may be requested from the court to intervene for assignment of an auditor. As such, an occurrence where the auditor has been absent is not regulated as to justify a request for dissolution of the company. Taking also into account the "independence" factor introduced by the 2011 Turkish Commercial Code in respect of the audit function and the auditor, it can be concluded that the "auditor" does not figure as an organ of the joint-stock corporation any longer.

Preponderance of *ad hoc* audits throughout the proceedings before the commercial courts such as to reinforce the objectivity sought in commercial law is noteworthy. Moreover, prescription of relatively short periods of time within which an issue must be brought before the commercial court, subjecting certain disputes to simplified trial procedure and provision of an array of definitive court decisions serves well to the functioning of the world of commerce and for the Turkish Commercial Code to remain relevant. In a similar vein, limitation of the trial periods where applicable, enables rapidity and settlement of issues under commercial law.

Provisions for deposit of cautions are frequent in the 2011 Turkish Commercial Code in addition to the existing general provisions of the Code of Judiciary Proceedings enabling deposit of cautions; specific provisions in the 2011 Turkish Commercial Code could encourage courts to rule for deposit of cautions when suitable and without paying much attention to other considerations.

The ways in which certain rights, such as the shareholder's right to receive information, can be asserted are not sufficiently regulated. Within the context of corporate companies, in order to confront failures in satisfying rights of information and examination held by the owners of stock, rulings for suspense of assemblies could have been enabled by the Commercial Code under certain circumstances.

It is further noteworthy that the absence of a willingness to introduce rules in respect of collective litigation for unfair competition has been subject to criticism.

Finally, given the preponderance of plain Turkish language throughout the amendments, wordings of the articles are worthy of constructive criticism in order to achieve consistency in respect of interpretations of the Code's provisions by various actors.

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