

## The Legal Results of the Abuse of Rights in case of Contradiction to the Formal Rules of Contracts

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### INTRODUCTION

It is impossible for law to regulate each and every kind of relation between persons down to the finest details. Laws usually frame the general terms and principles, but interpretation is necessary to apply these terms and principles to particular cases. Where laws are applied to particular cases rigidly and without any attempt at interpretation, unintended or unfair consequences may follow in the use of rights granted to persons by law.

The lawmaker, being aware of the impossibility of the regulation of each and every kind of relation between persons, has laid down Article 2/I of Turkish Civil Code<sup>1</sup>, which brings the prohibition of the abuse of such right as a general limitation on the use of those rights. Article 2/I of Turkish Civil Code states that in exercising rights and in performing duties, each party must act in accordance with good faith and fair dealing. Together with the norms that regulate the formation and execution of contracts, the good faith norms lay down a general criterion of behavior for the contracting parties, specifically that the parties are expected to act in good faith towards each other in the negotiation, formation and execution of contracts.

On the other hand, Article 2/II of Turkish Civil Code states that the exercise of rights as they are expressly exercised in a manner does constitute an abuse of rights.<sup>2</sup> Article 2/II of Turkish Civil Code also grants the right to plead a contract to be invalid because of defect in its form deprives it of what the statutory rule prescribes to be a prerequisite for validity. Then the question is then, in which cases is it to be accepted that pleading the invalidity of a contract would be an abuse of rights?

In order to answer this question, it is necessary to analyze what would be the elements of the affirmative defense of abuse of rights related to a pleading of invalidity based on the form of contract.

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<sup>1</sup> Kudret Güven, GENERAL PRINCIPLES OF TURKISH LAW, 22 (3rd Ed., Ankara 2007); Ahmet Kılıçoğlu, BORÇLAR HUKUKU GENEL HÜKÜMLER, 75-76 (6th Ed., Ankara 2005).

<sup>2</sup> The old version of the article emphasizes that there is an abuse of rights only "if the abuse harms another person" Article 2/II of old Turkish Civil Code states that, "The code does not protect the abuse of rights just inflicting harm to the others."

### **I. THE ELEMENTS OF THE ABUSE OF RIGHTS RELATED WITH THE PLEADINGS OF INVALIDITY BASED ON THE FORM OF CONTRACTS**

Since Article 2/II of New Turkish Civil Code mentions the concept “express abuse of rights,” it is necessary for a right to have been used contrary to the purpose of the regulation in order to conclude that it had been abused. This opinion is generally accepted and called the “objective opinion” under Turkish doctrine.<sup>3</sup>

According to this doctrine, pleading the invalidity of a contract is deemed to be an abuse of rights only when it is expressly contrary to the purpose of the regulation.<sup>4</sup>

Leaving aside the “subjective opinion,” which stipulates that in order for a right to be deemed as having been abused, there should be the intention to harm another person, and the “mixed opinion” which gives importance to whether this use has benefited the person possessing the right in question, the dominant opinion in Turkish law, according to the new version of Article 2/II of Turkish Civil Code, is the “objective opinion”.<sup>5</sup> According to this Article, a right can be deemed to have been abused only if it has been exercised against its purpose.

According to the objective opinion, in order for a pleading of invalidity based on the form of a contract to be considered to be an abuse of rights, four conditions must be present:

- A- The presence of a contract that fails to fulfill the requirements of form prescribed by statutory rule as a prerequisite for validity,
- B- The use of the right in a way contrary to the rule of good faith,
- C- The presence of damage that resulted from the use of the right, and
- E- The absence of any express rules that authorize the situation presented.

#### **A. The presence of a contract that fails to fulfil the requirements of form prescribed by statutory rule as a prerequisite for validity.**

In order for the pleading of the invalidity of a contract based on deficient form to be deemed as an abuse of right, there should first be a contract. A contract requires an exchange of assets between at least two parties. In other words, the parties should have mutually confirmed their common will about a given transaction.

However, this contract should also be contrary to the form prescribed by the statutory rule as a prerequisite of validity. In the case of such a contract each party has the right to plead the invalidity of the contract because of its failure to fulfil the requirements of form.<sup>6</sup>

For instance, according to Turkish law, a legal marriage is considered to be a contract made before authorized marriage officers; if the marriage was not performed before such officers, but before other people instead (like an *imam*), the marriage is considered null and void.

<sup>3</sup> Güven, *supra* note 1 at 22; Kılıçoğlu, *supra* note 1, at 78.

<sup>4</sup> Hüseyin Altaş, ŞEKLE AYKIRILIĞIN OLUMSUZ SONUÇLARININ DÜZELTİLMESİ, 160 (Ankara 1998).

<sup>5</sup> Seyfullah Edis, MEDENİ HUKUKA GİRİŞ VE BAŞLANGIÇ HÜKÜMLERİ, 327 (Ankara 1983); Güven *supra* note 1 at 22-23; Kılıçoğlu *supra* note 1 at 78; Altaş *supra* note 3 at 157.

<sup>6</sup> Altaş, *supra* note 4 at 161.

If there is no contract present because of the lack of intention on the part of the two sides to create a legal relation, like when a marriage ceremony is represented during a theater play, we can talk neither about the right to plead the invalidity of a contract on the grounds of its deficient form, nor about an abuse of such right.<sup>7</sup>

### **B. The use of the right contrary to the rule of good faith**

By stating that “every one must act in good faith while using his right and carrying out his debts,” Article 2/I of the Turkish Civil Code contains a general limitation on the use of rights and fulfilment of obligations. This general limitation is also valid for the right to plead the invalidity of a contract on the basis of its deficient form.

Pleading the invalidity of a contract that fails to fulfill the requirements of form is the right of each contractual party. The purpose of the requirement of form as a prerequisite of validity should be taken into consideration while using the right of pleading the invalidity of a contract. If using the right to plead the invalidity of a contract is contrary to the purpose of the requirement of form, this may give rise to an accusation of abuse of rights.

In the determination of whether an abuse of right has occurred, the balance of interests between the parties must also be taken into consideration. If the party who pleads the invalidity of a contract on the grounds of its deficient form would gain no benefit from this, and makes the claim only in order to inflict harm on the other party, an abuse of right can be deemed to exist. Similarly, if one of the parties deliberately fails to fulfill the requirements of form and then pleads the invalidity of the contract on the grounds of its deficient form, with the express purpose of evading his obligation to fulfill the terms of the contract, an abuse of right can be deemed to exist.<sup>8</sup>

According to Article 11/I of Turkish Code of Obligation, contracts are valid without any special form under Turkish law. This is usually referred to as the principle of “freedom of form.” However, according to Article 11/II of Turkish Code of Obligations, a written form is necessary when a statutory rule prescribes it, or when parties have agreed upon the written form as a condition of the validity of the contract. The purpose of the Article 11/II of Turkish Code of Obligation is then to compensate for the damages suffered by a party because of the failure of the contract to fulfil the requirements of form.

If one of the parties, of his own free will, renounces his right to plead the invalidity of the contract on the grounds of its deficient form before enacting the contract, but then desires to use this right afterwards, i.e. at a stage when he has to fulfill the obligations arising from the contract, this inconsistency is deemed to be an abuse of right.<sup>9</sup> For example, if one of the parties has fulfilled its part of the obligations but the other party, who has not yet done so, pleads the invalidity of the contract, this is deemed to be an abuse of right. Where the requirement of form has been imposed with the purpose of protecting the third parties or the public order, the contractual party using his right to plead the invalidity of the contract should not harm any third par-

<sup>7</sup> Ediş, *supra* note 5 at 349; Selahattin Sulhi Tekinay, *et al*, *Tekinay Borçlar Hukuku Genel Hükümler*, 143 (7th ed. İstanbul 1993).

<sup>8</sup> Altaş, *supra* note 4 at 162;

Kılıçoğlu, *supra* note 1 at 77.

<sup>9</sup> Alta, *supra* note 4 at 163.

ties and violate the public order. Acting in contravention of this principle is also deemed to be an abuse of right.<sup>10</sup>

**C. The presence of damage that resulted from the use of the right to plead the invalidity of a contract.**

Damage should have arisen from the use of the right to plead the invalidity of a contract. For instance, the transfer of real property is valid only if entered into the Land Registry. If the form required by law is not fulfilled by the parties, the transfer of the real property is considered to be invalid. If both parties to the contract have performed their respective duties a long time ago but one of the parties pleads the invalidity of the contract with the express purpose of harming the other party, an abuse of right is deemed to exist.<sup>11</sup> The existence of damage and the abuse of rights must be determined by the court on a case-by-case basis.<sup>12</sup>

**D. The absence of any express rules that authorize the situation presented.**

The last condition necessary for a right to be considered as having been abused is the absence of any express rules that limit the use of the right to plead the invalidity of a contract.<sup>13</sup> For example, if a lessor, after having removed a lessee of a real property on the grounds of renovation and reconstruction, but keeps it vacant instead of proceeding with the renovation and reconstruction, the lease holder cannot allege an abuse of right since the law grants the lessor the right to keep the property vacant. However, according to Article 15 of Law No. 6570, the lease holder does have the right of priority to rent the real property that has been vacated in the anticipation of renovation and reconstruction (but the lease holder should use his right of priority to rent the property within two months). According to this Article 15 of the Code, if the lease holder wishes to use his right of priority to rent the property but the lessor refuses to lease it, the latter is not allowed to lease the property in question before the lapse of three years. This article is a special provision overriding Article 2 of Turkish Civil Code, which as a consequence becomes inapplicable in this situation.<sup>14</sup>

In Turkish Law there is no special provision limiting the abuse of right of pleading the invalidity of a contract on the grounds of its deficient form. This is why Article 2 of Turkish Civil Code is applied in a wide-ranging manner.<sup>15</sup> However, in order for a contract that does not fulfil the requirements of form to be accepted as being valid, and thus being proof against any pleadings about its invalidity on the grounds of its deficient form, there should be a sound legal basis at hand. Normally, contracts that fail to fulfill the requirements of form prescribed by a statutory provision are not valid. If pleading the invalidity of a contract that fails to fulfill the requirements of form is considered as an abuse of right under these conditions, the contract remains binding and enforceable as a valid contract.<sup>16</sup>

<sup>10</sup> *Id.*

<sup>11</sup> ALTAŞ, s. 163-164.

<sup>12</sup> ALTAŞ, s. 164.

<sup>13</sup> Edis, *supra* note 5 at 330; Kılıçoğlu, *supra* note 1 at 78-79.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 80.

## II. RESULT OF THE DETERMINATION OF AN ABUSE OF RIGHT, THE INVALID CONTRACT THAT FAILS TO FULFIL THE REQUIREMENTS OF FORM BECOMES EFFECTIVE AND LEGALLY BINDING

In the Turkish law system, a contract may either be oral or written. There are different types of written forms, like the simple written form, an official form or an authentic form. Form has certain advantages in that as a means of proof it makes clear the genuine assent of the parties and prevents misunderstanding, misrepresentation and fraud. The requirement of form thus aims to prevent the parties and the law system from being abused.

In cases where pleading the invalidity of a contract on the grounds of its deficient form is considered to be an abuse of rights, the main aim of the law is to ensure that the contract in question has the same effects as any valid contract. As a result of the determination that an abuse of rights has occurred, the invalid contract that fails to fulfill the requirements of form becomes effective and legally binding. In order to establish of an abuse of rights, however, there should be a sound legal basis in the first place.

Opinions differ in Turkish doctrine as to the conditions under which pleading the invalidity of a contract that does not fulfil the requirements of form can be considered to be an abuse of right. According to Oğuzman,<sup>17</sup> it is impossible to reach an *a priori* decision on this matter and each case should be handled individually. Neither the fulfilment of the obligations and rights nor negligence can be accepted as evidence to establish of an abuse of rights. In other words, even when one of the parties has fulfilled his own obligations and the other party pleads the invalidity of the contract, the existence of an abuse of right cannot be straightforwardly assumed. Each case must be evaluated under the light of its specific circumstances.

According to Serozan,<sup>18</sup> in order to prevent a contract that contravenes the requirements of form from being declared invalid on this ground, one should have recourse to such alternative arguments like unjust enrichment first, and the abuse of right should be considered to be a last resort. If the law system allows the requirements of form to be dropped or at least to be applied in another way, the judge can compensate for the negative results of the contravention of the requirements of form.

The aim of these provisions in Turkish law that deal with the requirements of form is to ensure that a contract that fails to fulfil this requirement does not automatically become null and void. Consequently, even a contract that contravenes the requirements of form can be considered to be valid in order to avoid the unfair consequences that might arise from what is deemed to be an abuse of right.

In cases where unfair consequences arise because of the consideration of a contract to be null and void on the grounds of its contravention of the requirements of form, a “silence of the law” is said to exist. Faced with the silence of the law, there are essentially two tech-

<sup>17</sup> Kemal Oğuzman and Turgut Öz, BORÇLAR HUKUKU GENEL HÜKÜMLER, 118 (4th Ed., Istanbul 2005).

<sup>18</sup> Altaş, *supra* note 4 at 165.

niques that can be used: one of these is the application of texts to situations not foreseen by the legislator; and the other technique is reference to general principles (such as the principle of the rights of defence or of the abuse of rights).<sup>19</sup>

The silence of law is said to exist in cases when, although there is a legal provision in the laws, the provision turns out to be inapplicable because of the contradiction of its purposes with the letter and spirit of law.<sup>20</sup> The gap created by the silence of law is filled by the judge by taking into consideration the concrete circumstances of each case. Article 1 of Turkish Civil Code rules that when the law is silent on a certain matter the judge should make his decision in accordance with precedents, and if there is no precedent on the matter, he should decide in accordance with the rules he would have made if he had been the lawmaker.<sup>21</sup>

According to Edis and Altaş, if the application of Article 11 of Turkish Code of Obligations gives rise to unfair consequences, an “absence of legal provisions” can be spoken of rather than a “silence of law.”<sup>22</sup> The absence of legal provisions is something different than a legal loophole. In the case of the absence of legal provisions, there is a fault of the lawmaker or a fundamental change in the prevailing conditions which have turned the straightforward application of the law into an abuse of rights.<sup>23</sup>

Article 11 of Turkish Code of Obligation has also been rendered out of date by the social and economic developments that have taken place since its enactment. It can be said that there is a legal gap in Article 11 of Turkish Code of Obligations in that although legal forms have been prescribed by the law for certain contracts or legal instruments, there are no provisions compensating for the negative consequences involved in cases where a contract is declared invalid on the grounds of its deficient form.<sup>24</sup>

Contrary to the Turkish law system, consensus has been reached in the German law system on the availability of the principle of the abuse of rights as a way to compensate for the negative consequences involved in such cases.<sup>25</sup> However, in Turkish law system, it must be accepted that judge has the competence to regulate and correct unfair results causing from the strictly application of Article 11 of Turkish Code of Obligation. There is an absence of legal provision in this situation, so judge could not create law as if he had been the lawmaker. However, the judge could change the rule according to Article 2 of Turkish Code of Obligations.<sup>26</sup>

### III. DETERMINING THE CIRCUMSTANCES WHICH CAUSE ABUSE OF RIGHTS IN CASE OF BEING CONTRARY TO THE LEGAL FORM

When is it to be considered to be an abuse of rights to plead the invalidity of a contract that fails to fulfil the necessary requirements of form?

According to the theory of concrete events, it is impossible to establish *a priori* principles for determining the existence of an abuse of

<sup>19</sup> *Id.* at 166.

<sup>20</sup> Edis, *supra* note 5 at 134.

<sup>21</sup> Altaş, *supra* note 4 at 166.

<sup>22</sup> *Id.* at 167; Edis, *supra* note 5 at 128-29;

<sup>23</sup> Edis, *supra* note 5 at 129.

<sup>24</sup> Altaş, *supra* note 4 at 168-169.

<sup>25</sup> *Id.* 169.

<sup>26</sup> *Id.* at 168-170. Edis, *supra* note 5 at 129, 349.

right. That's why an independent evaluation should be carried out for each case.<sup>27</sup> According to the "IBK"<sup>28</sup> of the Turkish Supreme Court of Appeals, it is not possible to establish *a priori* principles about the implementation of the objective good faith rules, and consequently, every case should be considered in light of its particular circumstances.

According to the legal theory of Certain Events Groups,<sup>29</sup> following legal security (the situation where persons are able to know the guil- ties and penalties), a judge must act within certain limitations when determining an abuse of rights has occurred. That's why, when deter- mining if the abuse of rights has occurred, it must be decided in ac- cordance with conditions at hand.

On the other hand, according to the mixing theory,<sup>30</sup> conditions at hand may assist the judge, but the judge shouldn't limit himself to these conditions when determining if the abuse of rights has occurred. In Turkish doctrine, there are examples of general criteria and princi- ples on abuse of rights which are sometimes embodied by actual in- cidents.

Some of these actual incidents are: to disregard the other parties' rights, to damage others without gaining any actual personal benefit, mass disproportion of benefits to the parties' benefits, paradoxical be- havior of the owner of the right and the fulfillment of the obligations of both of contractual parties in spite of a lack of formality.

These general criteria and principles are not definite, but provide some assistance for the judge to decide consistent with Article 2 of Turkish Code of Obligation.<sup>31</sup>

#### IV. NEGATIVE EFFECT OF THE PROHIBITION OF ABUSE OF RIGHT

Despite the general lack of formality of contracts, when both parties have fulfilled his/her own obligation and one of the parties pleads the invalidity of the contract, it is called "negative effect of the abuse of rights."<sup>32</sup>

In this situation, according to an actual event, a judge doesn't take account the results of the invalidity of the contract by exercising his regulatory powers to prohibit the abuse of rights. Consequently, con- tractual parties don't ask for the return of the performance. Accord- ing to an opinion,<sup>33</sup> prohibition of the abuse of rights may only cause negative effects. That's to say, if the contractual parties have not ful- filled his/her own obligations yet, prohibition of the abuse of rights wouldn't cause positive effects. In other words, when examining a claim regarding the invalidity of the contract, the judge doesn't urge the contractual parties to fulfill their respective obligations and parties do not ask for the fulfillment by the other party.

If there is an invalid contract due to lack of formality, having a right is not mentioned. That's why the contractual party who pleads the in- validity of the contract and refuses to perform his/her own obligation,

<sup>27</sup> Altaş, *supra* note 4 at 170.

<sup>28</sup> Landmark decision of Turkish Supreme Court of Appeals, 3. 11. 1980, E. 1980/3, K. 1980/2, Land- mark decision of Turkish Supreme Court of Appeals, General Board of the Turkish Supreme Court of Ap- peals, C. V. 1957-1980, Ankara 1981, at 817. This was a decision of the General Board of the Turkish Supreme Court of Appeals made for the purpose of reconciliation contra- dicting opinions on the same ques- tion which have been expressed in the decisions of various panels, or in different decisions of the same panel, of Turkish Supreme Court of Ap- peals (a harmonization of law proce- dure).

<sup>29</sup> Altaş, *supra* note 4 at 171.

<sup>30</sup> *Id.* at 172; Kılıçoğlu, *supra* note 1 at 77.

<sup>31</sup> Edis, *supra* note 5 at 331; Kılı- çoğlu, *supra* note 1 at 77; Altaş, *supra* note 4 at 173.

<sup>32</sup> Altaş, *supra* note 4 at 174.

<sup>33</sup> Altaş, *supra* note 4 at 174-176.

does not enjoy a kind of right, but lays down an objective legal status which sets forth an invalid contract.<sup>34</sup>

However, accepting only negative effects of the prohibition of abuse of rights may cause unfair results in practice. For example, the contractual party who assures the other party through fraud but causes the lack of formality through his own actions, even the obligations of both parties have not fulfilled yet, should not plead the invalidity of the contract. Put another way, it must be accepted that there would be an abuse of rights in case of pleading the invalidity of the contract before performance of one's obligations; a determination that there had been an abuse of right would have a positive effect on the legal environment.

### CONCLUSION

Lawmakers, being aware of the impossibility of the regulation of each and every kind of relation between persons, have laid down Article 2/I of Turkish Civil Code that allows prohibition of the abuse of rights, as a general limitation on the use of rights. Article 2/II of Turkish Civil Code also grants the right to plead a contract to be invalid because of a defect in its form that deprives it of what the statutory rule prescribes to be a prerequisite for validity. In such cases, is it to be accepted that pleading the invalidity of a contract would constitute an example of the abuse of rights? According to the objective opinion, in order for a pleading of invalidity based on the form of a contract to be considered as an abuse of rights, four conditions should exist: the presence of a contract that fails to fulfil the requirements of form prescribed by statutory rule as a prerequisite for validity, the use of the right in a way contrary to the rule of good faith, the presence of damage that has resulted from the use of the right, and the absence of any express rules that authorize the situation presented. In cases in which pleading the invalidity of a contract on the grounds of its deficient form is considered to be an abuse of rights, the main purpose of the law is to ensure that the contract in question has the same effects as any valid contract. As a result of the determination of an abuse of rights, a normally invalid contract that fails to fulfil the requirements of form becomes effective and legally binding. For the establishment of an abuse of right, however, there should be a sound legal basis for such a decision. The purpose of the provisions in Turkish law that deal with the requirements of form is to ensure that a contract that fails to fulfil this requirement does not automatically become null and void. Consequently even a contract that contravenes the requirements of form can be considered to be valid in order to avoid unfair consequences arising from what is deemed to be an abuse of rights. If, despite of lack of formality of a contract, both of the parties have fulfilled their own obligation and one of the parties pleads the invalidity of the contract, it is called "*negative effect of abuse of right.*" In this situation, judge should exercise his regulatory powers to prohibit the abuse of rights and let the contract stand as is.