Signatures in Format-Based Contracts

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INTRODUCTION

In the Turkish law system, based on the Swiss system, the principle of optional format is valid. Thus, the parties to a contract may declare their volition by means of which the agreement is established in the format of their choice.[1] The Article 11 of the Turkish Code of Obligations has adopted the principle of optional format in contracts by stating *"[t]he properness of the contract does not depend on any format unless there is clarity in the law. If no other rules are defined about the degree, extent and effect of the format ordered by the law, a contract which is not complying with this format would not be proper"*. Considering this fact, individuals may make their contract in a verbal, an informally-written or a formally-written form. However, if *"there is clarity in the law,"* the Article states that the validity of the contract depends upon its being made in that format. Put differently, the law may dictate that a particular type of contract should be format-based. Undoubtedly, if the law does not have any format requirements for a transaction, the parties may personally decide to make their contract in written form.

According to this short explanation, the validity of contracts does not depend on a certain format. Nevertheless, just as the parties may decide that the contract will be in written form, the law, too, could stipulate that contracts should be made in written form. The format is considered to be based on mutual agreement (volitional, consensual) in the former case, and based on the law (lawful) in the latter case. Here, let us also briefly mention the difference between the format of validity, which is determined by Article 11 of the Turkish Law of Obligations (essentially Turkish contract law) and the format of proof; Article 11 is about the format of validity**.** According to this rule, a contract which is not in accordance with the format stipulated by the law (for exceptions to the general rule) is invalid. As a matter of fact, the second subsection of the same article points out that in cases where the law requires a certain format, contracts which are not in compliance with this format would not be valid.

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[1] Esener Turhan**:** Borçlar Hukuku, Ankara 1969 C.I, s. 168; Reisoğlu Safa**:** Borçlar Hukuku Genel Hükümler, İstanbul 2005 p.66

The format of proof, on the other hand, is the format required to prove the existence or execution of a lawful process when disagreement occurs between the parties about that process. This point is adjudicated in Article 288 of the Civil Procedure Code. According to this rule, it should be proven by a *"voucher,"* that is by a document, when disagreement occurs over a point such as the existence or execution of a lawful process whose value exceeds a certain amount in monetary terms. Here, the matter is not whether or not the agreement is valid, but rather the proof required of the claimant when disagreement takes place regarding the existence or execution of a certain point. The law stipulates that this could be proved only by a document. One particular thing contained in our Commercial Code is that the conditions for the validity for bill of exchanges are mentioned. One of these conditions is that a bill of exchange must be signed by the individual incurring liability. The format of validity, the format of proof and the signature on bill of exchange are all important. Our explanations that follow are valid for all the three legal instruments: for a signature in a written format.

I) SIGNATURE IN WRITTEN-FORMAT-BASED CONTRACTS

A) THE SIGNATURE STEP

A contract based on a written format consists of two steps: the first step is the writing out of the wishes of the parties, the second step is the signature step. Therefore, the individual for whom the wishes of parties are put down on paper, the writing step is unimportant. A contract is not established unless the prepared writing, that is the text, is signed and is not binding on a party who has not signed it. By the way, a signature is a sign that shows someone knows what he is accepting by putting this signature on the paper.[2]

B) SIGNATURE BY HAND

1) The Rule of signature by hand

Article 14 f/I of the Law of Obligations states the rule about how the signature should be appended, by stating that *"[t]he signature should be the handwriting of the individual incurring liability."* According to this rule, the signature should be appended by hand and the lawmakers have required that the wish to be bound in a contract be stated by the party to the agreement; in other words, that the signature be the free will of the owner of the wish. As a consequence of this fact, here, one should comprehend the expression *"by hand"* in a broad sense rather than a narrow one. The important thing is the statement of the wishes of the party incurring liability, in a written-validity-based contract, with a mark which we may call a signature. Thus, it is possible for one who cannot use *"one's hand*" to append signature by using the fingers of one's feet or by using the mouth.

The lawmakers have answered the question of "whose signature" is required in a written-validity-based contract by stating that it should

[2] Esener, p.174, Tunçomağ Kenan: Borçlar Hukuku Dersleri, İstanbul 1965, C.I, p.149, Eren Fikret: Borçlar Hukuku, İstanbul 1988, C.I, p.253

be *"the individual incurring liability."* Hence, in a written-validity-based contract, the signature of the individual incurring liability will be required. This solution is correct because the purpose of the written validity condition is to have the individual who will incur liability behave more carefully and considerately in order to prevent arbitrary or uninformed decisions. These purposes are for the party incurring liability in such a contract. For example: a contract of bailment is based on a written validity format as required by Article 484 of the Law of Obligations. The lawmakers have required the guarantor to not make a cursory decision, but to behave and think more carefully since he or she takes a risk for some other individual's liability. Therefore, the person whose signature is required on a obligatorily-written bailment voucher should be the guarantor. However, the absence of the signature of the creditor on the bailment voucher does not invalidate the contract.

2) Signature with a tool

After stating the rule of signature by hand, Article 14 f.I, of the Law of Obligations mentions an exception to this rule in the second subsection. According to the statement of this subsection, "[a] signature appended with a tool would qualify only in situations accepted by customs and traditions, and when it is necessary to sign valuable documents which are particularly put into circulation in large numbers." The lawmakers have stated this rule considering the exceptional cases where there is a need for a signature to be appended with a tool rather than by hand. According to this rule, a signature with a tool qualifies only in situations accepted by *"customs and traditions."* The Law has given *"valuable documents which are particularly put into circulation in large numbers*" as an example for such a case. In this context, it is either impossible or quite difficult to sign large numbers of company stocks in circulation by hand; therefore in this case, the signature could be appended with a tool.

3) Electronic signature

Technology dictates changes in laws as well. Computer technology was unknown in 1926 when our Code of Obligations was accepted. However today, computers are a part of our everyday lives and are needed to communicate and execute lawful processes. Domestically or abroad, two individuals could either conclude a validity-format-based contract (for instance, as required by Article 162 of the Law of Obligations -- alienation of a written-validity-format-based credit; as required by Article 52 of Law 5846, a written-validity-format-based contract of transfer of financial rights about a production) or could want to obtain the format of proof even if it does not follow a written validity format. It is these needs that have made it necessary to have an exception to the "signature by hand" rule stated in Article 14 of the Law of Obligations. In order to fulfill this requirement, Electronic Signature Law No. 5070 took effect on 23 January 2004. In the third article of this law, an *"electronic signature"* has been defined as *"electronic data appended to some other electronic data or related to electronic data and used for confirmation purposes."* In the same ar-

ticle, the owner of an electronic signature has been defined as a *"[r]eal individual who uses a signature-generating device to make an electronic signature."* Law 5070 stipulates that an electronic signature will have the same lawful consequences as a signature by hand. Let us finally state that electronic signatures are accepted for informally-written-validity-based contracts, and that formally-written-format-based contracts (such as sales of real property or motor vehicle sales) are not yet allowed in electronic form or with an electronic signature.

C) THE SHAPE OF THE SIGNATURE

In Turkish law, there does not exist any rules or limitations about the shape of signatures, because the important point is not the shape of the signature, but rather its being a sign expressing the wish to be bound by the individual incurring liability. During technical inspections where the individual denies the signature, it will be investigated as to whether or not "the sign used as a signature" is a handwork of that individual. If investigation yields that the sign is that individual's handwork, the contract will be binding on that individual.

D) LOCATION OF THE SIGNATURE

In written-validity-based contracts, no rules have been mentioned in the law regarding the location of the signature. Signatures are generally appended to the end of the text in written contracts.[3] However, signatures placed at any other location will also be valid. Although the location of the signature is unimportant as far as the written validity format in the Law of Obligations is concerned, it may be important in other branches of law. For instance, in bill of exchanges, all signatures except those appended on the front side by drawers are bill guarantees.

II) SIGNATURES FOR THE VISUALLY HANDICAPPED AND THOSE UNABLE TO SIGN

The visually handicapped and those unable to sign can execute all kinds of lawful processes where a specific written format is not required. However, if a written format is required, we face the problem of how the people who are unable to sign will execute this kind of lawful process. The lawmakers have stated that Articles 14 and 15 consider this fact, as discussed below.

A) THE VISUALLY HANDICAPPED

1) Written contracts of the visually handicapped before 07 July 2005

Article 14 f.III of the Law of Obligations stipulates how the visually handicapped can sign written-validity-based contracts. According to this rule, *"[t]he signatures of the blind do not bind them unless they are formally approved or it is certain that they are cognizant of the transaction text when they sign it."* With this rule, in order for the blind to conclude a written-validity-based contract, two opportunities are offered:

a) Their usage of approved signature

[3] Reisoğlu, p.73, Eren, p.260

Even if a visually handicapped individual is able to sign, he or she cannot conclude a written-validity-based contract. The lawmakers have required this in order to prevent them from being taken advantage of because, even if these visually handicapped people are capable of signing, they are deprived of the opportunity to read the text they sign. Therefore, it is necessary that the signature of a visually impaired individual be formally approved.

b) Proof that they are cognizant of the contract text

If the signature of a visually impaired individual on a written-validity-based contract has not been approved or this was not possible, the second way for the validity of this contract to be shown is "the proof that the visually impaired individual is cognizant of the contract text." For example, while signing the contract, if there were two attesters, if these individuals can be a witness stating that the contract was read out loud and later on when they declare that the visually impaired signed this text, the contract would be valid.

2) Written contracts for the visually impaired after the date 07 July 2005

The rule in Article 14 f.III of the Law of Obligations was abrogated on 07 July 2005 by Article 50 of The Law Concerning The Impaired and Changes In Some Laws and Executive Orders No. 5378. There has not been such a change in the Swiss Code of Obligations which was the original source of the Turkish Code of Obligations. No reason exists for this change to have been made in our case. However, this way, the possibility of the visually impaired individuals' concluding informally-written contracts was abolished and it was accepted that these individuals could conclude all written contracts at a public notary. Starting from this date, it is possible for a visually-impaired individual to conclude informally-written contracts such as the alienation of credit and bailment are only possible at a public notary. When this change was made, the rules concerning written contracts concluded by the visually-impaired were appended to Articles 73 and 75 of the Public Notary Law No. 1512 to replace the rule from Article 14 f.III of the Law of Obligations. Article 73 of the Public Notary Code, as changed by Law 5378, is now as follows: "[i]f the public notary realizes that the involved person is speech-, auditorily- or visually-impaired, the process will be executed in front of two attesters in accordance with the impaired person's will. If the individual concerned is auditorily or speech-impaired and there is no possibility of written conversation, two attesters and a sworn translator" will be needed. This rule is stated for the visually impaired who can sign; if the visually impaired individual can sign, as per Article 73, the public notary will have two attesters for a written-validity-based contract in accordance with this individual's will. A contract concluded without having two attesters, even though the visually-impaired demanded the right to sign, would be invalid. The second subsection of Article 75of the Public Notary Code, as amended by Law 5378 is as follows:

"[u]sage of a sign, seal or fingerprint instead of sig-

nature. Although a signature is appended or a handprint replacing a signature is made in a public notary process, if the individual concerned demands, or excluding the visually-impaired who are able to sign and in the name of whom the process is executed, the public notary or, if the public notary observes it to be necessary regarding the status or identity of the individual who signs or places a handprint, within the limits of the subsection above, the attester concerned, the translator or the expert will place a fingerprint as well. In the case of seal usage, fingerprinting is necessary."

Here, the rules for written contracts for the visually-impaired person who cannot sign are mentioned. In the article, having two attesters for processes involving these individuals has been made necessary. The validity of the contract depends on the existence of two attesters regardless of the will of the visually-impaired person.

B) THE UNABLE TO SIGN

Those unable to sign who are illiterate or who have bodily impairments enter into this category. Article 15 of the Law of Obligations states the following for such individuals: "[e]very individual who is unable to sign is allowed to place a formally-approved and hand-made mark or use a formal testimonial. Statements related to the bill of exchange policy are reserved." With this rule, the law has regulated how those people who are unable to sign can conclude validity-based contracts. In order for those unable to sign to conclude this kind of contracts the following requirements should be met:

1) The individual should not be able to sign. Article 15 of the Law of Obligation is made for those unable to sign. Individuals who can sign can never benefit this rule. Therefore, an individual who is able to sign cannot use a formally-approved and hand-made mark or a formal testimonial, which are determined by this article to be a replacement for signature because Article 14 f.I of the Law of Obligations has explicitly stipulated the rule of "signature by hand." The exception to this rule is possible only under the limited conditions in Article 15.

2) The individual must use a hand-made and formally approved mark

a) It is not possible for a person who is unable to sign to use any mark as a replacement for signature. It is necessary that this mark be hand-made. This hand-made mark should be placed on some sort of material, like a sign on a piece of silver metal. The Turkish Code of Civil Procedure (HUMK) mentions "a hand-made mark or a seal" instead of the concept of *"a hand-made sign"* (Article 297). According to this, those unable to sign can use a hand-made mark or a seal. A seal is a mark made, not by the person who is unable to sign, but by another individual. Consequently, those unable to sign can use his or her own hand-made mark as a replacement for a signature, as well as a seal engraved by another individual.

b) Turkish Law of Obligations has not accepted every mark made

by an person unable to sign as a replacement for signature. It mentions the condition that this sign should be *"formally-approved."* The hand-made mark or the seal must be approved by the public notary in advance.

When these two requirements are met, those unable to sign can conclude a written validity-based contract. It is also worth noting whether or not those unable to sign can use a fingerprint in order to conclude a written-validity-based contract instead of a hand-made sign or a seal. According to doctrine, it is accepted that the usage of fingerprinting requires the conditions stated in Article 15 of the Law of Obligations.[4] Thus, it is possible for someone unable to sign to use fingerprinting with the condition that the use of the fingerprint has been approved by the public notary in advance. For the formal processes related to real estate that are executed in the land registry, our Land Registry Statute accepts fingerprinting without the requirement that the fingerprint has been formally approved as a replacement for signature. Article 18 of this Statute has the following statement: *"[i]f one or more of the parties are unable to sign, the thumb of the left hand, or if missing, one of the other fingers, is pressed on the document and it is noted which finger is used. If a seal is used, fingerprinting, too, is necessary."* It can be seen that the Land Registery Statute has accepted the use of fingerprints for those unable to sign in the processes to be executed in Land Registery and has not mentioned the requirement that the fingerprint should be approved in the public notary in advance. The Constitution has taken it a step further and has required fingerprinting to accompany the use of a seal, even if the seal has been formally approved. The first subsection of Article 75 of the Public Notary Code has stated the possibility to use fingerprinting as a replacement for signature regarding for those unable to sign.

3) The usage of a formal testimonial by those unable to sign

"The formal testimonial" mentioned in the article refers to formal documentation or formal approval. Here, the person unable to sign tells a government official about a written-validity-based contract, and the official signs this information and approves it in accordance with the wishes of the person unable to sign.

4) Unrelatedness of the lawful process with the bill of exchange Article 15 of the Law of Obligations states that *"[s]tatements related to the bill of exchange policy are reserved."* Regulations regarding policies which our law of Obligations reserves have been mentioned in our Commercial Code. Regarding these policies, Article 668 of the *Turkish Commercial Code states the following: "[i]t is required that the declarations in the policy be signed by handwriting. As a replacement for a signature by handwriting, one cannot use any mechanical device or a hand-made or an approved mark or a formal testimonial. It is necessary that the handwriting signatures of the blind have been formally approved."* It can be seen that Turkish Commercial Code requires the policy that signatures be signed by hand and has declined the usage of any hand-made mark or a formal testimonial for those unable to sign, as contained in Article 15 of the Law of Obligations.

[4] Tekinay: Borçlar Hukuku Genel Hükümler,6.Bası,İstanbul 1988, p. 160; Kılıçoğlu,Ahmet.: Borçlar Hukuku Genel Hükümler, 9.Bası, Ankara 2007,p.87.