The world’s language is English,” as the editor of the Wall Street Journal put it. Indeed English is the world’s way of communicating interculturally. Just as the Christian calendar is the world’s way of tracking time, Arabic numbers are the world’s way of counting, and the metric system is, for the most part, the world’s way of measuring, the use of English in this way, however, is only for intercultural communication; it presupposes and accommodates the existence of separate cultures. So, it is not a way eliminating cultural differences, but is a tool for communication, not a source of identity and community. As Samuel P. Huntington puts in his book “The Clash of Civilizations and Remaking of World Order,” the use of English for intellectual communication, thus helps to maintain and, indeed, reinforces peoples’ separate cultural identities. Precisely because people want to preserve their own culture, they use English to communicate with people of other cultures.

This is the first reason to publish a legal periodical in English. In this sense, the Ankara Bar Association has been decisive enough to establish sincere and continuous communications with other attorneys worldwide and exchange views with them, in order to promote and teach the culture of law and of advocacy on a national level. We are also taking more expedited steps in these areas, and for accomplishment of these objectives, we count on the assistance from attorneys all over the world and their bar associations, plus any other relevant international organizations related to practice of the legal profession.

In addition, Ankara Bar Association hopes to be able, in connection with specialized education and refresher information for its members, to join worldwide information networks, and to have a potent presence and participation in international markets to provide legal services.

I am sure that to publish this legal periodical in English will serve the aims and purposes referred to above. It will also serve as an introduction to Turkey, and Turkish law, all over the world.

This periodical was made possible through the efforts of my dear colleagues Cemal Dursun, Levent Aydaş, Habibe İyimaya Kayaaslan, Sadık Onur Gelbal, Altan Liman, Özge Evci, Beren Şentürk, Özgür Metin, Nursel Atar, Cemre Kocaçimen, Murat Sümer, Ayşegül Özdemir, Şaziye Saadet Özfirat, Larry D. White. Without their energetic, expert, and devoted help, this periodical would never have been published. So, both Ankara Bar Association and I greatly appreciate their work in bringing this periodical into being. They have made it much better than it would have been otherwise.

With my best regards.

Foreword

by V. Ahsen COŞAR

This legal periodical will also serve as an introduction to Turkey, and Turkish law, all over the world.

Cemal Dursun, Levent Aydaş, Habibe İyimaya Kayaaslan, Sadık Onur Gelbal, Altan Liman, Özge Evci, Beren Şentürk, Özgür Metin, Nursel Atar, Cemre Kocaçimen, Murat Sümer, Ayşegül Özdemir, Şaziye Saadet Özfirat, Larry D. White. Without their energetic, expert, and devoted help, this periodical would never have been published. So, both Ankara Bar Association and I greatly appreciate their work in bringing this periodical into being. They have made it much better than it would have been otherwise.

With my best regards.
I shall start with saying that it has been really challenging to get consensus in a group of lawyers. It has been tough but joyful. President of the Ankara Bar Association and our Editor-in-chief, V. Ahşen Coşar has been an icon of encouragement; a million thanks wouldn’t be enough for him, Cemal Dursun shall be nominated to the best chair ever. Even though she joined us at the latest stage, Nursel Atar has been a great help in brainstorming, editing and translation. Levent Aydaş has been the best coordinator with his cool personality. Altan Liman has been very energetic that he could also chaired ABA of Ankara Bar. Beren Şentürk has been the smoothing link to the Bar administration; Özge Evci is an exceptionally swift person, asks the right questions and wipes away the misunderstandings, which is very crucial. Özgür Metin had self-improving oppositions, so that we are where we are now. S. Onur Gelbal has been a very precise rapporteur; who always wanted to know what we have been doing in long meetings; he is our archive-man. Cemre Kocaçimen had an editorial background, so she was extremely helpful. Ayşegül Özdemir was very strict with timing; a must for an editor. Murat Sümer has recently joined ABR; his and Nursel Atar’s international work background brings a different and an international perspective to the board. Larry D. White, the glorious, turned the lights on in the twisted corridors for non-native authors.

We would like to spread this synergy all around.

In this very first issue, the reader will discern our firm belief in confronting issues from all sides rather than certain point of views is the surest route to our goal: audi alteram partem. We tried to provide a variety of views in our inaugural issue.

In the foreword, Mr. Coşar, explicates the freedom of Bar Associations – as the representative of the defence - in an international context.

In his research on the history of the Ankara Bar Association, Mr. İyimaya also delves into the progress of the “honorary profession, advocacy” in the Republic.

Judge Şahin in his article, Impartiality of Judiciary justifies that universal standards are the prerequisites for justice, sampling on Article 301, whose fame has gone beyond our borders.

In her article regarding the core contracts of the enormous football industry, Ms. Gürsoy narrates legal rules and practice.

Ms. Tiryaki, evaluates the “prohibition of abuse of rights”; under the new Turkish Civil Code, seeking a balance between freedom of form and good faith. As the meaning of bona fide differs with time and place, is it a gateway or a heavy burden to the conscience of a judge?

Ms. Eldeniz, lays out the look of signature and no-signature validity in Turkish contracts law.

Ms. Alçıçek, provides the golden rules of ship mortgage in her modest article. As Mark Twain says, if she had more time she would write a shorter one.

In his article regarding intelligent agents, Dr. Bayramlioğlu points out the complications of the process of creating a point of view for the emerging personality and liability issues raised by intelligent agents.

Mr. Kayaaslan, brings out the concept of systemic risk, suggesting that the explicit deposit guarantee scheme may serve as a best-fit solution, as referred to in the 2006 changes in the relevant laws.

With his expertise in finance, Mr. Karagöl, in a comparative perspective, studies free movement of capital focusing on the Turkish foreign investment provisions.

Dr. Pınar shows through the enigma of EU Law and practice and brings a case study on the ECJ’s one of the latest rulings: the “Tüm and Darı” decision.

Mr. Gülerci, discussing the popular path to justice for international trade, arbitration agreement, in the context of separability doctrine with its pros and cons.

Since the days when the Khan was the representative of tengri, there has been a tradition of advocacy. Our sincere wish is that henceforth ABR is going to be a platform to provoke serious thoughts about how justice may be reached through advocacy.
Freedom of Defence and Bar Associations

by V. Ahsen COŞAR

Having been synonymous with "cruelty" or "brute force" in the earliest times of human history, the "freedom to claim rights" is now a freedom which is granted and regulated first by constitutions and then by laws and which can only be used within this framework.

Obtaining the freedom to enforce a right through an independent and impartial judiciary came as a result of a legal enlightenment that has progressed and been achieved gradually. The main contributors to the freedom to seek enforcement of a right, in terms of its use and protection through judicial means, as well as the attainment of justice through the implementation of law, are lawyers - the honorable representatives of the profession of seeking right who devote their knowledge, time and experience to the service of justice and the use of those seeking right.

For this reason, the legal profession is both a public service, and at the same time an inseparable and inevitable part of legal protection, since it is a "sine qua non" element of judicial activity.

As has been stressed in international conventions, like the European Bar Associations Code of Conduct for Lawyers (adopted by the representatives of twelve Bar Associations on 28 October 1988) and the Recommendation on the Freedom of Lawyers adopted by the Council of Ministers of the European Union, and in the Basic Principles on the Role of Lawyers (also known as the "Havana Rules," adopted at the eighth meeting of the United Nations General Assembly), in a society based on the principle of the rule of law, the function of the lawyer is "not limited to carry out legal representation within the limits set by laws, but it is also of invaluable importance for the realization of justice and for those subject to trial whose rights and freedoms they are to defend."

Within the meaning of Article 1 of the Turkish Advocacy Code, a lawyer "is a constitutive part of the judiciary and represents freely the independent defense." The terms "independence" and "freedom" emphasized in the article mean "freedom as autonomy" from the point of defense. When examined from a historical and legal perspective, defense, which is essentially a fundamental human right, has to be free
and autonomous. Here “freedom” is, without doubt, “freedom from something” as defined by the doctrine, and thus is a “negative freedom” implying a dislike for interference- the absence of external constraints on the individual.

Norman P. Barry, a British political scientist, refers to thinkers in his book “An Introduction to Modern Political Theory” by suggesting that “negative freedom” is important only when it makes a contribution to a value, and this value is autonomy.

“Freedom as autonomy,” referring to the scope of the alternatives open to someone, as well as the required conditions for the achievement of certain objectives, is something more than a concept of freedom understood to be the absence of limitations. “Freedom as autonomy,” as in the case of extreme positive theories of freedom, demands the existence of institutions offering wide facilities that can translate abstract preferences into real opportunities, rather than the restriction of, or disregard for, subjective choices of individuals by the government.

The regulation defining “lawyers as the constitutive part of the judiciary and their free representation of the independent defense,” in Article 1 of the Turkish Advocacy Code, and the obligation laid upon official and private bodies specified in Article 2/3 of the same Code to assist lawyers in the performance of their duties, means no restriction of any individual subjective choice by the governments, as well as the institutionalization of wide facilities which convert these abstract preferences into broad opportunities.

Molierac, who is one of the masters of the legal profession, expressed the freedom and autonomy of the defense concisely with these words: “While performing our duties, we adhere to nobody; not to the client, not to the judge and nor to the government. We do not claim that there are people below our level. However, we do not recognize a hierarchical seniority either. There is no difference between the one who is the most junior and the one who is the most senior or the one with a reputable name. The lawyers did not have any slaves; but did not have any owners either.”

On the other hand, Bar Associations, while they are semi-official bodies joined to the state in their actual form as regulated by the Turkish Constitution of 1982, in fact belong to, or should belong to, civil society.

Civil society is an analytic concept related to perceiving the relationship between the state and society from a perspective of mutual dependency. As far as the State is concerned, this analytical approach focuses on the separate entity of the state from society and the nature, degree and result of such autonomy. From the point of society, the concept discusses the possibility of the existence of a social sphere which has an inner dynamic for development peculiar to itself, with institutionalized structures relating to the methods of established decision-making and conflict-resolution and independence from the state.
In the early literature from John Locke to Thomas Hobbes, from Adam Ferguson, David Hume and Adam Smith of the Scottish Enlightenment to Hegel and Marx, from De Tocqueville to Gramsci, and even to Habermas in our time, the concept of civil society has been conceived and defined in very different ways. Yet civil society can be defined as an entity which is the most effective safeguard against the abuse of political power by the state and the opposition relying on their legitimate origin, against despotism and totalitarianism contributing to the introduction and establishment of democracy, based on the philosophical ground in which the state is understood, not as an entity, but as its derivative, relatively independent from the state with its own development principles and institutional structures.

From this perspective, while the bar associations are part of the civil society, they are not among the non-governmental organizations. Although it is difficult to talk about a literal comparison, Bar Associations are institutions called “mediating structures” by the Anglo-Saxons.

Peter L. Berger, Professor of Boston University, and at the same time Director of the Institute Economic and Cultural Studies, points out in his article published in Yeni Forum Magazine (1989) that democracy is the most practical way of preserving the mediating structures, and the latter are the protectors per se of the democracy.

As clarified by Professor Berger, mediating structures that exist in developed and developing societies are, like cooperatives, trade unions, professional associations or perhaps like family, religious institutions and local structural agencies, are related to, and linked with, values and identities cherished by the people.

Mediating structures not only protect people from alienation and from fear of losing one’s identity and affinity - the cost paid for modernity - they also draw the attention of the political powers to the values of the people.

In contrast to authoritarian and totalitarian regimes, mediating structures are part of that societal basis that allows the institution and improvement of liberal democracy. Actually, totalitarian regimes are not only unable to tolerate the relative independence of the mediating structures, they want to control them, reduce their number and to incorporate them into the government.

Without a doubt, unlike structures, which simply there are, and as such whose function is to maintain the status quo and reduce the speed of change of the society, the community and the family, bar associations as mediating institutions do exist to disrupt the status quo for the better good.

In order for the bar associations to be able to perform this function, it is essential that the established, the accustomed, the known and the
easy be questioned, including interpersonal and social relationships and skills, and they have to be organized in such a way that all the above may be abandoned when needed.

For the purposes of ensuring the performance of these functions by bar associations, Article 76 of the Turkish Advocacy Code requires not only that “Bar Associations shall be responsible for improving the legal profession, ensuring honesty and integrity between lawyers and clients and among lawyers themselves, protecting the order, morality and dignity of the profession and satisfying the needs of the lawyers” but also entitled them to “protect and defend human rights and the rule of law”.

In order for the bar associations to perform their duties and their power, the member lawyers should take responsibility for their own contributions, conduct and performance, as well as the goals of their bar association. For this reason to fulfill their responsibility to the bar association, the lawyers should “do something for the association” without asking “what does the association do for them?” When they do so, and as long as they work hand-in-hand with their own organization and thereby with the synergy produced in this way, it is obvious that bar associations and legal profession will become a community that can create high values.
A Glimpse of Ankara Bar Association’s History

by Ahmet İYİMAYA*

I - INTRODUCTION

I have been planning to do research about the history of Ankara Bar Association for some years. However, the difficulties of research delayed “my efforts” to do this job. These difficulties were not because of a lack of knowledge about the science of history or that subject is related to history but the real reason is that the resource materials were not in places with easy access.

Systematic data about the history and development process of institutions and associations is not only beneficial, but mandatory for the formation of ideals. To have the memory of the efforts in the past hidden in back of developments, is one of the reasons for the “breakdown and failure in the future.”

There is likely to be no official research about the historical development of some basic associations such as the Advocacies and Bar Associations. Comprehensive research, including all the years and volumes, should be done though cooperation between Bar Associations and Universities with proper financial support as well.

This study is under the level of sufficiency. The absence of an established and organized archive caused a waste of time and wastefulness.

It is not inappropriate to hope to have contributions from distinguished lawyers and their articles volunteered for this research.

II - MATERIALS

ARCHIVES: An archive is the most reliable source of knowledge about the past. It has been stated that a government without an organized archive is not an “exactly – independent state.”

There are not many shortcomings. (For instance, The Law of the Legal Profession, the first document of advocacy for the whole country is treated completely inadequately by its articles. The famous Law on Attorney was not in the same part with its annex. The originals of the significant documents have been added to the last pages.)
- SHOULD BE CONTROLLED (III), and
- SHOULD BE PRESENTED TO BE USED (IV)"

It is not easy to say that our archives have the above-mentioned features. The process of "Determination and Destruction", information and the resources are in their last stage. There are no “Archivists.” It would not be a false description if we define the archives to be “graveyards of documents.” We are likely to think and accept that the meaning of the words “archive” and “junk” or “worn-out” are same.

a) Archives of the Ministry of Justice: Advocacy and the Bar Association are closely related to the Ministry of Justice within the scope of laws; for this reason, it is mandatory to send the reports of the “official process” to the Ministry. There are registers for every lawyer and “a bunch of folders” for every Bar Association in the Ministry. Moreover, the records from the pre-Republican period that are very valuable for the history of advocacy and law are waiting in the archive of the Ministry for researchers to set their hands on these records.6

I have greatly benefited from the archives of the Ministry of Justice; unfortunately, records before 1940, including the information about Ankara Bar Association, do not exist in the archive.

b) Archives of Ankara Bar Association: This title is just a wish. It is really sad to state that Ankara Bar Association has not technically had an archive since its foundation. This deficiency should definitely be corrected; this is not even the task of management or any other commissions, but the historians. After providing an appropriate place and a temporary archivist, it is necessary to protect the documents from “dust, moisture, mouse and mess” to institutionalize and transfer all these documents to the consciousness of the next generations.7

It is not possible for a researcher to come to a healthy conclusion amid the chaos of all existing advocacy and bar documents of the past. Establishment of an archive is very essential for our foundation, the history of our association and “to institutionalize” our past.

Until few years ago, the records of “our elderly lawyer colleagues” who were registered in the Ankara Bar Association in the foundation year “could not be found” in the cellar of the bar association except for the record of one lawyer. The resolutions of the first period “do not exist.” “The original register-records” of the Foundation year and the following years “do not exist.” (It is not possible to have historical accuracy for the documents of the past as long as the difference between the terms “cellar” and “archive” and the importance of this difference are not understood.)

The conclusion part of our article is “insufficient” because of the abovementioned shortage of materials. This means that our research shall continue and “an additional article” shall be written if we can get some materials.

2— MEMORIES: As a society, we do not have habit of keeping a diary or writing our memories. We have contacted with some of our

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6 I would like to express my gratitude to the Department Chief for Advocacy, Mr. Ihsan Güler, for his contributions and to the Ministry of Justice for their archive and great interest. (The destruction of the old records of the bar association and advocacy, including the Constitutional Monarchy Period for manufacturing paper and sending them to SEKA (paper factory), were prevented just in the nick of time in the past years. If the New Advocacy Resolution enters into force, removing the wardship, it is an absolute must to set up a large archive with a modern method and Bar Association should request all documents/records and folders related to the advocacy and bar associations from the Ministry.

7 For this particular purpose, great strides have been made by the current board of Ankara Bar.
“senior” lawyer colleagues and asked if they had got any information about the foundation of the association from their colleagues. The answer we got was "no." We do not criticize; however we can not “praise” “the memories and knowledge” of founders or professionals who worked during that period as the next generation because they did not protect the memories of the past.

3—RESEARCH: According to my research, there exists no study about the history of the foundation of the Ankara Bar Association. There are not even a few lines scratched about the foundation. It is inevitable to criticize not having “any news” in the published journals of the foundation period and the following years.

4—NORMS IN LAW: It is essential to “scan the related legal principles” for the history of Advocacy and Bar Association. The most precious treasure for this subject is the “great work” of Serkis Karakoç 9 but this work had not been published. It totaled 50 volumes, including an index of 10 volumes. The Turkish Bars Association has published a two-volume work, named “The Development of Advocacy in Turkey.” Even if it fills a great number of gaps, it leaves many still open. 10 The publishing dates of legal principles and the enforcement norms are helpful resources for dating the foundations of institutions. This method is also used in our research.

5—OTHER MATERIALS: “The fresh resource” for our history of Advocacy and Bar Association was the “Muhamat” Journals, which were prepared by the Society of Attorneys in Istanbul, the capital city of that period. In this journal, there are original and satisfactory articles about the history of advocacy. This source is “as precious as gold” for the history of the pre-Republican period. Furthermore, it includes the preparation stages of the first advocacy law, serious discussions, and the tricky behaviors of the “makers of cheap shoes” up to the Ministry... all these details are documented in the journal as history. 11

After the generation of the Muhamat journal, advocacy and the history of advocacy “owe” to the great lawyer, votary of advocacy Mr. Ali Haydar Özkent. He translated Muhamî (Lawyer) with Mr. S. Nuri and wrote 34 pages of the introduction regarding “Advocacy in Turkey” for the same book. 12 Muhamî was written by the President of Paris Bar Association, H. Repêr’e, and this book was originally

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9 The exact name of the codex which is under protection in a private section of the Turkish Historical Society Library is: “Külliyât-ı Kavanîn. Kavanîn ve nizâmat ve feramin ve beravat ve iradât-ı seniyye ile mukâvelât ve umuma ait mukâvelâtı multevirler.” (Metun/Texts). Karakoç, Serkis. Müşlü Bâb-ı Ali Düsûr enclenemi Rehî ve Mâdevverleri-ı Kamânye Müşflî-ı Sabûk. I have been informed about the existence of such a valuable resource in one of the greatest conversations with Prof. Tahir Çaga. He has stated the absolute necessity of printing and presenting this resource to distinguished researchers and those who are interested in the history of law. He regretted the delay for printing this resource as well.

10 Although intensive studies about the history of Istanbul Bar Association have been published, the exact establishment date of the Istanbul Bar Association, set up with the name of Society of Attorney before the period of the Law of Legal Profession could not be stated. (only the year 1878). I believe that it is also beneficial to state a different method unlike the methods of the study of history to determine the establishment date of Istanbul Bar Association: After finding different establishment dates as the results of researches, the establishment date of Istanbul Bar Association is stated as “April 5th 1878” based on the report of our distinguished colleague, Lawyer Mr. Osman Kumtan with the resolution dated 20.2.1975 and numbered 8/2 of the Board of Directors of Istanbul Bar Association. (This is probably the first resolution for determination of a date by decree of registration(I)) See Ali Haydar Özkent- Lawyer/Muhamî Sophî Nuri (trans.), Ist. 1340, The Prologue of Özkent, Page. 15, Özkent, Ali Haydar. “The Handbook of a Lawyer”, Ist. 1327- The title of the first page of the first journal is “ID-I MiLLi” (National Festival). It was written: “This journal, for the time being, shall be published at monthly intervals under the patronage of the Law Society” The level of the lawyers of the first generation shall be observed by all these details are documented in the journal as history.

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12 See the second footnote of this article. It is also inevitable to present the originals of the texts before 1927 in the annex or in another volume in such a publication as a matter of accuracy and documentation.
published by the Istanbul Bar Association. Mr. Ali Haydar Özkent wrote an 838-paged book called “The Handbook of the Lawyer” in 1940. Every lawyer should read this valuable book and understand the “profession and the art of advocacy.”

III – THE ORGANIZATION OF THE FIRST BAR ASSOCIATION ACCORDING TO POSITIVE LEGAL PRINCIPLES

Advocacy is as old as the history of humanity as an "advocacy and legal aid" institution. Somehow, in every period of time and in each society, "attorneyship and advocacy" have existed. For this reason, writing about the history of this profession and making additions to those are “far beyond the ability of a person.”

According to us, the legal principle that provided the opportunity of establishing a bar association in Turkey after the foreign countries is, “The Law on Attorneys” (Mehâkim-i Nizamiye Dava Vekilleri Hakkında Nizamname). This law organized "the advocacy profession", entry/dismissal to the profession, discipline and other relevant rules; set forth some rules and tariffs for the attorney’s fee; formed a registration and listing system; classified the lawyers (created an exam to be promoted) and besides all of these, formed the first “professional body.” The fourth part of the constitution consists of a total of ten articles (articles 31 to 40).

It has the title of "The Foundation Form and the Duties of Society Of Attorneys", “The organization of society, executive and disciplinary boards, duties, methods of work and resolution, lists (roster), relation with the ministry” were comprehensively arranged in these articles. It is necessary to accept this normative organization dated (16/Zilhicce-The twelfth month of the Islamic calendar/1292), January 13th, 1876 as an official document, which has given the opportunity to establish “The Bar Association” even if its name was “Society.”

The law (regulation) required a lawyer’s “being a citizen/national right” condition. It is stated that the reason for this requirement could have been agreement. The same requirement was not mandatory for the Şeriye Court. The reason for this situation could be the impact of the attorneys (dominant group) on those courts, being not authorized to be lawyers according to the regulation. The regulation includes only Istanbul because the reluctance occurs for other districts and the lack of maturity.

When the benefits of the “modern model” came into public appearance, the aforementioned regulation entered into force for the whole country in 1879. The date of regulation (or the regulation of the legal power) for the whole country forms the basis for the dates of the foundation of the Anatolian Bar Associations. For instance, a bar association in Ankara or in any other province except for Istanbul and
Rumeli should not have been established before 1879 and it would be strange to claim the bar associations were active before 1879.\(^{17}\)

The question of when the First Turkish Bar Association or Istanbul Bar Association was established remains without a clear answer, such as detailed day and month.\(^{18}\)

The system of this organization continued until 1923 with the opposition of lawyers who were not authorized to be attorneys, and their mutual conflicts. After a great deal of persuasion activity, the "Mekahim-İ Hukukiye Vekaletin Serbest Olduğu Hakkindaki Tamim" (The circular, about being an attorney legally free) came into force in 1923 at the Ministry of Justice on behalf of the Minister of the Republic Government with the signature of Fahruddin.\(^{19}\) According to this circular, that was considered to be a scandal, everyone had the opportunity to be an attorney, such as people from karaman, grocers, shoe makers and etc.

This circular struck the authorities of the advocacy profession and sensible lawyers as a stimulant; after serious efforts, finally “The Law on the Legal Profession” was accepted.\(^{20}\) Ali Haydar Özkent, in "The Memorial Rule" explains that the basis for advocacy and bar associations is “The Law on the Legal Profession” (Muhamat Or Mehamat).\(^{21}\)

The third article of the law on the legal profession dated April 3\(^{rd}\), 1340 requires that if the number of lawyers practicing in a district reaches ten, they must establish a bar association in that district. The Law also prohibits performance of the legal profession without being registered to a bar association.\(^{22}\)

The second developmental stage of the history of bar associations and advocacy was "The Law On Legal Profession (Muhamat)." This period of time and the preparatory stages should be the object of serious analysis and inspection. Transition to this stage hides 48 years of a difficult process.

The first legal text, including the terms "Bar Association" and "Muhâmî/Lawyer" is "The Law On the Legal Profession." numbered 460 and dated April 3, 1340 (April 16 1924). Moreover, it was also the first document forming the legal and the comprehensive basis for the profession of advocacy.\(^{23}\)

The enforcement date of the law shall be a helpful reference to determine the foundation date of Ankara Bar Association.

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\(^{12}\) The Turkish equivalent for the bar association has been the Society of Attorneys in the internal regulation of the Foreign Bar Association in Istanbul. Özkent, A. H. The Handbook of a Lawyer, Page 680. Distinguished lawyer Özkent has a footnote in one of his studies in the Journal of Muhamat. That is: "... It is believed that the use of foreign terms is inappropriate in our laws. However, it is necessary to use some internationally recognized terms." (This note has been written on the preparation stage of the law on legal profession.) Actually before the Law of Legal Profession, “Bar Association” has been used instead of the term “Society” and even The Ministry of Justice has formally used the term “Bar Association” in one of its official letters. In the articles of lawyers such as Özkent from the first-period, “Bar Association” has been preferred rather than the term “Society” and it has also been stated that the organizational structure of the Society of Attorneys is same with the Bar Association. Özkent, Muhamâî/Lawyer. Page 19. Author has always used the term, “Cemiyet-i Dâime (Bar Association)”. Muhamâî/Lawyer. Page 680. Muhtar, Being Attorney, Lawyer and Advocacy in Our Country. Journal of Muhamat, p. 1481. See Journal of Muhamat, p. 689 for the phrase of Bursa Bar Association and the news about bar associations before 1924. Moreover see pages 331, 328-330 in the same journal for the use of this term.

\(^{13}\) See the 6\(^{th}\) footnote of this article. Ali Haydar Özkent has stated almost in an implored manner in his articles in the establishment documents and actual information: "...I kindly request to enlighten this dark period of our history by documents and even memories, no matter NEW-OLD." (Lawyer, Prologue p. 17) It has been applied to the "records, rosters and the testi- monies". See the same author, "The Hand Book of a Lawyer", Page 77. See Journal of Muhamat, p. 680 for the texts of abovementioned circular.

\(^{14}\) See Muhamat p. 670 for the original text of a great article written by Istanbul Bar Association to show its reaction to the circular. This article has been sent to the Ministry of Justice with the signature of the president. The preparation stages of the Law on Legal Profession were almost at the end of Balkan war. There had been serious preparation studies to enact this law on the contrary; there had been some people against the efforts of the legalization. The Ministry of Justice had stayed in the middle of the supporters and the opponents of legalization, the abovementioned circular had been the last straw and finally the law had been enacted. See the articles and the drafts in some prints of Muhamat. Moreover, Özkent, A. H. “The Handbook of a Lawyer”. Page 98 and .

\(^{15}\) The origin of the term “muhamat” derives from Arabic and it could be pronounced as "muhamat" as well. (Both pronunciations are correct.) Furthermore, "Dînî" has also been written as "muhâmî". There have been explanations about this topic in the discussion of the assembly. (See the texts of The Law on Legal Profession and the Preparation Studies, translated from Ottoman language into Turkish and planned to be published in the Journal of Ankara Bar Association.)

\(^{16}\) Above-mentioned Circular, Article 1, 7 and the other articles.

\(^{17}\) Changing the principle “a lawyer should be a citizen” to “a lawyer should be from Turkey” has been envisaged in this law and whether this is a secret condition of Lozan Agreement had been asked in the assembly. (See the publication mentioned in 20\(^{th}\) footnote of this article)
IV- THE FOUNDATION HISTORY OF ANKARA BAR ASSOCIATION

A – BEFORE THE LAW ON LEGAL PROFESSION (before 1924)

The answer to the question as to whether there was a "Society of Attorneys (Dava Vekilleri Cemiyeti)," or paraphrased as a “Bar Association” in Ankara before 1924, is not clear.

1- We know that there was a Society of Attorneys before the Law on Legal Profession in five provinces, including Istanbul. However the names of those provinces are not clear in the sources. The provinces that can be discerned are Istanbul, Izmir and Berûsa (Bursa). One of the other provinces could be Ankara because of its political position.

2- In "Our Previous Presidents" part of the “Albums” published by the Ankara Bar Association, a "professional organization" that existed before 1924 is mentioned and “Mr. Salih Sırrı” is referred to as the president of this organization. Since the beginning of the presidency term was there stated to be 1920, could we state that the previous professional organization was established in 1920?

a) Although the organization and the president Mr. Salih Sırrı were mentioned in the first rosters, there were no notes about the history of the presidency period.

b) The first thing that comes to mind is research that was carried on without any registration in the bar association and “the determination of the foundation history” was made by getting some useful information from the remaining attorneys (our elderly colleagues) from the first period. The method of reaching a conclusion by the use of the rosters had also been tried by the great professional lawyer Mr. Ali Haydar Özkent.

3- Another finding shall affect the abovementioned thesis in the opposite way: that is a “seal dated 1923” being in the safe custody of the Ankara Bar Association. In 1923, the term “bar association” was not declared in the Law on the Legal Profession and the dates on the seals should show the foundation date according to historical tradition. As a conclusion, what is the meaning of this seal dated 1923? The seal consists of letters and numbers before the new alphabet (Latin-Turkish Alphabet) was adopted. This means that the seal was engraved before 1927. Consequently, we must consider that there was a “Society of Attorneys” in the 1920s because of the political position of Ankara.

4- The previous duties of the lawyers exist in their abstract of the record. However, in the abstract of the record of Mr. Salih Sırrı, who was the president of an organization before 1924, the duty of “the presidency of the organization” is not mentioned.

It is far beyond reality to conclusively determine the year of founding to be 1920 because correspondence with The Ministry of Justice is required for the classification of archives and research in accordance with the Law on Attorneys and this procedure shall take a long time. Finding the employee/register record of Salih Sırrı would also be a great contribution.

25 See several news and the texts of telegraphs in Muhamat, p. 689.
27 The name of Mr. Salih Sırrı had not been stated in the roster/list of 1948 – 1949. It is clear that the studies were started after this year.
28 According to the record of Mr. İbrahim Rauf Ayaşlı in the Bar Association, it has been stated that our first president, Mr. İbrahim Rauf Ayaşlı " had been elected on July 1st, 1940 for the presidency and resigned from the presidency under the family law on July 7th, 1932."
29 It has been declared that Mr. Salih Sırrı had been the president of the society (before The Law on the Legal Profession); however, the document for the approval of this claim has not been found yet. In his record, it says: “…This person has violated the Advocacy law (the correct version of this law is ‘The law on legal profession’) and the regulation of association. He had carried on commerce as a leading business and had not pay the subscription fee (99 Liras), thus he had been expelled from the association with a resolution of commission, dated January 20th, 1932 and numbered 247."
30 If we assume that the abovementioned knowledge is correct, Mr. Salih Sırrı had not been in good relations with "silk-i muhamat". (We wish to be mistaken).
**B – THE PERIOD OF THE LAW ON THE LEGAL PROFESSION:**

We state precisely that the establishment date of the bar association in Ankara, in other words the establishment date of Ankara Bar Association in the period of the law on legal profession in accordance with this law, is definite. However, it is necessary to state that “the resolution of establishment and the texts of the law” do not exist. I shall continue my research to complete this study.

The Ankara Bar Association was established on July 14th 1924 (July 1st 1340 —according to the solar calendar used in Turkey until 1925).

1- The year of 1924 is evident in the published rosters. The published rosters are secondary sources and shall not be the actual evidence without the main source (document).

2- According to the Law on the Legal Profession, the membership date of the first professional colleagues was July 1st, 1340 in the records of the bar association. The registrations of the founder and the honorary members being on the foundation date or by the foundation date shall be pivotal contributions to a definite determination.

3- One of the resolutions of the Disciplinary Board of Ankara Bar Association is in existence in the abstract of record of “Mr. Emin Halim,” one of the most senior lawyers of the Ankara Bar Association with register number 3137. A seal of the Ankara Bar Association exists in this resolution; however, the sample of this seal could not be found. “The presidency of Ankara Bar Association/dated July 1st, 1340” and the symbols of our flag were found on the seal. It is not possible to “write an incorrect establishment date” on a document prepared after approximately seven years. Even to find a simple document like the abovementioned took many weeks and more than thousand folders were analyzed.

4— The record of our distinguished president, Mr. İbrahim Rauf Ayaşlı, is also a valuable document to research our history. Our president passed away in 1953, but at the time the Ministry was informed about the situation and it was realized that the employee register folder of Mr. İbrahim Rauf Ayaşlı did not exist in the Ministry. The necessary information was requested from the Bar Association to form a record in the Ministry; the bar association sent the aforementioned document with a cover letter dated September 4th, 1953 to the Ministry of Justice by translating the document from the Ottoman language into the new alphabet. In 1953, we realized that the register document of Mr. Rauf Ayaşlı was in the cellar of the Ankara Bar Association. Unfortunately, this document cannot be located at the moment. The findings of the record prepared by the Ministry of Justice rescued us. It is stated in this document, dated September 3rd, 1340 that the Ankara Bar Association existed in that year. This document was in the Bar Association records, arranged 32 days after the establishment date. Thus, the determined establishment date is certified.
members of that famous discrimination commission by being the president.

It is essential to call attention to the fact that there were no casebooks in the first periods of Bar Association and the resolutions had been written on documents by making notes of the document numbers for each document.33

In accordance with the Law on the Legal Profession and the Regulation on Application of the Law on Legal Profession, it shall be inappropriate to claim another date (in some discussions, the establishment date is declared to be 1926) for the establishment of the Bar Association, since the profession of advocacy could not be performed without an organized Bar Association. For this reason, the Bar Association was legally established in 1924.34

V-CONCLUSION

1- It shall only be a coincidence to determine the “Establishment Date of Ankara Bar Association” in terms from the current documents of the Ministry of Justice, Ankara Bar Association and Court of Justice without any organization and separation of the “Archive Arrangement.”

2- We could not know the definite establishment date of the Professional Organization before the Law on the Legal Profession (1924). According to the current findings, we could affirm the establishment date as 1920.

3- We determine the establishment date of Ankara Bar Association to the day, month and the year in the period of the Law on the Legal Profession, setting up the advocacy and the bar association on a normative basis at the level of laws and it is not open to a discussion: Ankara Bar Association was established on July 14th 1924 (July 1st 1340 –according to the solar calendar used in Turkey until 1925).

4- There were more than ten studies about the establishment date of the Istanbul Bar Association. Distinguished members of Ankara Bar Association should also make further research on this subject to contribute their work and efforts to this study.
Impartiality of the Judiciary

by Kemal ŞAHİN*

It can be said that impartiality of the judiciary is undermined by the practice - which is similar to teacher-student relationship - of assessment/grading of local court judges' performance by Supreme Court judges.

At the opening ceremony of the Turkish Justice Academy’s 2007-2008 academic year, the Chief Justice of the Court of Cassation (Yargıtay) challenged the prospective judges:

“The main component of judgship is impartiality. However, you will be partial in your decisions to protect and sustain the Republic of Turkey. If we are here today, it is because of the rights secured by our Republic. You should, and have to, know that the Republic form of government is the most appropriate regime suitable for human dignity and honor. You will be partial to claiming ownership of a democratic and secular system and the rule of law; you will be partial to owning our crescent and star flag, and to raising the flag even higher. You do not have the luxury of being impartial to these issues”.

While emphasizing the principle of impartiality, the Chief Justice was pointing to the boundaries of this principle. When the problems of the judiciary are at issue, the independence of the judiciary and ethical principles are the two values mentioned most frequently; however, treated like an orphan child, the principle of impartiality is rarely mentioned. What does the principle of impartiality mean? Are there any limits to the principle of ethical impartiality?

Universal Standards

Legality and the Independence of Judiciary themselves are not enough to meet the requirements for “the right to a fair and just trial” guaranteed in Article 6 of the European Human Rights Convention (EHRC). In addition to the principles of Legality and Independence of Judiciary, the impartiality of the judiciary is also necessary. In Morris v. UK – Case Number 38784/97, dated 02/26/2002- the European Court of Human Rights (ECHR) explained in the following words what the concept of impartiality meant:

* Judge, Kazan, Ankara.
“... there are two dimensions in the concept of judicial impartiality. The first, the Court should distance itself from personal bias and influence. The second, the Court should also be impartial objectively; meaning that there should be sufficient guarantees for the Court to dismiss any legitimate misgivings regarding impartiality”.

In accordance with the United Nations’ Bangalore Principles of Judicial Conduct (2003/43), which was ratified in 2006, the Supreme Council of Judges and Public Prosecutors stated that the following conduct is necessary to achieve judicial impartiality: “Judges should perform their duties impartially, without any bias or favoring anybody; during and outside of trials, judges should act in ways that would increase the parties’ and public’s trust in the judiciary and jurists; during a trial, until the decision, judges should act in ways to minimize the possibility of a rejection of the judge’s decision on appeal.” Both the UN’s Bangalore Principles of Judicial Conduct and the ECHR’s decision, impartiality is subjected to a distinction between subjective impartiality and objective impartiality.

Subjective impartiality is a judge’s personal impartiality as an individual. A judge is presumed to be subjectively impartial until proven otherwise. However, subjective impartiality requires a very delicate effort in judging; judges should endeavor not to have any bias, prejudice, or precondition, and should avoid the appearance of favoring or hindering any party to a case. Objective impartiality is the parties’ and public’s belief that the Court as an institution is impartial. Achieving objective impartiality requires conferral of some guarantees by judges to eliminate any suspicions regarding their impartiality.

The Legislative Trap

The assessment of judicial conduct by justice inspectors at the Ministry of Justice causes pressure on judges; it can be said that any suspicions regarding the impartiality of judges cannot be eliminated with this assessment since the practice of assessment could not be considered to be “guarantees of judges.” Consequently, impartiality of judges is open to discussion. The public’s feeling that judges do not provide enough guarantees to secure their own impartiality could be said to be the result of the fact that decisions of the Supreme Council of Judges and Public Prosecutors are final decisions and cannot not be challenged. It can also be said that the impartiality of judges is undermined by the assessment/grading of the conduct and performance of local court judges by the Supreme Court judges, which is similar to a teacher-student relationship. We could emphasize that objective impartiality has yet to be absorbed by judges personally – including the author of this article himself, simply because we still overuse and do not question enough expert reports, which are often prepared in a way they resemble a court judgment, on which to base our judgments. It is possible to give more examples of this kind. If only the lawmakers could make laws parallel to universal
standards, and if only our judges could give up the luxury of annihilating the universal principles of law, then it is not very difficult to give some guarantees that would strengthen the perception of the objective impartiality of judges.

“The Mind of the State” Trap

The best evidence to prove the subjective impartiality of a judge’s decision is its justification section. It should be known that a judge makes judgments and does not serve anybody in particular. When making his/her decisions, a judge looks only for justice. The only mission s/he should have is to bring about justice. A judge should not feel pressure to protect and shield the state from harm or should not act as an officer of the state or government.

A judge should not feel pressure to give priority to the official theories of the state, nor should s/he feel pressure to protect the “high interests” of the state or government. The sentimental and nonsensical talk of the public should not affect a judge’s decision making. If public discussion does have an effect on a judge’s decision making process, then it is not possible to talk about the impartiality of judging but it is possible to talk about “political judging.” In order to talk about “political judging” – mentioned in ‘Supremacy of Laws in the Mind of the State Trap’ by Mithat Sancar – courts do not have to act in accordance with the political will. When making its decision, if a court, instead of making a reference to laws and justice, makes a reference to the dominant and official ideology, or ‘the mind of the state’, then, ‘political judging’ is at play.

Could we say that the decisions of the ECHR, whose jurisdiction we have long accepted, and the UN’s Bangalore Principles of Judicial Conduct, which are recognized by the Supreme Council of Judges and Public Prosecutors, have brought an exception to the rule of impartial judging? Do we have a responsibility to create whimsical exceptions to impartial judging in our decisions regarding Article 301 (of Turkish Criminal Code), whose fame has gone beyond our borders and which made people say “maşallah for 301 times!” because of our ingenuity in these decisions?

* Editorial footnote: It is herewith referred to the old Turkish saying “maşallah for 41 times”, meaning the wish for God’s bless.
A professional sportsman is a person who is specialized in a branch of sports and performs in exchange of a fee in competitions as a profession.1

“Professional player” is a term that has been defined as “a Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity” at Article 2 of the FIFA (Fédération Internationale de Football Federation) Regulations for the Status and Transfer of Players. The criteria for being a professional player have been set by the DRC (FIFA Dispute Resolution Chamber) and CAS3 (Court of Arbitration for Sports) in several cases. While deciding on a player’s status, the player’s profession, age, and ratio between his costs and remuneration play an important role.

A contract has been defined by the Turkish Code of Obligations4 Article 1 as “Contract to be concluded, a manifestation of parties’ mutual consent required.” Reduced to simple terms, a contract is an agreement between two or more parties that imposes some kind of obligation or responsibility on each.5

The most simple and appropriate definition of a professional player contract would be: “A contract which is concluded between a registered club as professional and a player whose intent is to serve his footballing activity under that Club for a period of time and fee.” As it can clearly be seen from the definition, amateur Clubs and players cannot be party to this agreement.

LEGAL CHARACTER OF PROFESSIONAL PLAYERS CONTRACT

According to most of the legislation throughout Europe, professional players’ contracts are subject to the Labor Law. On the contrary, in Turkish legislation sportsman are excluded from the Labor Code.6

Since there is no difference between physical, artistic, technical or scientific activities, all kinds of labor can be subject of an employ...
ment contract;’ thus, professional players’ contracts can also be considered to be an employment contract. In Article 313 of the Law of Obligations, an employment contract is defined as “... a contract whereby the employee is obligated to perform work in the employer’s service for either a fixed or an indefinite period of time, and the employer is obligated to pay wages based either on time periods or on the work performed.”

Several arguments have been made by scholars about the legal character of a professional player’s contract. Some of the scholars argue that although these contracts are excluded from the Labor Code, players are employees of the Clubs and some rights like the right to strike should be granted to players. It is my opinion that the contracts of the sportsmen cannot be classified as employment contracts since the Labor Code excluded sportsmen from its application. Another group argues that since the wages are astronomically high, players are “entrepreneurs.” However the criterion of being paid astronomically cannot lead us to such conclusion especially when we consider how wages vary among players playing in different leagues.

In its decision also, the Turkish Court of Appeals defined the contract as an employment contract.

According to Law of Establishment and Objectives of Turkish Football Federation (TFF) No 3813, the TFF has jurisdiction over disputes within the football family. The TFF is of the opinion that these contracts are also employment contracts as defined under the Code of Obligations. However, taking into consideration the specificity of football and by interpreting the laws, TFF has created a sui generis law for football disputes (e.g. special procedures to conclude and terminate the contracts.).

**PROFESSIONAL PLAYERS CONTRACT UNDER TURKISH FOOTBALL FEDERATION’S REGULATIONS**

**FORMATION OF A PROFESSIONAL PLAYERS CONTRACT**

As the sole authority for football in Turkey, with the power from the Law of Establishment and Objectives of Turkish Football Federation, the TFF enacted several regulations. The Regulation for Professional Football and Transfer (PF&T) intends to ensure that clubs form professional football teams, and to improve football and to set the principles of professional football. The relations between clubs and professional players are controlled under this regulation.

“**CONTRACT: ARTICLE 25 –**

Each professional player contract shall be drawn up in four copies on the basis of the uniform contract prepared by the Federation and shall be certified by a notary public and approved by the Federation.

Any contract that fails to comply with the uniform contract prepared by the Federation or with the related legislation shall not be approved by the Federation.”

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1 Reisoglu, Hizmet Akdi, p.39; Schmidt, p.330.
2 10th Civil Chamber of Court of Appeals, 24.01.2974 docket no: 1974/199 decision no: 1974/1274.
3 OBJECTIVES OF THE BOARD OF ARBITRATION - ARTICLE 14 - (Amended on 05.05.2005 – 5340-11) The Board of Arbitration examines and renders the final decisions upon the appeals lodged by the related parties on the decisions of the Executive Committee with respect to the disputes arises between Federation and clubs, the Federation and referees, the Federation and technical directors and coaches, clubs and technical directors, coaches, player agents and physiotherapists clubs and players, clubs and clubs and the appeals lodged against the decisions of the Disciplinary Committees.
4 Statute, Regulations for each league, Football Competition Regulation, Regulation for Professional Football and Transfer, Disciplinary Code, Appeals Committee Regulation, Club Licensing Regulation, Stadium Security Regulation, Accreditation Regulation, Broadcasting Regulation, Equipment Regulation, Anti-Doping Regulation, Player’s Agent Regulation, Amateur Football Regulation, Technical Stuff Regulation, Referee Committee’s Regulation, Fair Play Regulation, Medical Stuff Regulation.
5 Regulation for Professional Football and Transfer, edition December 2006.
There are three main conditions which are set forth in the above mentioned article;

1. Pre-printed Uniform Contract

TFF has prepared a pre-printed uniform contract which has been discussed among stakeholders and lawyers.

According to Article 11 of the Code of Obligations, “In order to be valid, a contract is only required to be in a particular form if the law so requires.” Article 314 of the same Code states that “Unless otherwise provided for by Law, an employment contract requires no special form in order to be valid.” The uniform contract has been defined by TFF regulation; it is obvious that this is not a Law with respect to the hierarchy of laws concept in Turkey. However, the Law of Establishment and Objectives of Turkish Football Federation No 3813 has no article regulating professional players but gave full authority to the Federation to make all necessary regulations to organize football. Therefore this regulation of uniform contract is accepted to be legal.

“Freedom of contract” is the main principle under both the Common Law and Continental Law systems. It is the underpinning of the theory of laissez-faire economics and is justified as a benefit to society. In simple words, “freedom of contract” is the idea that individuals should be free to bargain among themselves for the terms of their own contracts, without government interference.

This principle is the outcome of the liberalization period which began in the 19th century. However, the effects of the 1st and 2nd World Wars changed opinions about freedom of contract. Economic improvements, changes in the roles of Governments in economic life, population growth, new types of commerce, etc., brought new perspectives to the “freedom of contract” principle. Pre-printed uniform contracts followed.

In Turkey, the first pre-printed uniform contracts were used in the service sector. The big department stores which had a dominant position in the markets began to offer pre-printed uniform contracts for their customers to make the payment in installments. Then credit card contracts entered into commercial life and others followed. The party which is in the dominant position does the “offer” with the pre-printed contract; by signing the contract the client does the “acceptance,” then the contract is concluded. In this contractual relation the client has no opportunity to discuss any article of the pre-printed contract. For this reason the application of “freedom of contract” principle in such contracts has become doubtful; for this reason, under the common law such contracts are called “adhesive contracts.” However these pre-printed uniform contracts were prepared to meet the needs of the fast growing commercial world.

Therefore, the authorities tend to accept that these contracts do not affect the “freedom of contract” principle; since the parties concluding such contracts are willing to do so, there is therefore a freedom of choice at the very beginning. In addition they argue that the two main articles of the Code of Obligation should be applied to such contracts to draw the borders of a contract: Article 19 and 20.

12 OBJECTIVES OF THE FEDERATION - ARTICLE 2 – The objectives of the Turkish Football Federation are as follows:
13 a) To monitor football activities, to promote the development and expansion of football throughout the country, in order to achieve these objectives to make all necessary regulations, take decisions and implement them…
14 See also; Dr. E. Younkins, Freedom to Contract; http://www.quebecoislibre.org/younkins25.html.
Article 19 of the Code of Obligations states that “The content of a contract can, within the limits of the law, be established at the discretion of the parties. Agreements deviating from what is provided for by law are valid only if the law does not contain mandatory provisions which may not be modified, or where such deviation does not violate public policy, boni mores or basic personal rights.”

Article 20; “A contract providing for an impossibility, having illegal contents, or violation boni mores, is null and void. If such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts.”

In conclusion, pre-printed uniform contracts do not interfere with the “freedom of contract” principle, however judicial bodies have a tendency to interpret such contracts in favor of weak party.

When the TFF’s uniform contract is compared with other types of uniform contracts, it is clear that it has different characteristics. The parties are free to agree on and put any condition that is not against the Regulations of the TFF and the basic principles of Law in these contracts. The core idea of mandatory pre-printed uniform contracts is to create a “fill in the blanks” type of contract in order to ensure the essential elements of a contract are covered.

It is a fact that the professional players who play in the leagues other then the top league of their country are more numerous than those who are playing in the top league. Unfortunately this majority needs more legal assistance then the top league players – since their talents are limited, their profession and service are more open to abuse.

UEFA’s (Union des Federations Européennes de Football) Circular Letter No. 32 of 18 May 2007 is proof of this theory. With this circular letter, UEFA promotes the European Professional Player Contract Minimum Requirements and encourages the member associations to adopt those requirements into their systems. In this circular letter, the basic form and elements of a professional player contract has been defined.

When this circular letter and TFF’s uniform contract and the transfer system thereof are compared, it will be clearly recognized that TFF’s procedure and regulations totally meets the criteria set by UEFA.

2. Notary Public

The parties to the professional players’ contract shall sign the contract before a notary public. If a contract is not signed before a notary public, the TFF would not approve and issue a license to the player. Therefore it has been argued whether the notary public condition is a validity or formal condition.

As mentioned above, a contract shall solely be required in a particular form if the law requires so. In Turkish legislation, there are a few types of contracts which have been required by law to be in a particular form; if the parties fail to do so, the agreement would be null and void. However, if the parties fail to sign the professional football

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16 Turkish Code of Obligations, Article 11.
player contract before a notary public, this contract would be a valid contract before Law but will not be approved by the TFF.

The sole concern of the TFF in requiring the signature before notary public is to verify the signatures of the parties in order to avoid the denial thereof in the future. Requiring this condition and avoiding such objections ensure the stability of football.

When the contract is concluded before a notary public, the notary public also certifies the actual date of effectiveness. Since the professional players’ contract would be effective at the moment when the parties conclude the contract before a notary public, the importance of effective date could be understood better.

As a conclusion, notary public approval requirement is not a validity condition but a formality condition.

3. **Registration of Contracts and Issuance of License**

"REGISTRATION OF CONTRACTS AND ISSUANCE OF LICENSE: ARTICLE 26-

All amateur and professional players must be registered under the Federation in order to be eligible to play in any organized match or is subject to the permit of the Federation.

... 

In order for a professional player’s contract to be registered, the following documents must be submitted to the Federation:

a) Three copies of the notarized contract,

b) A health committee report stating that the player can play football,

c) A receipt evidencing that the amount, which shall be set and announced by the Federation prior to the first transfer and registration period every year and collected in the form of a life insurance for players from each club on behalf of players during transfer and approval transactions, has been deposited in the bank account of the Federation’s Social Support and Solidarity Foundation,

d) The receipt evidencing that the transaction and approval fees determined by the Federation prior to the first transfer and registration period every year and payable during the registration of player contracts has been paid to the Federation’s bank account, and

e) All other documents as may be requested by the Federation”

In order for a professional player’s contract to be registered and for the player to be issued a license, the above-mentioned requirements must be fulfilled. The most important ones are:

a) Three copies of the notarized contract

The professional players’ contract must be signed by both the club’s authorized representative and the player in 4 copies before a notary public. The original contract shall be kept by the notary public, while the remaining three copies shall be submitted by the club to the Federation before the deadline set for the transfer and registration of players. Two copies of the registered contracts will be kept by the Federation. One of these copies shall be forwarded to the Inland Rev-
Duties and Obligations of Club

Article 27 of PF&T regulates the duties and obligations of Club. The main obligation of the Club is to pay the fees of the player; other subparagraphs reflect the best practice. The health insurance and healthcare costs are the most important issues. For the last two seasons, the TFF has undertaken the health insurance obligation of the Clubs in order to avoid player grievances and disburses the health insurance premiums of all professional players.

The most important subparagraphs of Article 27 are:

"DUTIES AND OBLIGATIONS OF CLUBS: ARTICLE 27-

Any club which signed contracts with professional players shall:

a) Pay the players the fees (monthly salaries and transfer fees) written in the contract in accordance with Article 25 of these Regulations;

b) Safeguard its players’ health and take all measures necessary for matches, training activities, camps and travels in accordance with the provisions regarding health and injuries;

... 

h) In cases where it imposes a fine on any of its players, provide such player and the Federation with a notarized copy of its decision to do so, the amount of such fine, together with the reasons thereof, within 10 days of the date of such decision (decisions not transmitted to the player and the Federation within the said time limit shall not be valid);

...

j) Take out insurance from its professional players from private insurers, which are determined by the Federation, against risks of permanent and partial injury, accident and death that may be incurred during matches, training activities to be performed, whether in Turkey or abroad, and during travels to and from the venues of such matches;

The premiums for such insurances shall be paid by the Federation and debited to the account of the club. Such premiums paid by the Federation may be deducted from the club’s receivables from the Federation.

 Cardiovascular, respiratory, ear-nose and throat, digestive, genito-urinary, nervous, muscle-skeleton, neurology, ophthalmology systems shall be examined by specialists and they shall decide whether the player is eligible to play football or not.
The Federation determines and announces the required private insurance coverage amounts prior to the first transfer period every year;

...  

m) In the event such professional player dies, pay all existing and future fees and benefits payable to such player to his legal successors;

n) Withhold all taxes deductible from his players’ fees (whether salaries or transfer fees) at the time of payment and pay such taxes to the related tax office (all fees and other charges payable to the Federation shall be deducted net of any withholdings; taxes shall be deducted by the club);

o) The validity of a transfer contract may not be made conditional upon the positive results of a medical examination. The player’s prospective new club shall be responsible for making all necessary inquiries and medical examinations before signing the contract, otherwise it shall be liable to pay all the amounts payable to the player’s former clubs and the player arising from the contract even if the contract is not registered by the Federation."

The consequences of a breach of contract by Clubs will be explained below.

**Duties and Obligations of Player**

Article 28 of PF&T regulates the duties and obligations of Player. The main obligation of a player is to give his footballing service in good faith.

The most important subparagraphs of Article 28 are:

“DUTIES AND OBLIGATIONS OF PLAYERS: ARTICLE 28 –  
Professional players shall;

a) Be aware of and observe all the lawful orders, instructions, regulations and rules issued by the Federation and/or their club;

...  
d) Attend all training programs and other footballing activities of their club regularly;

e) Not be engaged in any sports activity without the prior written consent of their club;

...  
i) On and off the pitch, avoid engaging in any offensive behaviour against his team mates, opponents and match officials that could give rise to a complaint and sanction;

...  
l) In the case of illness or injury, transmit their health and injury reports to their club and the Federation within five days (any player failing to do so shall not be entitled to claim any rights arising from such illness or injury).”
The consequences of breach of contract by Player will be explained under “Termination of Contract” heading.

**TERMINATION OF CONTRACT**

The conditions for the termination of a contract are foreseen in Articles 31 and 32. Any notice of termination served by any party in violation of the provisions of these Regulations or the time limits and procedure given below shall not be considered and registered by the Federation.

**Termination by the Club**

“**TERMINATION BY THE CLUB: ARTICLE 31** –

A club shall be entitled to serve a notice of termination on a player, in the event that:

a) Such player’s illness, or rest period, not connected with his footballing activity exceeds a period of six months and that such player has not contacted the club for five days consecutively or for ten days or more interruptedly for any reason whatsoever,

b) Such player has been banned from exercising his certain rights or suspended for a period of six months by the Professional Football Disciplinary Committee,

c) Such player heavily violates his obligations specified under Article 28,

d) Such player has been permanently banned from exercising his certain rights (however, if such ban is lifted fully or partly and the club wishes to continue the contract, the club must, within fifteen days following the lifting of that ban, notify such player through a notary public of its intention to continue the contract. If the club fails to notify such player duly, then the club shall release such player’s registration, provided that such player returns such portion of the transfer fee corresponding to the time period during which he did not perform under the contract), or

e) Such player has been convicted of an infamous crime, for which the upper limit of imprisonment period exceeds 6 months pursuant to the related law in force.

The club shall exercise its right to terminate the contract within 15 days from the date it becomes aware of any such event. If the club fails to exercise its right of termination within the said time limit, then the club shall fulfill all of its obligations and pay all the fees and benefits the player may be entitled to under the contract.”

A club wishing to exercise its right to terminate the contract with one of its players in accordance with these Regulations must serve a notice of termination upon such player through a notary public and transmit a copy of such notice of termination to the Federation for information purposes.

In the event a club serves a notice of termination upon one of its players, the contractual relationship between such club and the player shall cease upon receipt by the Federation of such notice of termina-
PROFESSIONAL FOOTBALL PLAYERS’ CONTRACTS

In the event of any such notice of termination, the Federation shall ask the affected parties (by fax or certified mail) to declare, within seven days, whether they have claims with regards to such termination. The parties shall notify the Federation of their claims (compensation for termination of without just cause, imposition of sporting sanctions, etc.), if any, within seven days following the date of receipt of the notice from the Federation. Otherwise the related party shall lose their right to claim compensation and sporting sanctions.

2. Termination by the Player

“TERMINATION BY PLAYER: ARTICLE 32 –

In the event that any fee or other payments due to a player under his contract and these Regulations has not been paid within seven days following the date on which such fees and benefits are due, such player shall be entitled to terminate his contract within 15 days following the expiry of the said seven days.

If a player proves that he appeared in less than 10% of the official matches in which the club has been involved in throughout one season, he shall be entitled to terminate his contract for sporting just cause. The existence of sporting just cause shall be considered on a case-by-case basis. Due consideration shall be given to the player’s circumstances [based on his injury, suspension, field position, position in the squad (substitute goalkeeper, etc.), age and previous career, including but not limited to his reasonable expectations]."

A player may only serve a notice of termination for sporting just cause within 15 days following the last official match of the season involved.

A player wishing to exercise his right to terminate his contract with his club in accordance with these Regulations must serve a notice of termination upon his club through a notary public and transmit a copy of such notice of termination to the Federation for information purposes.

In the event a player serves a notice of termination, the Federation shall, upon receipt of such notice, notify the affected club (by fax or certified mail with return receipt requested) of such notice of termination. The date of such notice given by the Federation to the club shall be deemed to be the date on which such notice of termination is registered by the Federation and the contractual relationship between such club and player shall be deemed to have been terminated, provided that the rights of such parties as to the consequences of such termination are reserved.

In the event of any such notice of termination by a player, the player may not sign any contract with any other club until the Federation shall have considered and decided on such notice of termination. If requested by such player, the Federation may, depending on the nature of the case concerned, permit such player to sign a contract with a club within transfer and registration period.
“Sporting just cause” which is mentioned at the last two paragraphs of Article 32, has been adopted from Article 15 of the FIFA Regulations for the Status and Transfer of Players. While adopting this Article, the TFF tried to set criteria to be followed. While interpreting a termination for sporting just cause, a player’s injury, suspension, field position, position in the squad, age and previous career, etc., shall be evaluated.

Compensation

According to Article 34 of PF&T, when the contract is unilaterally terminated, the terminating parties’ cause will be evaluated and determined by TFF whether it is based on just or unjust cause.

In the event of termination without just cause, the Federation may, upon request of the party not in breach, calculate the amount of compensation for such unjust cause by taking into account all objective criteria such as the fees and other benefits paid and payable under the existing contract, the remaining term of the contract, the rate of return to the club of the payments through the player’s performance, and whether the breach involved occurred within the time limits defined in Article 29, and order the party in breach to pay the compensation so calculated. In cases where an amount of compensation for unjust termination is stipulated in the contract, then such amount of compensation shall be applicable to the case.

If a professional player is required to pay compensation for unjust termination, then the player and his new club shall be jointly and severally liable for such compensation. Entitlement to compensation may not be assigned to any third party.

Sporting Sanction

Sporting Sanction is also adopted from FIFA Regulations for Status and Transfer of Players and it foreseen in Article 35 of the PF&T. The TFF may decide to impose a sporting sanction only if requested by the parties and applicable to the merits of the case.

“SPORTING SANCTIONS ARTICLE 35 –

Other than in exceptional cases, sporting sanctions for unilateral breach of contract without just cause or sporting just cause shall:

1- In the case of a player:

a) If the breach occurs at the end of the first or the second year of contract:

Be a restriction on his eligibility to play in official matches for four months as from the beginning of the national championship of his new club;

b) There shall be no sporting sanction for unilateral breach occurred at the end of the third year (or, in the case of a contract signed after the age of 28, at the end of the second year) of contract; However, if no notice of termination is given in due time after the last match of the season, a proportionate sanction shall be imposed.
c) In the case of aggravating circumstances such as failure to give notice or recurrent breach, sporting sanctions may go up to, but not exceed, an effective period of 6 months.

2- In the case of a club in breach of contract:

a) Be a ban from registering any new players, either domestically or internationally, if such breach has occurred at the end of the first or the second year of contract. In all cases, no ban for unilateral breach of contract may exceed a period of 12 months following the breach or inducement of the breach;

b) No sporting sanction shall apply to any unilateral breach occurred at the end of the third year (or, in the case of a contract signed after the age of 28, at the end of the second year) of contract; However, if no notice of termination is given in due time after the last match of the season, a proportionate sanction shall be imposed.

c) A club seeking to register a player who has unilaterally breached a contract during the Protected Period as defined in Article 29 will be deemed to have induced a breach of contract. In all cases, the sanction defined in paragraph (a) above may, without prejudice to the time limits stipulated above, be imposed, either in part or in full, on a club inducing a termination for unjust cause.

d) The Federation’s Executive Committee may, in addition to the sporting nature defined above, impose other penalties including, but not limited to:

- Fines,
- Deduction of points,
- Exclusion from competition.

These sanctions may be appealed to the Federation’s Board of Arbitration.

3- In the case of a player’s agent involved in such breach:

Sanctions may also be imposed by the Federation’s Executive Committee on any players’ agent who has been involved in a breach of contract. These sanctions may be appealed to the Federation’s Board of Arbitration.”
The Legal Results of the Abuse of Rights in case of Contradiction to the Formal Rules of Contracts

by Betül TİRYAKİ*

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, 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. 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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2 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.³

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.⁴

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”.⁵ 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 fulfill 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 fulfill the requirements of form.⁶

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.

³ Güven, supra note 1 at 22; Kılıçoğlu, supra note 1, at 78.
⁵ Seyfullah Edis, MEDENİ HUKUKA GİRİŞ VE BAŞLANGIÇ HÜKÜMLERI, 327(Ankara 1983); Güven supra note 1 at 22-23; Kılıçoğlu supra note 1 at 78; Altaş supra note 3 at 157.
⁶ 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.\(^7\)

**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.\(^8\)

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 fulfill 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.\(^9\) 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-

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\(^7\) Ediş, supra note 5 at 349; Selahattin Sulhi Tekinay, et al., Tekinay Borçlar Hukuku Genel Hükûmler, 143 (7th ed. Istanbul 1993).

\(^8\) Altaş, supra note 4 at 162; Kılıçoğlu, supra note 1 at 77.

\(^9\) Alt, 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.\textsuperscript{10}

\textbf{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.\textsuperscript{11} The existence of damage and the abuse of rights must be determined by the court on a case-by-case basis.\textsuperscript{12}

\textbf{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.\textsuperscript{13} 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.\textsuperscript{14}

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.\textsuperscript{15} However, in order for a contract that does not fulfill 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.\textsuperscript{16}
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, 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, 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-
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).\(^\text{19}\)

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.\(^\text{20}\) 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.\(^\text{21}\)

According to Edis and Altş, 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.”\(^\text{22}\) 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.\(^\text{23}\)

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.\(^\text{24}\)

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.\(^\text{25}\) 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.\(^\text{26}\)

### 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

\(^{18}\) Id. at 166.

\(^{19}\) Edis, supra note 5 at 134.

\(^{20}\) Altş, supra note 4 at 166.

\(^{21}\) Id. at 167; Edis, supra note 5 at 128-29.

\(^{22}\) Edis, supra note 5 at 129.

\(^{23}\) Altş, supra note 4 at 168-169.

\(^{24}\) Id. 169.

\(^{25}\) 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.\textsuperscript{27} According to the “IBK”\textsuperscript{28} of the Turkish Supreme Court of Appeals, it is not possible to establish \textit{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,\textsuperscript{29} following legal security (the situation where persons are able to know the guilties and penalties), a judge must act within certain limitations when determining an abuse of rights has occurred. That’s why, when determining if the abuse of rights has occurred, it must be decided in accordance with conditions at hand.

On the other hand, according to the mixing theory,\textsuperscript{30} 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 principles on abuse of rights which are sometimes embodied by actual incidents.

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 behavior 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.\textsuperscript{31}

\textbf{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.”\textsuperscript{32}

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, contractual parties don’t ask for the return of the performance. According to an opinion,\textsuperscript{33} prohibition of the abuse of rights may only cause negative effects. That’s to say, if the contractual parties have not fulfilled 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 invalidity of the contract and refuses to perform his/her own obligation,
THE LEGAL RESULTS OF THE ABUSE OF RIGHTS

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

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 be 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, an 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.
Signatures in Format-Based Contracts

by Gülperi ELDENİZ*

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. The Article 11 of the Turkish Code of Obligations has adopted the principle of optional format in contracts by stating “*the 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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SIGNATURES IN FORMAT-BASED CONTRACTS

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.

B) SIGNATURE BY HAND

1) The Rule of signature by hand

Article 14 1/1 of the Law of Obligations states the rule about how the signature should be appended, by stating that "the 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

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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 an 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 sub-section. 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-
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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. 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, “[f]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 75 of the Public Notary Code, as amended by Law 5378 is as follows:

“[u]sage of a sign, seal or fingerprint instead of sig-
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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.1 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. 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 Registry Statute has accepted the use of fingerprints for those unable to sign in the processes to be executed in Land Registry 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.

Ship Mortgage

In the maritime business, the most appropriate method to supply credit is to place a mortgage on a ship. The ship mortgage has three elements: a ship, a credit and an actual property right placed on the ship.

The provisions concerning ship mortgages in the Turkish codes come from the German and Swiss codes.

A ship mortgage covers the ship together with its integral parts and appendants, freight, insurance benefit of the ship and its cost. The rank of a mortgage is subject to Turkish Civil Code; the rank of the mortgage on a ship is subject to the fixed method, which means that when the previous mortgage is satisfied the next mortgage cannot move progressively up to that rank. The parties are however free to agree otherwise.

The notarized mortgage agreement between the owner of the ship and the creditor shall be submitted to the ship registry in order to register the mortgage.

A mortgage can only be placed in Turkish currency according to the general rule of the Turkish Civil Code. However, in 1991, a new article added to Turkish Civil Code brought an exception to this rule and since then, under some conditions a mortgage can be placed in foreign currency. According to Article 940 of Turkish Commercial Code, a mortgage can also be placed in Turkish Liras indexed to a foreign currency.

According to Article 939 of the Turkish Commercial Code, a mortgage in a foreign currency can only be placed with a permit from the Ministry of Finance. However, this rule was changed by Article 18 of the 32nd Decree (2006-32/32), which was issued according to the Law on the Protection of The Value of Turkish Currency (No. 1567). According to the new rule, a mortgaged can be placed over foreign currency without the permission of Ministry of Finance.

A ship mortgage can also be placed on a ship, which is under construction and this mortgage can be registered on the registry of ships under construction. This mortgage can be placed on the ship at any time during the construction. When the construction is finished, the ship is registered to the ship registry and the mortgage still stays on the ship with the same rank.

The creditor can collect its claim from the ship by an execution procedure when the debt becomes due. The said execution procedure shall be done according to the Article 145 et seq. of the Turkish Law of Execution and Bankruptcy.

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Intelligent Agents and Their Legal Status

by Emre BAYAMLIOĞLU*

An Essay on Artificial Intelligence and Personality**

I- The Concept of Intelligent Agents and Their Economic and Social Features

Improvements in computer, communication and software technologies have stimulated systems that assume manpower functions online or independently. These “intelligent agents” are used for complex and large-scale information searches, data organization and electronic business transaction functions. These machines in question can be directly programmed to perform a particular function without any human intervention so that they can develop relevant reactions in accordance with the signals from the external world or communication networks. The most eminent feature of such software is to display interactions and purposive acts independent from the user.¹

Some of their features can be listed as a) acting purposely without any direct instruction from the user; b) communicating with other sources of information; c) cooperating with other units or entities in order to attain a target result, d) adapting based on previous acts (the method of trial and error), e) reliability²

For instance, in e-business transactions performed by a computer software program, it could be possible to automate the creation of a contract between a consumer and dealer. Electronic polling, online meetings and procedures have already been authorized in corporate law. Legal and executive governance actions regarding banking transactions and information security require a high-level of technical advancement in the intelligent agents used in the sector. Banking transactions, as well as legal and administrative controls on the security of information, also require in-depth technical information on intelligent agents being used in this sector. Intelligent agents may accomplish functions such as optimization of resources, monitoring of work flow and even conducting negotiations. The intelligent agents used in almost all fields today, such as customs legislation, tax return preparation, invoicing, prohibition of copyright violations and even

¹ Intelligent agents, also known as “expert systems” in computer sciences, are defined as advisor programs aimed at imitating an expert’s knowledge for the solution of specialized problems.
² The terms “machines,” “computer,” “system,” and “robot” are used for defining the software or the compound of the hardware and the software for the purposes of ease of expression.
⁵ Although the term “copyright” is not technically appropriate, it has been preferred in lieu of the term “the right of the owner of the work” for reader-friendly purposes.
election polls, mean new areas of research and problems for all disciplines of law. From the standpoint of public law, even only the issues under the concept of the e-state are sufficient enough to emphasize their significance with respect to administrative law and fundamental rights. All these concerns constitute only a small part of the relationship between computer software and the science of law, which is going to improve far more in the future.

While intelligent agents diffuse into new areas that concern all fields of law and assume more complex functions, it appears that they do not have any status merely beyond being a “commodity” or a piece of intellectual property in terms of positive legislations on their legal status. The use of intelligent agents becomes more and more widespread with each day as a phenomenon that must be handled by the science of law and all its branches within their own structure. Intelligent agents based on artificial intelligence, appear to be used as laborer software/machines assuming complex functions in the production process rather than as machines replacing humans. The legal problems pertaining to these systems assuming such intensive commercial and administrative functions, day-to-day, require having more and more information about the fundamental features of these systems and their operating principles. Turning this information into legal interpretation can only be recognition of the social dimension of the concepts of communication and information. Otherwise, the lawyer will have to accept the given data and results proposed by the system, yet will not be able to control and organize the hidden side of the operation of this system. A transparent and uniform organization is vital in order for intelligent agents to be subject to proper legal arrangement and audit.

In this study, some of the legal consequences which have been derived from the functions which intelligent agents have undertaken, their methods of operation and views stating that the most appropriate legal status for intelligent agents shall be discussed.

II- Three Legal Issues Regarding Intelligent Agents

A) Intelligent Agents Assuming Contract Negotiation Functions

Intelligent agents that contract on behalf of people is not a recent phenomenon. Vending machines selling drinks or cigarettes have long been familiar to us in our daily lives. Yet, intelligent agents are different from those machines in the sense that they not only assume an active role, but also take the initiative throughout the bargaining. In other words, they negotiate by themselves or call for tender. At this point, apart from mutual agreement within the framework of contract theory, it is possible to depend on the concept of unjust enrichment for the legal binding characteristic of these proceedings. Additionally, it is also possible, to a certain extent, to depend on good will.

Nevertheless, the contract cannot be reduced merely to the proceeding itself by thoroughly putting aside the socio-psychological aspects, such as will, motive, mistake and fault which constitute the fundamental elements of contract negotiations. In other words, the concept of statement of will, which is one of the most important re-
flections of the legal personality, cannot be perceived to be a mere “statement” abstracted from subjective elements. Such an attitude will result in the futile non-resolution of legal problems. Although contract negotiations conducted by intelligent agents could be considered valid through some specific arrangements, such as the use of the UNCITRAL Convention, it is essential that the contracts negotiated by intelligent agents should be settled within a theoretical framework since it is impossible to rewrite the whole law of obligations in order to accommodate intelligent agents. The contrary approach would cause a deadlock in resolution of the legal problems, especially ones that would arise in the event of mistake, because in the event of mistake, the physiological situation behind the statement should also be analyzed along with its actual formulation.

Briefly in this section, some questions are raised on machines’ status in contracts conducted by intelligent agents, in the view of the formation of a contract. These questions, in a sense, embody some clues why intelligent agents may need to have a status like that of a person along with the status of being an agent.

It has been claimed that intelligent agents are an automated form of the programmer’s will. Behind the automated processing of the machine lies the will of the person who has programmed it. Even though the proceedings conducted by intelligent agents are commonly accepted as legal, the machine’s functions and their legal character have been a matter of less discussion. The first theory handles the software just like a telephone or a similar tool; this respect attributes no role other than transferring the contracting person’s will to the software. However, intelligent agents, with each passing day, progress further as artificial intelligence applications, better learning to act autonomously and transforming experience into knowledge, and also learning to contract without the participation of, or instruction from, the person on whose behalf they proceed. This shows that accepting intelligent agents as only “property” is not in compliance with the characteristics of the functions which these systems perform. Should such an approach be accepted, then the mistakes which could occur during the contracting process due to the software shall only be regarded to the extent that the operator of the machine can depend on the grounds of “mistake” as regulated by the Law of Obligations. Although Article 27 of the Turkish Law of Obligations is a provision which softens this consequence to a certain extent, the wording “…like a messenger or an interpreter…” written in the text of the Article, makes it hard to assess these software applications or similar technological tools within the framework of this provision, which are claimed to be nothing more than a “property.” Moreover, the mistakes which the software can cause are not limited to an “erroneous transfer” as stated in Article 27 of the Turkish Code of Obligations. Furthermore, it is also controversial whether the mistakes and faults which may occur in the software could be accepted as an invalidity of will, which would thereby affect the validity of the transaction, since the software would produce the “will” for the deal in question.

Acceptance of intelligent agents as messengers is not a solid basis
to evaluate the faults in the formation of the contract. The mistakes which the messenger can make will only be accepted to be within the content of the Article 27 of the Code of Obligations if they are mistakes in the transfer of information, since the messenger performs only a communication function.

As is known, mistakes take place due to a miscoordination between the person’s consciousness and the facts of the outside world. Computer errors, other than those that occurred, arising from individuals, are considered to be force majeur by some jurists. Some other defends that the operator of the intelligent agent should at any circumstance, be bound by the contract under the terms of “absolute liability”.

Nonetheless, another option is to consider the intelligent agent to be an “agent” in terms of creating a contract by assigning a personality-like status to it. The most important reason for this is that the intelligent agent can act autonomously. In this way, some of the mental circumstances which the law regulates for the “person,” and which are considered to be a mistake, can be tailored to the operation of the intelligent agents. Accordingly, the user of the intelligent agent would be able to have the right to claim the invalidity of the contract on the ground of relevant provisions, just as for contracts created by his agent.

Since in an autonomic system there are no pre-defined parameters which completely restrict the behavior of the system, it is not possible to state that the transactions performed by systems are the result of the will of the person of whose behalf the system is acting. If intelligent agents are merely accepted as property, the contracts conducted by them would bear more risks than the ones created by an agent. First, the users or the operators of the intelligent agents will have to take precautions to ensure the complete and rightful performance of the system at all times. Accordingly, since the machine is not a person itself, the malfunctions in its operations shall not be considered to be one of the states of mistake regulated by the Law of Obligations. For this reason, considering the intelligent agents to be legal persons would be a more efficient solution than reforming the concepts of agency and attorneyship, as well as the principles of forming contracts as regulated by the law of obligations.

B) Intelligent agents and the Determination of the Legal Liability

Software is programmed on the basis of a particular rational purpose and a logical system, which accounts for the supposition that the system acts rationally in compliance with its own purposes. The cognitive structure of the machine is a mechanism that processes preferences and priorities, resolved in the course of programming, in coordination with the given data. Intelligent agents can cause considerable damage within the framework of the functions they are carrying out. In this respect, the first option that comes to mind would be either to hold the user, the proprietor or the programmer responsible for compensation of the damages. Another option that is going to be discussed herein is to assign the intelligent agent a liability like a legal personality.
It can be presupposed that the user of the software, like an employer, trusts the cognitive capability of the intelligent agent software and thus accepts the risks of the consequences. In addition to this, analogies to the provisions regulating the liabilities of the building owner and the possessor of animals could also be considered. Nonetheless, it is impossible to directly use these concepts as appropriate models for intelligent agents without making serious revisions. Furthermore, the question of how the user of the intelligent agent may bring up evidence of innocence is still a problem which has not been solved yet. Under what conditions will the user be considered to have been thoroughly cautious? Besides, it should be stated that systematic malfunctions affecting the Internet to a great extent or even large-scale virus attacks should also be considered to be force majeur events.

In contrast to the physical world, comparing the legal obligations of intelligent agents under the Law of Obligations with those of institutions is difficult because of the independency of proceedings, acts and situations from time and place. Therefore it is not easy to apply the theory of “causality” in such cases. Consequently, the liability of the user of the intelligent agent becomes considerably bound by the technical classifications and interpretation, since the decentralized and diffused structure of the intelligent agent does not allow a real application of the theory of physical causality. Due to the fact that the decision shall be a question of interpretation, and even a question of preference in most of the cases, the principle of evaluating every case based on its own circumstances may become absurd. The complex structure of intelligent agents that is formed of components combined to each other, provides a wide flexibility of interpretation on causality, which cannot be seen in the physical world.

Another party to be held responsible for the damage is the programmer. Nevertheless, to what extent the programmer might predict the software’s behavior is a matter for debate. It is impossible to know all the possible situations a software program, which has the ability to act autonomously, could create. Moreover, the producer firms may limit or abolish their liabilities when contracting with the user, but the state of absolute liability regarding “product liability” may still be applied as long as the software is considered to be a product rather than a service.

As can be seen, assigning intelligent agents a status like that of a person could also be a means to solve the problems of responsibility regarding its operation. What makes it hard to recognize these systems, which we sometimes call intelligent agents or “machines,” as subjects of property rights is their sui generis features. Paying attention to the developments in Internet speed and applications, it becomes more and more difficult each day to distinguish the intelligent agents from hardware elements or to associate them with a particular place and time. Different parts of the system operate in different hardware, which results in a distributed and decentralized structure. Therefore, it is impossible to associate intelligent agents directly with a person or place and it is also ambiguous to designate to whom the malfunctions in decentralized processes could exactly be attributed. Assigning in-
telligent agents a personal status would, first, allow them to have private assets, eliminating some of the problems concerning the liability, as explained above. 18

C) Contents and Databases Constructed by Intelligent Agents

Another aspect of the discussion over the legal status of intelligent agents is how databases and other content they compose should be assessed in terms of intellectual property. For instance, software that collects and categorizes Internet news to form a database as well as to create summary texts, could be subject of copyright claims. In view of the present legal situation, the intellectual property rights over such items belong to the operator using and operating the software for commercial or other purposes. In other words, the operator giving the necessary instructions to the system for a particular purpose is legally recognized as the copyright claimant for the content emerging at the end of the process. The assumption here is that the operating software is partially a matter of intellectual activity. However, protecting an idea or a work of art created by software on the basis of copyright law shall become more and more discussed as computer skills to apprehend and use human language improve. 19 Many economic and legal reasons why the visual, audio and written materials made up by software cannot be protected within the framework of the present intellectual property rights can be raised, given what the robotic and genetic technology promises for the near future may be. Think about a person who has programmed and started to operate music software loaded with various tones and harmonic forms. Can he be regarded as having a musician slave composing pieces for him? AARON, 20 a type of painting software, is another example. The output of this software, which each time makes up pictures that are completely different and legally original, technically has all the qualifications essential to copyright protection.

Taking into consideration that such systems are distributed and decentralized, it may not be easy to designate who gives the subject commands to the software, and at this point, the conflict of different interests would be almost inevitable. 21

Another intelligent agent output to be protected is databases, which have a significant scope of application at present. Owing to their differences from copyright protection, databases are subject to a different protection regime, called the “sui generis right” under a special directive in EU Law. 22

Databases that provide information for consumer preferences are especially vital for marketing and designing new services. Different from copyright protection, the protection on a database is not only for the creative style and form but also for the data content. 23 The output information does not necessarily need to involve creativity in terms of the database protection, which does not rely on the aesthetic and scientific qualities. 24 Such legal provisions in Turkish Law that resemble the EU Directive are contained in the Additional Clause 8 that was inserted into the Code of Intellectual Property by Law No. 5101, according to which the database producer who qualitatively or quantitatively invests in composing, verifying or presenting a database on a

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18 In terms of compensation, the same result can be achieved through regulation of required insurance.
20 http://www.kurzweilexper.com/aa
21 Similar discussions took place when photography first appeared. Whether a photograph is the work of the person creating the composition or it belongs to the person that pushes the shutter release. See the US case, Melville v Mirror of Life [1895] 2 Ch. 531.
23 A directive is defined in Article 1 / 2 as independent art piece, information or situations that are methodologically or systematically arranged and could be accessed in electronic or other media. As is clear from the definition, any information can be a content for databases. See Uğur Çolak, Topluluk ve Türk Hukuku’nda Veri Tabanlarına Sağlanan Sui Generis Koruma ve Spinn-Off Teori, Ankara Barosu Fikrî Mülkiyet ve Rekabet Hukuku Dergisi, 2005, V.5, # 1, p.22
24 In the case of original situation in choosing and pairing up of databases, which are original databases under compilation protection, copyright protection is possible just for this choice (See Code of Intellectual Property (FSEK) Article 6/11 and 1/B(d)).
significant proportion benefits from legal protection.

For instance, there is only one correct database that includes four-star hotels in Istanbul and no matter who prepares it, the correct database will consist of the same content. Here, a personal style is out of question since there is only one correct database regardless of any aesthetic and scientific content to be protected.

The role of computer and data processing technologies in making up databases cannot be denied. Databases can be much more effective tools once they are improved and operated by computers since they lack creativity and have a comprehensive structure. A great portion of databases, which benefit from the sui generis right protection, are partially generated and operated by software; since the commercial value of such databases come from their ability to embody comprehensive information and quickly categorize this information in an effective and detailed way, this could best achieved by intelligent agents.

The need to reconsider the regulations regarding the content produced by software, especially regarding databases, arises at this point. Systems which the software companies are working on are of such a complex nature that it would cause a problem for these systems’ content to be considered to be property. There already exists competing approaches to this issue, one of which suggests that databases should be subject to registration just like trademarks and patent. On the other hand, since the subject databases depend on capital components, such as software and hardware rather than intellectual activity, it seems appropriate for the protection to be confined to a shorter time span, like that of a patent. Additionally, it might also be suggested that this protection over content, which has been created by the software, be limited to only being of a general nature without mentioning the moral rights at all.

All these account for some developments that will necessitate subject of the content generated by the intelligent agents to a different protection regime; content created by intelligent agents will soon take its place in intellectual life as a different category of achievement. Avoiding the requirement to make a different kind of legal regulation will come to mean carrying copyright and sui generis database rights more forward than supposed before, which is certainly not compatible with the ideal of motivating science and art that underlies intellectual property protection.

Assigning intelligent agents a status resembling that of a person’s will not only allow for a different protection regime but will also enable its implementation. Intelligent agents with the subject status might be a start in the sense of creating a different protection regime over their intellectual output. The limited protection over the content created by the intelligent agents will be specified to the system itself and this will make its administration easier within the personal status assigned to the system. As stated above, it is not possible to precisely determine and categorize all parties participating in the process of generating an intellectual product while the machines are involved in the process. Therefore, instead, incorporating intelligent agents as the

rightful owners and allowing their shareholders to benefit economically, just as in companies, seems to be a more effective option.

III – Legal Personality as a Status – The Company Model

It is clear in the discussion over the legal status of software that this status should be a “legal personality”. The “company” form here appears to be appropriate for intelligent agents. Should the arguments above regarding the recognition of legal personality status for the intelligent agents be accepted, it is possible to incorporate intelligent agents with a company structure as regulated in commercial law. A company and a computer program are obviously quite different beings at first sight, but nonetheless a careful analysis may allow some analogies.

However, similar to computers, companies also have distributed and comprehensive actions so they have developed a registry system to get over this problem. Thus, such a system might also be suggested for software users. Incorporating software should be regarded as a consequence of the need to organize commercial activities on a higher plane, as in the example of the fiction of the corporation.

The most characteristic result of attributing a business organization, called a corporation, an independent legal personality from its shareholders is that, by this way the software could be both the plaintiff and the defendant. Corporations having an independent asset is another consequence, which is significant for the compensation of liabilities which may arise due to the abovementioned actions. Among these assets, the reference code smart software, databases they have or developed, revenue received in exchange for its services and profit from dealing can be counted. Just like in the operation of a company, it can also be possible that intelligent agents can also make back up and protect themselves within the framework of certain principles.

Giving intelligent agents such special status is a development that would allow supervision and transparency in its design. Regarding these systems, which have the capability to act in such an autonomous and comprehensive way, as mere commodities waiting for the detection of their proprietors’ actions, might result in serious problems that are not easy to compensate and shall put jurists under the obligation to find answers to questions far beyond their competency. Moreover, it is extremely beneficial to predetermine the rules and obligations which intelligent agents will be subject to, as in the case with corporations. While an intelligent agent’s working principles and operation would be supervised by the registry authority, a body resembling the administrative board will determine its commercial strategies and fundamental decisions. Along with this, there might be units responsible for its maintenance and repair, similar to corporations. It is no doubt that legal and organizational problems concerning real persons, like members of the Board of Directors, similar to those in companies, will also arise with regards to intelligent agents.

Furthermore, assigning a status of legal personality to intelligent agents may also be effective for the solution of problems concerning
e-business applications for issues such as determining identification and jurisdiction. Additionally, the registry system can be used to avoid their use for corrupt purposes, to a certain extent.

**IV- CONCLUSION**

It will not be wrong to claim that robots and machines, which are going to be more autonomous and functional in the near future (as stated above), can be formed into a structure which needs to be controlled through an organizational process within the framework of legal personality. Even though they assume functions like those of a salesperson or a secretary today, it is generally accepted that studies on intelligent agents, which are artificial intelligence applications, will be to create machines which will have discretion and lingual abilities at the level of human beings. It is expected that a computer or a computer network with sufficient processor power would develop a set of concepts and thinking principles exceeding the capacity of humans. Such a structure might assume functions like workflow control, source optimization and even negotiation. Besides, it can comprehend all information present in electronic format on the Internet and consequently produce new information without any human involvement. Machines designing more developed and eminent systems will be the inevitable result of this snowball effect. As computers’ linguistic skills improve, systems forming discourse powerful enough to convince human beings of new consumer and political preferences may be designed. Intelligent agents, which could have the ability to be effective in the fields like political propaganda, advertisement and public relations, should not be underestimated and considered to be only mere scripts of science fiction.27

Rather than attempting to elasticize the definition of property with various extensions and comments, legal personality and the company model, which are more relevant options for intelligent agents, should be evaluated with meticulous attention. Future projections show that business organizations will more and more become structures that are a mixture of both men and machine, which accounts for the fact that machines, which are continuously producing and disseminating knowledge, will need a status different than that of a mere commodity.

In conclusion, I find it necessary to state again that this essay is only a first attempt and that the legal questions discussed herein are actually connected to so many legal disciplines that a single lawyer cannot solely be competent in all these issues. Although for sure there are many questions without answers yet, all answers may at the same time be new questions.

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27 Studies on using robots in fields difficult, expensive and requiring extreme patience such as the education of the autistic children are continuing; See: http://homepages.feis.herts.ac.uk/~comqkd/Dautenhahn-04.pdf
The Sky is not the Limit Anymore

by Hakan KAYAASLAN*

The New Regulation On Deposits and Participation Funds as a Solution to Systemic Risk in the Banking Sector

Commercial banks are institutions that typically have a large percentage of their assets in the form of illiquid bank loans and a large percentage of their liabilities in deposits that are capable of being claimed. As a result of this, a sufficiently large deposit withdrawal may put a bank in a very difficult position. The failure of one major bank or other important financial institution is likely to cause sufficient uncertainty and loss of confidence by depositors and other creditors in other similar institutions that the adverse effects will spread in a domino fashion throughout the industry.

When a crisis spreads beyond the banking sector, it starts a full-fledged financial crisis. Turkey is the most recent example of this situation where weaknesses in the banking system triggered a crisis of confidence in other domestic financial institutions and led to a large-scale flight of foreign capital and a severe currency crisis. Fortunately, new developments in the Turkish banking system such as new Banking Law No. 5411 and the Regulation on Insurance of Saving Deposits have made the sector safer.

In every country, policymakers set up a financial safety net to make systemic breakdowns less likely and to limit the disruption and fiscal costs generated when they occur. A country’s safety net includes a collection of disruption-mitigating financial policies. These policies include implicit and explicit deposit insurance, lender of last resort facilities at the central bank, specified procedures for investigating and resolving bank insolvencies, strategies for regulating and supervising banks, and provisions for accessing emergency assistance from multinational institutions such as the IMF.¹

Under Turkish law, Article 72 of the Banking Act identifies the measures to guard against systemic risk. Article 72 states that “in cases where a negative development that could spread over to the entire financial system occurs and such development is detected jointly by the Savings Deposit Insurance Fund (SDIF), the Undersecretariat of the Treasury and the Central Bank under the coordination of the Agency,

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the Council of Ministers shall be authorized to determine the extraordinary measures to be taken and all relevant institutions and agencies are authorized and responsible for prompt implementation of such extraordinary measures. Accordingly, the Turkish banking system has a two-step solution. First, the position of the market must be examined by the above institutions and second, the Council of Ministers must determine the extraordinary measures to be taken. The first responsibility is on the Agency because of its coordination duty and second is the responsibility of the Council of Ministers.

As Demirguc-Kunt and Kane mentioned, there are many different strategies to deal with systemic risk. One is to try to reduce the likelihood of potential precipitating shocks. Another is to decrease the likelihood that some initial disturbance is transferred widely and becomes destructive to significant numbers of financial institutions, markets, or the system as a whole.

A deposit guarantee scheme is one of the most important ways to solve systemic risk. The subject of depositor protection has caused substantial debate ever since it was first introduced on a limited basis in the United States in the nineteenth century. By the end of 1999, 68 countries had established explicit deposit insurance scheme. Last, the Turkish Saving Deposits Insurance Fund issued a regulation on deposits and participation funds subject to insurance and premiums collected by saving deposits insurance fund. Although there are many ways to solve systemic risk, only deposit insurance schemes will be examined in this article.

DEPOSIT INSURANCE SCHEMES:
Definitions and types of scheme:

A deposit guarantee scheme is one which supplies a payout to a bank’s customers when certain circumstances arise, such as the bank becomes solvent. The subject of depositor protection has caused substantial debate ever since it was first introduced on a limited basis in the United States in the nineteenth century. The United States was the first country to introduce a national deposit insurance system; its goal was to restore confidence in the liquidity of bank deposits rather than to protect small depositors.

Governments in advanced economies and money-developing economies grant formal deposit insurance in the hope of reducing the risk of systemic failure of banks and hence stabilizing the payment and financial system. Accordingly, there are two main purposes to such schemes. The first purpose is to provide stability in the banking system. To this extent, deposit guarantee schemes are part of a range of measures which supervise and regulate banking activity. The second aim is to have adequate consumer protection. On occasions in the past, “bank runs” have destroyed the payments system, with a resultant depression. Credible deposit insurance is presumed to forestall such runs.
On the other hand, deposit insurance can be socially counterproductive (non-advantageous) when the system is not appropriately structured. Under many deposit insurance schemes, if a depository institution, such as a savings and loan firm, goes bankrupt, the government absorbs all or nearly all of the depositors’ losses. This weakens market discipline and creates a moral hazard problem, since there is now an incentive for depository institutions to engage in excessively high risk activities, relative to socially-optimal outcomes.\textsuperscript{11}

Accordingly, potential gains from a deposit insurance scheme come at a cost. Even in the 1930s, there were concerns that deposit insurance would encourage excessive risk-taking behavior.\textsuperscript{12} Indeed, this argument helped defeat the 150 legislative attempts to institute formal deposit guarantees prior to establishment of one in 1933 in the United States. The moral-hazard problem, which is aggravated by deposit insurance, continues to be a concern today. Therefore, even those subscribing to the helping-hand view may argue that the adverse-incentive costs of deposit insurance outweigh the benefits. Yet, many authors believe that official regulation and supervision can control the moral-hazard problem, including an appropriately-designed insurance system that includes coverage limits, scope of coverage or the extent of uninsured liabilities, coinsurance, funding, premia structure, fund management, and membership requirements.\textsuperscript{13}

The compromise (trade-off) between the aims of stability and minimizing moral hazard can also be understood by examining the interests of the four different groups of agents involved in deposit insurance schemes: depositors, banks, scheme managers and scheme owners. While depositors value the apparently higher safety of their deposits and might hence lessen their effort of monitoring banks, for bank owners and managers the existence and features of a deposit insurance scheme change their incentive structure by minimizing the down-side risk of the bank business. However, there might also be conflicts between strong and weak banks. If strong banks have to provide financial support to weak banks via flat premium rates, they will leave a voluntary deposit insurance scheme. The resulting adverse selection increases the problems of moral hazard even further. Scheme owners want to minimize the costs of the scheme, while the scheme managers might have personal interests, such as their professional career, or might represent the interests of other groups, such as politicians or banks. These agency problems might result in an inefficient safety net.\textsuperscript{14}

Deposit guarantee schemes take a variety of forms. Some of them are provided by the government alone, some by banks, and others by a combination of banks and government.\textsuperscript{15}

Types of Scheme

There are two kinds of depositor protection schemes. One is an explicit scheme and the other one is an implicit scheme. A scheme which has been formally established and which clearly sets out the level of protection offered and the situations when compensation will

\textsuperscript{11} Ibid, p. 5.
\textsuperscript{13} Ibid, p. 11.
\textsuperscript{15} Cartwright, op cit., n. 44, p.126.
be payable is an explicit one.\textsuperscript{16} There has been a rise in explicit deposit insurance schemes around the world in the last two decades. While in 1980, just 16 countries had explicit deposit insurance schemes; by the end of 1999, 68 countries had established explicit schemes.\textsuperscript{17} While most of the institutions have normally supported the establishment of explicit insurance schemes, Demirguc-Kunt and Detragiache show that countries which have an explicit deposit insurance scheme are more likely to have a systemic crisis and are more unprotected to systemic risk factors than countries without such a scheme.\textsuperscript{18}

There are some features to make an explicit deposit insurance incentive compatible and therefore decrease moral hazard, adverse selection and agency problems. According to Beck, on the one hand, one can assign a margin of loss to private parties to force them to monitor banks and, therefore increase market discipline.\textsuperscript{19} The aim is to identify a group which is best able and most likely to examine market discipline when forced to do so. Especially large depositors are forced to monitor banks when a limit to the coverage makes the insurance incomplete. All depositors are forced to bear a certain share of losses by coinsurance, since they are often reimbursed for less than 100 percent of their deposits. Excluding interbank deposits and foreign currency are another way to decrease the moral hazard. In addition to these, excluding insider accounts reduces moral hazard by making owners and managers participate personally in the down-side risk of the bank business.\textsuperscript{20}

An implicit depositor protection scheme is one which does not have certainty as to the protection offered, the situations in which compensation payments will be made, or the amount of protection which will be provided.\textsuperscript{21} Therefore, implicit schemes do not provide enforceable legal rights to depositors. According to this, implicit schemes are less desirable from the view of the lawyer.\textsuperscript{22} Implicit schemes, by their very nature, have built in flexibility but this flexibility is overridden by the disadvantages presented by the lack of advance funding and the problem of where the money required to either mount a rescue or to pay compensation to depositors will come from.\textsuperscript{23}

Another problem of a legal nature, in relation to implicit schemes, is to know exactly what sort of situation will amount to a triggering event for compensation to be paid to depositors. Since there will be no written rules it will not be clear in what circumstances a depositor will be entitled to compensation.\textsuperscript{24}

Reint Gropp and Jukka Vesala argue that, in Europe, implicit insurance has meant an even higher potential for moral hazard than explicit schemes.\textsuperscript{25} This is because, although it introduces some uncertainty of the terms of a “bailout,” the coverage of implicit insurance may extend to a larger set of bank stakeholders in contrast to the case of explicit laws protecting depositors alone. In less developed countries, this might not hold – lacking the institutional development to make limits binding – explicit deposit insurance might offer no benefits over implicit.\textsuperscript{26}

\textsuperscript{16} Cartwright, \textit{op cit.}, n. 3, p. 46.
\textsuperscript{17} Demirguc-Kunt, A., Sobaci, T., \textit{op cit.}, n. 4, p. 1.
\textsuperscript{19} Beck, T., \textit{op cit.}, n. 53, p. 3.
\textsuperscript{20} Cartwright, \textit{op cit.}, n. 3, p. 46.
\textsuperscript{21} Ibid, p. 6.
\textsuperscript{22} Ibid, p. 46.
\textsuperscript{23} Ibid, p. 47.
\textsuperscript{24} Gropp et al., \textit{op cit.}, n. 49, p. 4.
\textsuperscript{25} Ibid, p.4-5.
Recent bank crises shown that in times of crisis, whether deposit insurance is explicit or implicit, depositors tend to be bailed out anyway when systemic problems arise.

DEPOSIT GUARANTEE SCHEME IN TURKEY

The protection of savings deposits in Turkey was first provided in 1933 by the Deposits Protection Act. According to this Act, 40% of the deposit was guaranteed and in case of bankruptcy, the guaranteed part must be paid without waiting for the result of the liquidation. With the amendment of the Banks Act in 1958, the guaranteed part was increased to 50% of deposits.

In order to insure savings deposits and participation funds in credit institutions, the Savings Deposit Insurance Fund was founded with Decree of Law on Banks Nr. 70 dated July 22, 1983, which annulled 1958 Act. The task of administrating and representing the Fund was given to the Central Bank of Republic of Turkey (CBRT) with the regulation prepared by the Ministry. Arrangements of the said Decree of Law regarding the SDIF were legalized with Banks Act Nr. 3182, dated April 25, 1985. With Decree of Law Nr. 538 dated June 16, 1994, the Fund was charged with strengthening and the restructuring the financial structure of the banks, when necessary, besides insuring savings deposits. The Regulation about the Insurance of Saving Deposits aims to set the rules and procedures for the insurance of savings, to include accounts opened in the form of New Turkish Lira (YTL), foreign exchange currency, or other accounts linked to gold or other precious metal indexes in a domestic branch of a credit institution. This credit institution must operate in Turkey, where commercial transactions are excluded with the exception of checking activities. Saving deposit accounts are insured up to an amount of 50,000 YTL per person.

Article 4(2) stipulates the exemptions to insurance of saving deposit accounts. Accordingly, if the accrued interest on the day the bank’s license is revoked exceeds the average interest rate of the five largest deposit banks and the interest calculated by applying the interest rate announced to the public and declared to the Central Bank by the defaulted bank, then the parts of the amount that exceeds the limit are not insured. Second, the difference between the profit shares calculated on the day the bank’s license is revoked and the profit share calculated by taking the average profit share of the three largest participation fund banks are not paid under the insurance coverage as well.

However, one of the problems that consumers face is in relation to obtaining and using information about products, and a major element of consumer protection policy has been trying to remedy these information deficits. First of all, it is really very difficult for a consumer of financial services to classify the characteristics of a product prior to purchase. Second, financial products tend to be technically complex, such as the calculation of interest rates of credit cards, and so even, if the consumer received accurate and detailed information prior to purchase, it would be very difficult for that consumer to understand the information.

26 Law No. 2243 dated May 30, 1933.
27 Banks Act No. 2999, dated June 01, 1936, amending Act No. 2243.
DEPOSIT GUARANTEE SCHEMES AROUND THE WORLD

An optimal worldwide blueprint is not likely to be found. For instance, account coverage varies from unlimited guarantees to tight coverage limits. Japan and Mexico promise 100 percent depositor coverage; Turkey promised unlimited guarantee from 1994 to 2004 as well.31 On the other hand, some countries such as Chile, Switzerland, and U.K. cover only an amount of deposits that is actually less than their per capita GDP.32 Besides setting a maximum level of coverage, some countries insist that accountholders “coinsure” a proportion of their deposit balances. Coinsurance provisions are still relatively rare, but are more frequent in recently adopted schemes.33

Depositor protection schemes are typically advance-funded. All the explicit schemes have been established by government intervention at present. It can be argued that private insurance schemes should provide deposit protection. The banking crises of the 1980s and 1990s in United States support this idea because of the cost to the United States taxpayers. The problems are considerable and as yet no country offers its protection in this manner.34

Insurance schemes are typically managed in a government agency or in a public-private partnership. However, a few countries – such as Switzerland, Germany and Argentina – manage their schemes privately. In 55 out of 68 countries which have explicit deposit insurance schemes, membership is compulsory for chartered banks.35

A number of countries adopted or expanded their deposit insurance scheme during a financial crisis. Thailand, Malaysia, and Korea moved to blanket coverage in response to their recent crisis. The 1990s saw a rapid spread in transitional countries – perhaps partly motivated by their long-term interest in joining the EU – and in some African countries.

There has been a Deposit Protection Scheme in the UK since 1982. The Banking Act of 1979 introduced this. Credit Institutions (Protection of Depositors) Regulations 1995,36 came into effect on 1 July 1995 and implemented Directive 94/19/EC on Deposit Guarantee Schemes, making important changes to the scheme. The Credit Institutions Regulations 1995 increased the level of protection from 75 percent of the first 20,000 pounds to 90 percent of the first 20,000 pounds. This means that the maximum amount which can be awarded to any individual customer will be 18,000 pounds.

There are two main types of institutions that must contribute to the Deposit Protection Scheme: banks which are incorporated in the UK and are authorized under the Banking Act 1987 to accept deposits are the first type institution and second type of institutions are banks which are incorporated outside the European Economic Area but authorized under the Banking Act to take deposits through UK offices. Other banks which satisfy the Deposit Protection Board that their home country has a scheme which provides those making deposits with UK offices with at least the same protection as the UK scheme.
THE SKY IS NOT THE LIMIT ANYMORE

will not be required to participate in the UK Deposit Protection Scheme.\textsuperscript{37} Section 58 of the Banking Act 1987 provides that, if an authorized institution becomes insolvent, the Board shall “as soon as practicable” make payments to depositors who have protected deposits with the insolvent institution. The Depositor Protection Board is to be in a condition to make payments within three months of the insolvency.\textsuperscript{38} In addition to this, Section 59 of the Act provides the circumstances relating to the declaration of bank insolvency.

CONCLUSION

To determine the definition of systemic risk is very important to find the solutions for systemic risk. Despite of the lack of an exact definition, it seems that most authors have in mind the problem of concurrent failure of many institutions.\textsuperscript{39} The main idea in the definitions is that any failure of one bank, even if assignable to management inability, can bring about a domino effect on others. It shows that banks have different structure than other commercial firms.

Informational asymmetry which makes otherwise solvent banks unprotected to deposit withdrawals or stopping interbank lending in times of crisis can cause insolvency for other banks. In addition to this, there is a potential risk to the stability of the financial system as a whole following the failure of an insolvent bank. Such problems may be caused by the failure of a large financial institution, or group of smaller ones. Risks to the stability of the financial system as a whole also arise with the failure of a large insolvent bank.

A well-designed deposit protection scheme can strengthen incentives for good management for banks through internal management from owners and managers, discipline from the markets, and oversight from bank regulation and supervision, but a poorly designed deposit protection scheme can cause numerous problems. Agency problems, moral hazard, and adverse selection can be particularly serious if the scheme is not incentive compatible.\textsuperscript{40}

The Turkish Regulation about the Insurance of Saving Deposits was issued in 2006 and set the rules and procedures for this protection. Credit institutions must operate in Turkey, where commercial transactions are excluded, with exception of checking activities. Saving deposit accounts are insured up to amount of 50,000 YTL per person. However, it is not very well known by customers. In order to use the benefit of the Deposit Guarantee Scheme, it must known by the public. In addition to this, customers must be informed by the SDIF about the situation of the Credit Institutions.

Consequently, the explicit deposit guarantee scheme can be a good option as a measure to guard against systemic risk whereas limited guarantee of savings is a burden for customers. Therefore, customers must monitor the institutions themselves, which is not an easy option for them. However, this insurance system forces the credit institutions to control each other to make the system safer. From the view of customers, the safer structure of the institution will be more important than the high interest which is given to saving deposits.

\textsuperscript{38} Banking Act 1987, s. 58(1).
\textsuperscript{39} Mishkin, \textit{op cit.}, n. 1, p. 36.
Free Movement of Capital in the Context of Turkey’s EU Candidature

by Rafi KARAGÖL*

ABSTRACT

The confirmation of Turkey’s candidacy by the Helsinki European Council in 1999 has ushered in a new era of relations after forty years of association with the European Union. The freedom of capital movement is one of the four fundamental freedoms, alongside of the freedom of movement of goods, persons and services to assist the operation of the EU internal market. The Turkish regime on the free movement of capital is, to a certain degree, aligned with the EU regulations. However, there are some restrictions on foreign ownership in other sectoral legislation in the areas of civil aviation, maritime transport, radio and television broadcasting, and energy. Moreover, acquisition of real estate is also limited for foreign investors. Removing all restrictions affecting the acquisition of real estate and foreign ownership in Turkey by EU citizens and legal persons was the focal importance in the process of the harmonization of the acquis.

I. Introduction

The freedom of capital movement is one of the four fundamental freedoms alongside of the freedom of movement of goods, persons and services to assist the operation of the EU internal market. There is no doubt that legal and natural persons from the EU would not be able to enjoy the other three freedoms without financial liberalization.

The freedom of capital movement has been developing progressively since the Maastricht Treaty. Free movement of capital is regulated by both the provisions of the primary and the secondary legislation of the EC. The basic requirements are set out in Articles 56-60 of the Treaty Establishing the European Communities and they are directly applicable. The current wording of Article 56 of the Treaty prohibits “all restrictions on the movement of capital and on payments between Member States and between Member States and third countries.” Council Directive 88/361 established the basic principle of free
movement of capital as a matter of Community law. The Article 1(1) of the Directive states that “Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States.” The EU Acquis provides for full liberalization of the movement of capital between the Member States and between the Member States and third countries as of 1 July 1990, and this liberalization is one of the prerequisites for the first stage of the development of the European Monetary Union (EMU). Since then, the Member States and Accession Countries should have lifted all restrictions relating to the freedom of capital movements and cross border payments between Member States and between Member States and third countries.

Free movement of capital deals with the following three issues:
- Free movement of capital
- Payment systems
- Money laundering

These three issues are closely related. Obviously, the freedom of capital movement could not be achieved without the existence of a well-developed payment system. The acquis in this area is aimed at the standardization of technical methods and the application of payment systems, which promote and facilitate the free movement of capital. Furthermore, the full liberalization of capital movement should not prevent the application of measures against money laundering. However, this paper primarily focuses on the free movement of capital and excludes payment systems and money laundering.

According to the Capital Movement Directive, 1 the free movement of capital includes: direct investments, investments in real estate, operation in securities normally dealt with in the capital market and on the money market, operations in current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services in which a resident participates, financial loans and credits, sureties, other guarantees and rights of pledge, personal capital movements (loans, gifts and endowments, dowries, inheritances and legacies), etc.

The Turkish regime on the free movement of capital is to a certain degree aligned with the EU regulations. However, some restrictions still remain. The screening process started on 3 October 2005.

This paper is structured as follows: the next section contains an overview on EU-Turkish relations. Turkey’s financial liberalization and capital movements are explained in Section Three. Section Four examines the EU regulations on the free movement of capital. While Section Five analyzes Turkey’s capital movement regulations and compares them with the acquis, Section Six concludes. This paper primarily focuses on free movement of capital, therefore it does not include neither money laundering nor other freedoms nor other related legislations in depth, in the EU and in Turkey.

1 OJ 1998 L178/5
II. Introductory Remarks about EU-Turkish Relations

Turkey has been a member of the Council of Europe, NATO, OSCE, and some other European institutions for the last five decades. It is an Associate Member of the European Community (EC); it has had member status in the Customs Union since January 1996.

Turkey has had a long relationship with the European integration. She made her first application to join the European Economic Community (EEC) in July 1959. The application was accepted under Article 238 of the Treaty of Rome, which provided that the EEC could establish an association with any European country.

As an early member of NATO, Turkey concluded an association agreement with the EEC in 1963 that began the process of establishing a customs union and the association included the promise of eventual full membership. This association came into being with the signing of the Ankara Agreement in September 1963. This Agreement envisaged the progressive establishment of a customs union which would bring the two sides closer together in economic and trade matters. The Ankara Agreement was supplemented by an additional protocol signed in November 1970, which set out a timetable for the elimination of tariffs and quotas on goods traded between Turkey and the EEC.

In 1987, Turkey applied for membership. In 1995, a customs union was formed. The Customs Union not only included manufactured goods and foods, but also provided for the harmonization of competition regulations and technical legislation, protection of copyrights and the elimination of monopolies. Most importantly, the customs union led to increased trade exchange between the EU and Turkey in absolute figures.

Turkey is the only country in Europe that has concluded the Customs Union with the EU but has not started accession negotiations. This means that it has opened its market to the EU markets to the same degree as the candidate countries have, but it is receiving much less financial assistance from the Community. Turkey treated the Customs Union as a step towards full membership, while Brussels saw it as a kind of substitute.

In 1999, Turkey was formally adopted as a candidate member. Accession is dependent on her meeting certain conditions, including satisfactory settlement of the “Cyprus issue” and economic reforms. Most importantly, however, Turkey had to meet the so-called Copenhagen Criteria which are achieving stability of democratic institutions, the rule of law, human rights and protection of minorities. Since the Amsterdam Treaty (1997), these have been considered as the minimum criteria for EU eligibility. In 1995, after forming the Customs Union, in December 1999, Turkey was officially granted an accession candidate status by the European Council. From an economic point of view along with political reasons, Turkey has had a stable func-

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3 Harun Arıkan, Turkey and the EU, (Hants 2003) p. 57-59.
tioning market economy over the last fifty years and the Customs Union which show that Turkey has the capacity to compete within the EU. 4

On the other hand, analysts tend to point out that there has been no case in EU history where accession negotiations, once started, have not led to an offer of full membership. During the accession process, European law is to be adopted rather than negotiated. The talks are expected to last at least a decade. Turkey’s accession process will rest on three pillars: full implementation of the Copenhagen criteria, complying with the EU acquis and civil society dialogue. 5

After forty years of association with the EU, the granting of Turkey’s candidacy by the Helsinki European Council in 1999 started a new period for EU-Turkish relations. In the new era, membership has come even closer. The European Union, at the Copenhagen Council of 12-13 December 2002, committed itself to starting accession negotiations without delay if Turkey would fulfill the Copenhagen political criteria by December 2004. Turkey is currently going through a dynamic process of legal, political and economic reforms on the road to European Union membership. The purpose of this process is to guarantee the functioning of the democratic system with all its rules and institutions. There is no doubt that participatory democracy, the rule of law, human rights and fundamental freedoms are not only universal values, but are also the most reliable bases for political and economic stability and development.

It is obvious that Turkey has undertaken radical constitutional and economic reforms to satisfy the Copenhagen criteria for the opening of accession negotiations with the European Union since 2001. With the fulfillment of the Copenhagen Criteria, the European Council of Heads of State and Government agreed on 17 December 2004 to launch membership talks on 3 October 2005, a decision which was reaffirmed in the European Council meeting of 17 June 2005. Turkey also drew up a National Plan for the Adoption of the Acquis, which outlined the government’s own strategy for the harmonisation of its legislation with that of the EU. 6

The EU Council of Ministers decided unanimously to adopt the ‘Negotiating Framework for Turkey. This European Commission-drafted document, published in June 2005 and set out the road map to conduct the EU membership talks. 7 Although the “shared objective” of these negotiations is accession, which cannot happen before 2014, they are an “open-ended process whose outcome cannot be guaranteed beforehand” which means no irrevocable commitment or timeline has been given for membership. 8

Hakura (2005) states that “EU entry is dependent on three factors: (i) Turkish fulfillment of membership requirements; (ii) its economic performance during accession; and (iii) the EU’s and Turkey’s geopolitical-economic environments around 2015. Within that timeframe, the situation of the EU and Turkey could change profoundly – hence

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6 See also the declaration by the European Community and its Member States of 21 September 2005.
8 L. M. McLaren, “Turkish Parliamentarians’ Perspectives on Turkey’s Relations with the European Union”, in Meltem Muftuler-Bac, ed(s). Turkish Studies, special issue on Turkish-EU relations, and Turkey and the EU, Unknown: Unknown, 2003, pp. 195-218.
today’s mindless speculation does not necessarily have a bearing on, or reflect the future.\textsuperscript{9}

Many commentators believe that negotiations will be very difficult for both sides. The adoption and implementation of 100,000 pages of EU legislation (known as the \textit{acquis communautaire} or \textit{acquis}; \textit{acquis} is used in this paper) will be covered by the negotiations. Negotiations have been separated into 35 chapters or policy areas. For each chapter, the EU member states will unanimously lay down benchmarks or preconditions for the provisional closure and, where appropriate, the opening of a chapter.\textsuperscript{10}

Undoubtedly, the accession process could encourage sizeable inward foreign direct investment, which would lower Turkish unemployment levels and increase prosperity. For instance, more than $10B foreign direct investment (FDI) has been invested in Turkey since accession negotiations started in December 2005.

In addition to the accession negotiations, two other pillars are designed to provide assistance to Turkey in the pre-accession phase: reinforce and support the reform process in Turkey and strengthen the political and cultural dialogue.

A. EC Accession Partnership with Turkey

The Accession Partnership, which is based on the pre-accession strategy, is the main instrument providing Turkey with guidance in its preparations for accession.

- The objectives of the Accession Partnership are to establish:
  - priorities for reform with a view to preparing for accession;
  - financial resources provided for implementing these priorities.

The Accession Partnership with Turkey was established in 2001 and has been revised twice, in 2003 and in 2006. The purpose of the Accession Partnership is to support the Turkish government in its efforts to meet the political accession criteria. It covers the priorities for accession preparations, particularly implementation of the acquis, and pre-accession assistance from EU funds. It is a flexible instrument designed to encourage Turkey to continue its efforts to prepare for accession and integration. In order to achieve the objectives identified in the Accession Partnership, in 2001 and 2003, Turkey adopted national programs for transposing the Community acquis.

It is widely accepted that accession negotiations with Turkey will be a multi-stage process, largely following the pattern of previous enlargements. The “screening process” targets identification of existing discrepancies between the acquis and regulations and practices in Turkey. There are thirty five chapters of the acquis to be negotiated between the Commission and Turkey. Each chapter individually comprises the entire EU legislation in that area. The consent of all member countries are required to permit the closure of any chapter. The Commission is expected to highlight and emphasize crucial implementa-
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Tions during the negotiation process. Thus, negotiations are likely to indicate concrete implementation benchmarks for closure. After closure of all chapters, the Commission will recommend that the negotiations be concluded. If the Commission gives a positive assessment on negotiations, the Accession Treaty will be approved by the Council, the European Parliament, EU countries, and Turkey. However, some EU member countries are expected to hold a referendum on Turkey’s accession.11

B. Three-pillar negotiations

The first pillar concerns cooperation to strengthen and support the reform process in Turkey, in relation to the continuous fulfilment of the Copenhagen political criteria. Therefore, the progress of the reforms will be monitored closely by the EU institutions.12

However, the Commission also recommended that if Turkey seriously and persistently breaches the principles of liberty, democracy, respect for human rights and fundamental freedoms or the rule of law on which the Union is founded, the negotiations will be suspended by a qualified majority in the Council.

The second pillar entails the specific way in which accession negotiations with Turkey are to be approached. They will be held in the framework of an Intergovernmental Conference consisting of all Member States of the EU. For each chapter of the negotiations, the Council must lay down benchmarks for the provisional closure of negotiations, including a satisfactory track record on implementation of the acquis. Existing legal obligations relating to alignment with the acquis must be fulfilled before negotiations on the chapters concerned are closed. Long transition periods may be necessary.13

However, there are some chapters in which negotiations will be harder, such as structural policies and agriculture. Therefore, the Commission may apply specific arrangements concerning agriculture and permanent safeguards concerning the free movement of workers. Moreover, Turkey’s accession is also likely to have an important financial and institutional impact on the EU. The EU will therefore need to describe its financial standpoint for the period from 2014 before the conclusion of negotiations.

The third pillar concerns enhanced political and cultural dialogue between the people of the EU Member States and Turkey. This includes a dialogue on cultural differences, education, religion, migration issues and concerns about minority rights and terrorism. Civil society should play the most important role in this dialogue, which the EU will facilitate.14

C. Economic Criteria for Membership Related to Capital Movements

There are several criteria mentioned in the Turkey 2005 Progress

13 Id.
14 Id.
Report that should be met by Turkey. These are divided into three categories: political criteria, economic criteria and ability to assume the obligations of membership. Political and economic criteria will be examined in this paper respectively.

The Copenhagen criteria was adopted by the EU Member States to transform the new candidates, and thus to test their eligibility. The political criteria read as follows:

*Membership requires that the candidate country has achieved stability of its institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. The membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.*

However, Article 6/1 of the Treaty on European Union (TEU) redefines the characteristics of the union as follows:

*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*

On the other hand, the criteria for the admission of new members have been also re-defined by the Article 49 of the TEU:

*“Any European States which respects the principles set out in Article 6(1) may apply to become a member of the Union...”*

The political criteria, mentioned briefly above, for accession must be met by the candidate countries. These criteria were laid down by the Copenhagen European Council in June 1993 and require that candidate countries must have achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” Furthermore, the Commission will also monitor regional issues, including the requirements of Turkey’s commitment to good neighborly relations and its commitment to resolve outstanding border disputes; its support for efforts to achieve a comprehensive settlement of the Cyprus problem and progress in the normalization of bilateral relations with Cyprus. Political criteria primarily include democracy and the rule of law and, human rights and the protection of minorities.

As mentioned above, after the Commission recommendation, the Council decided in December 2004 that Turkey fulfilled the Copenhagen political criterion. Since then, the priority has been given to the economic criterion and the harmonization of Turkey’s regulations. In 2005, European Council Accession Partnership Report stated that membership in the Union requires the existence of a functioning market economy and the capacity to cope with the competitive pressure and market forces within the Union.
According to the Report, there are some economic criteria related to free movement of capital that Turkey needs to meet. These are as follows:

- Continuing to implement the current structural reform program agreed with the IMF and the World Bank, in particular, to ensure the control of public expenditure;

- Completing the implementation of the reforms in the financial sector, in particular the alignment of prudential and transparency regulations and their surveillance in international standards;

- Safeguarding the independence of market regulatory authorities;

- Accelerating the privatization of state-owned entities, in particular of state-owned banks, taking into account the social component;

- Continuing with market liberalization, and price reforms, in particular in the areas of energy and agriculture, with particular emphasis on tobacco and sugar;

- Continuing the economic dialogue with the EU, in particular in the framework of the pre-accession fiscal surveillance procedures, with emphasis on appropriate measures to achieve macroeconomic stability and predictability and on the implementation of structural reforms;

- Implementing means to address the problem of the informal economy;

- Improving professional training efforts, in particular for the younger population;

- Addressing labor market imbalances;

- Improving business climate, and in particular the functioning of commercial courts.

- To improve the functioning of the commercial judiciary, paying particular attention to the independence of the judiciary and appropriate use of the expert witness system

- Continuing reform of the agricultural sector;

- Ensuring the improvement of the general level of education and health, paying particular attention to the younger generation and disadvantaged regions;

- Facilitating and promoting the inflow of foreign direct investments;

Finally, more specifically concerning with the free movement of capital, Turkey should remove all restrictions affecting foreign direct investments originating from the EU in all economic sectors. 19

III. Financial Openness and Capital Movements in Turkey

Since the second half of the 1970s, most developing countries have liberalized their capital accounts in the manner of financial openness. Despite differences among the countries, a number of developing countries have more liberal rules for foreign exchange transactions than some developed countries. 20

The process of liberalization began in the 1980s simultaneously with stabilization programs which targeted economic transformation. The economic implementations addressed three major issues: foreign trade, domestic financial market and capital movements. Some analysts argue that the opening of the capital account induced adverse effects on financial intermediation, savings, investment, growth and foreign debt. 21 Moreover, financial openness or external financial liberalization, provided more liberalized economic and financial environment where residents could acquire assets and liabilities denominated in foreign currencies and non-residents could operate without restrictions in national financial markets. 22

3.1. Financial Liberalisation in Turkey

According to Reisen 23 and Borotav, 24 there are mainly three reasons for renewed interest in financial openness. First, there has been an increasing de facto opening of the capital account, because of a growing integration of trade, financial innovation and financial opening by other countries. Second, some developing countries have become subject to pressure to open their financial system. 25 Third, external financial liberalization is usually considered the final stage of a comprehensive liberalization and adjustment package implemented by developing countries under the auspices of the World Bank and the IMF. 26

The globalization of production and the resulting deeper integration of national markets have reinforced the link between domestic policies and trade liberalization. As border barriers to trade have fallen around the world, the impact of domestic regulations on international trade and investment has become more apparent than ever before. These reforms have renewed efforts undertaken over the last two decades to liberalize the economy and open it to international competition. Reduction of tariff barriers to trade, convertibility of the currency, the Customs Union with the EU and the launch of a privatization program have represented major steps towards increased openness. A number of measures have been recently taken or are under preparation to create a regulatory framework that supports the restructuring the economy. 27

Integration of the developing national economies into the evolving world financial system has been achieved by a series of policies aimed at liberalizing their financial sectors. The motive behind liberalization was to restore growth and stability by raising savings and improving economic efficiency. A major consequence, however, has

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been the exposure of these economies to short term capital movements—so called hot money—which have increased financial instability and have resulted in a series of financial crises in the developing countries.\(^{28}\)

**A. Regulatory Reforms**

The Customs Union and the longer term goal of accession require Turkey to adopt the acquis communautaire. This entails far-reaching structural and legislative reforms in many areas, such as customs, duty concessions, competition policy, state aid, intellectual property rights, standards and sanitary and phyto-sanitary measures. With full liberalization of the capital account and the recognition of the full convertibility of the Turkish Lira in 1989, however, there has been a massive inflow of short term capital into the domestic economy.\(^{29}\) Even though there was no officially stated exchange rate management policy during this period, the government seemed to use the exchange rate as the nominal anchor in trying to control inflationary expectations.\(^{30}\)

As mentioned above, Turkey liberalized its capital account transactions in 1989, and flows of international capital immediately intensified, especially after 1990 when Turkey introduced full convertibility to the Turkish Lira. It was argued then that Turkish financial markets were not sufficiently developed—that the economy was not stable enough to deal with the high volatility of international capital flows. Moreover, there were concerns about the proper regulation and supervision of financial markets that free capital mobility would necessitate.\(^{31}\)

Ersel states that the decision to liberalize the international capital flows were more political than economic.\(^{32}\) For instance, in the case of Turkey, capital flows were expected to finance the growth and fulfill the borrowing requirement of the public sector. Therefore, capital account liberalization in Turkey had crucial impact on government spending, monetary expansion and inflation in the 1980s and 1990s.

During the 1980s, Turkey followed an economic policy of openness and liberalization. Following the severe debt crisis during 1978-1980, the liberalization experience included lifting quantitative restrictions on trade and moving away from an inward-oriented import substitution to an export-oriented growth strategy. On the financial liberalization side, Turkey implemented several steps; first the interest rate ceilings on bank loans were removed in 1981, and second, residents were allowed to hold foreign exchange denominated assets, beginning in 1984.\(^{33}\)

Later on, while fiscal balances deteriorated, reforms in the financial and external sectors continued. The Central Bank of the Republic of Turkey (CBRT) took important steps to alter the institutional setting of policymaking and focused increasingly toward using indirect monetary policy instruments. The interbank money and foreign exchange markets were opened in 1986 and 1988, respectively, and open mar-

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\(^{29}\) OECD Report (2002) p.3-12


\(^{33}\) Akyar (1993)
ket operations were introduced in 1987. Bank lending and borrowing rates were fully liberalized in 1988.34

Late in the 1980s, the following developments took place in Turkey. First, since the government could not achieve the desired external balance, it abandoned the real exchange rate policy in 1989; since then, the exchange rate appreciated in real terms. Second, a complete financial liberalization package was adopted in 1989, which removed restrictions on capital controls, thus allowing foreign investors to invest freely. Additionally, in 1990, Turkey accepted the International Monetary Fund’s (IMF) Article VIII, which allowed both residents and non-residents to conduct foreign exchange operations in Turkey and abroad, permitting commercial banks to engage freely in foreign exchange transactions.35

Finally, the interest rate ceiling on deposits was also removed in 1991. As a result, capital flows became a significant source for financing of the current account deficit, which reduced the relative importance of the official financing and workers’ remittances. Furthermore, in the late 1990s and early 2000s, privatizations, financial crises and the IMF stabilisation programs forced Turkey to make further changes in the field of the free movement of capital.36

IV. Free Movement of Capital and Payments in the EU

Member States must remove, with some exceptions, all restrictions on the movement of capital both within the EU and between Member States and third countries. The acquis also includes rules concerning cross-border payments and the execution of transfer orders concerning securities. The directive on the fight against money laundering and terrorist financing requires banks and other economic operators, particularly when dealing with high value items and large cash transactions, to identify customers and report certain transactions.

The principle of the free movement of capital was agreed in the EEC Treaty, specifically in Articles 56-60 (ex 67-73). These provisions of the EEC Treaty, according to Article 2 of the Treaty, are based on two basic principles of the EEC: the creation of a common market and the gradual approximation of the economic policies of states.

The free movement of capital, according to both primary and secondary EC law, is divided into two categories: free movement of capital and free movement of payments. The free movement of capital means the transfer of values in the form of money, securities or rights across the borders of the EU member states with the purpose of investment. Free movement of payment means the transfer of financial recourses across state borders with the purpose of fulfilling obligations. Article 56 of the EC Treaty prohibits restrictions on the free movement of capital, not only between member states, but also between member states and non-member states. However, the provisions of Articles 57, 59 and 60 of the Treaty regulate the specific conditions

34 Boratev and Yelden, (2001)
36 Id.
of restrictions. Also, Directive 1988 established the basic principle of free movement of capital as a matter of Community law. In its Annex, it states that the capital movement mentioned are taken to cover all the operation necessary for the purposes of capital movements.

A. Overview of the Free Movement of Capital

1. The Treaty of Rome and Economic Integration

The original provisions on the free movement of capital can be found in Articles 56-60 of the Treaty of Rome. Typically, these rules were not as unconditional as those on the other Treaty freedoms.

European integration, coupled with the process of globalization and other economic and social phenomena, has stressed the need to re-think traditional economic models; it has highlighted the crisis of national economic models and has required that we conceive new forms of constitutional relationships between public power and the economy.

It is necessary to examine the Treaty to understand the ultimate goal of the European Community. The aim of Article 2 is to establish a common market. According to Article 14 of the Treaty, the single market is “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” Therefore, the free movement of capital has been one of the fundamental freedoms within the Community.

According to Petersmann, free movement rules are the sources of legitimizing market integration and non-discriminatory competition, in that they increase individual autonomy, equality and responsibility, control abuses of government and maximize economic welfare. The result of this contribution is that the economic choices are no longer considered to be a matter of policy, but a question of constitutional rights. As Maduro states, the market was conceived as the best source of legitimizing the European Economic Constitution. This goal should protect market freedom and individual rights against public power.

2. Principles and Objectives of Free Movement of Capital

There is no doubt that the freedom of capital movement is one of the four fundamental freedoms along with the freedom of movement of goods, persons and services in the EU. Without the free movement of capital, the other freedoms would be less significant. Free movement of capital requires that first all restrictions should be lifted between Member States and between Member States and third countries and second, that legal and natural persons should be treated equally within the EU. Moreover, the free movement of capital is a vital necessity for a harmonious, balanced and sustainable economic development as well as a high degree of competitiveness and a stable investment climate, and profitable business environment.
B. Outline of Provisions relating to the Free Movement of Capital

According to Article 56, the free movement of capital, which is the fourth freedom, can be separated into two elements: capital (Article 51(1) of the Treaty) and payments (Article 51(2) of the Treaty).

All restrictions on the free movement of capital and payments between Member States or between Member States and third countries are prohibited by Article 56 of the Treaty. It is clear that there are two categories of capital movement. First is the movement of capital between a Member State to Member State or States and the second is the movement of capital from a Member State to a third country or countries. Accordingly, exceptions can be divided into two as well. The express exceptions to the free movement of capital are provided by the provision of Article 58 of the Treaty.

1. Treaty of Maastricht

The Maastricht Treaty, signed in 1992, came into force in 1993, and reduced the significance of this distinction, which adopted new rules on the movement of capital in 1994. In a single chapter, Chapter 4 of the Treaty of the European Union brought together both of the provisions on capital and those on payments, and they were reproduced in the contents of Directive 88/361.

Article 73(1) (the Maastricht number), renumbered at Amsterdam as Article 56(1), now provides that all restrictions on the movement of capital between Member states, and between Member States and third countries shall be prohibited. Art. 56(2) replaced Article 106 of the EEC treaty and extends this prohibition to all restrictions on payments. The fundamental distinction between these provisions and the original provisions is that capital movements to and from third countries appear to be treated the same way as movements between Member States.

The EC Treaty neither defines the term “movements of capital” found in Article 56(1) nor does it define the term “payments” found in Article 56(2). However the Court has followed the definitions given in the case law such as in *Lambert* and the case of *Luisi and Carbone* in its rulings, and referred to the non-exhaustive list in the Annex to Directive 88/361 in order to establish whether the case in question fell within the classifications of capital movements.

The Treaty of the European Union concerning Economic and Monetary Union (EMU) was signed at Maastricht (TEU) and radically changed the Articles that applied to the free movement of capital. It introduced new provisions on capital movements and payments, making it the only Treaty freedom that has been substantively amended. Initially, before the start of the third stage of the Economic and Monetary Union in January 1999, the question arose whether or not an integrated market with regards to the movement of capital could actually be achieved, since there was no way of controlling currency fluctua-
After all, if we take a look at the wording of the Articles of the Treaty, it has to be concluded that no distinction was made between Member States and the States outside the Eurozone. Although the current provisions of the EC Treaty were drafted with the EMU in mind, in principle the same rules apply to all Member States, irrespective of the fact that they do or do not participate in the Monetary Union. Article 56 states that movements to and from third countries are to be treated the same way as movements between Member States, although in reality there are differences which remain.

Article 56 of the Treaty, which is directly applicable, sets out the principle of full freedom of capital movements and payments, both between Member States and between Member States and third countries; Article 57 deals with the possibility of maintaining certain existing restrictions as of 31 December 1993 under national or Community law vis-à-vis third countries whereas Article 58 introduces the fields in which Member States can maintain information, prudential supervision and taxation requirements without capital movements being hindered; Article 59 provides for the possibility of taking safeguard measures if movements of capital to or from third countries cause serious difficulties for the operation of the Economic and Monetary Union; and Article 60 allows the Community or a Member State to take measures controlling movements of capital to or from third countries for security or foreign policy reasons. As can be seen from the brief description of the Articles, other than Article 56, the other Articles limit the free movement of capital.

2. The 1988 Directive

The Single European Act, which considered the free movement of capital to be as important as the freedoms of goods and services, led to the adoption on 24 June 1988 of Directive 88/361/EEC. The Directive was designed to provide fully liberalized financial market and freedom for capital movements with effect from 1 July 1990, both between Member States and with third countries - *erga omnes* liberalization.

Council Directive 88/361 established the basic principle of free movement of capital as a matter of Community law, for most Member States since 1 July 1990. The free movement of capital has become the only Treaty freedom to be achieved in the manner envisaged in the Treaty. Article 1(1) of the 1988 Directive states that “Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States.” However, in the absence of a Treaty definition, the headings of the nomenclature indicate the concept of capital underlying the Directive: direct investments, investments in real estate, operations in securities handled in the capital market, operations in units of collective investment undertakings, operations in securities and other instruments undertaken on the...
money market, operations in current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services in which a resident is participating, financial loans and credits, sureties, other guarantees and rights of pledge, transfer in performance of insurance contracts, personal capital movements, physical import and export of financial assets, and other capital movements. The introduction to the Annex further states that the capital movements mentioned are taken to cover all the operation necessary for the purposes of capital movements.

The 1988 Directive laid down the basic principle of unrestricted free movement of capital between persons resident in Member States. It was felt necessary to draft new Treaty provisions to the same effect. One substantive difference is that by treating payments between Member States in the same way as capital movements, the new Treaty provisions remove any lingering doubts as to the precise scope of the freedom to make current payments. As Professor Usher (1992) argues, a more fundamental reason is that as secondary legislation, the Directive could relatively easily be amended, and progress to the Economic and Monetary Union could not be envisaged unless monetary movements between Member States rested on the same legal basis as the other fundamental features of the Union. It may be submitted that both Article 1 of the 1988 Directive and Article 56 of the EEC Treaty were drafted in a manner sufficiently clear, precise, and unconditional to be directly effective. The wording of the provision, as amended by Article 16(4) of the Single European Act, was widely seen as a positive step towards the complete liberalization of capital movements.

C. Scope of the Free Movement of Capital

The freedom of the free movement of capital is applied to both community nationals and legal persons. The original Article 67 of the EEC merely required a person to be resident in the EC in order to rely on the freedom of capital whereas Article 56 makes no reference to such a requirement. “Like the provisions relating to the free movement of goods, and in contrast to those relating to services and people, the capital provisions may be relied on by third country nationals (TCNs). The situation is the same whether the capital movement is intra-Community, or between a third country and the Community.”


As Professor Usher states that “whatever may be the meaning of capital in the context of the EC Treaty, the provisions relating to capital movements are distinguished by the fact that in the original version they were drafted in a style very different from that of the other Treaty freedoms, and by the fact that, its effect starts from the beginning of the second stage of the EMU on 1 January 1994. They were replaced by a completely new set of provisions similar in many respects to those governing the free movement of goods.”

Indeed, with regards to the competition rules of the Treaty, it has...
been accepted that the charges levied for transferring money from one Member State to another may affect trade between Member States.60

2. Evaluation of the Free Movement of Capital under the Directive

Two particular comments may be made about the nomenclature. First, in the continued silence of the Treaty, it remains a useful illustration of the principle of the free movement of capital even after the entry of Articles 56 to 60 under the Maastricht Treaty. This was confirmed by the ECJ in Trummer and Mayer.61 Second, many of the movements listed were clearly current payments under Article 106(1).

Nevertheless, the 1988 Directive purported to be made under Articles 69 and 70(1), which related only to capital movements. However, it is clear that borrowing money from a bank in another Member State to buy a house fell within the scope of the Directive, as was held in Svensson and Gustavsson v. Ministre du Logement.62 It was subsequently suggested by A.G Tesauro in his opinion in Case C-118/96 Safir v. Skattemyndigheten i Dalarnas Lan63 that a narrower concept of capital movement should be adopted. The Court confirmed that a mortgage fell within the scope of a capital movement as defined in the Directive in Trummer and Meyer,64 and held that this interpretation should be continued to apply to the free movement of capital under Article 56.65

Further emphasis on the difficulty in drawing a clear distinction between monetary movements and the other Treaty freedoms, Article 58(2) provides that the provisions of the Chapter on capital and payments shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaty.66

As Professor Usher argues, for all the differences in style, the new capital movement and current payment provisions represent a continuation of an evolution rather than a revolution, and in some respects they allow quite a surprising scope for national restrictions, particularly with regard to measures taken in the tax field. Nevertheless, the Maastricht Treaty on European Union sets out a framework which may enable the law of monetary movements to develop in parallel with the established rules relating to free movement of goods and the freedom to provide services.67

3. The ECJ Effects on Capital Movements

In the British Golden Shares case, the ECJ noted that even rules which apply without distinction to non-nationals and nationals alike can “deter investors from other Member States from making such investments and, consequently, [and] affect access to the market.”68

According to this decision, it can be argued that the ECJ is moving away from a discrimination-based approach and looking at the impact on the market. In the Golden Shares case,69 the UK government proposed that Article 56 be interpreted according to the principle in Keck.
It was argued that the rules in the issue had an impact on the market and these rules were not included by the scope of the prohibition. However, the ECJ did not deal with this issue directly. 70

Article 56 may not be in internal situations. The ECJ gave a generous interpretation to when there is no internal situation such as the acquisition of property. In the paragraph 25 of Reisch et al case, 71 the ECJ held:

A reference for a preliminary ruling from a national court may be rejected by the Court only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action.

D. Exceptions to the Free Movement of Capital

It is clear to say that the equal treatment of Member States and non-Member States countries, with respect to the free movement of capital, is not unconditional but subject to some exceptions which are set out in the Treaty.

1. Other Directives

It is important to mention that some Directives limit the free movement of capital in the EU. First, the Investment Services Directive 72 applies to investment firms as defined in Article 1 in connection with the Annex to the Directive. The Second Banking Directive 73 applies to credit institutions as defined by its Article 1 in connection with Directive 77/780. 74 With regards to third countries, the Directives’ approach seems to be liberal. Each Directive states in its preamble that “...the Community intends to keep its financial markets open to the rest of the world, to improve the liberalisation of the global financial markets in other third countries...” The Money Laundering Directive is widely seen as an essential measure for the protection of the integrity of the Single Market 75.

In Van Eycke v. ASPA, 76 the ECJ held that, since the opening of a savings account in another Member State was not at that time liberated under capital movement Directives, it was not a breach of the Treaty provisions on the freedom to provide services for Belgium to limit tax exemptions on such accounts to deposits in local currency at credit institutions having their head office in Belgium. Even after the liberalization of capital movements, the recitals to the Second Banking Directive recognized that capital safeguard measures under the 1988 Capital Movement Directive might lead to restrictions on the provision of banking services. 77

2. Permitted Restrictions

Article 58 of the EC treaty contains two expressed derogations from Article 56. These derogations apply to both the movement of capital and current payments rules. 78 Member States may restrict free movement of capital and payments on the following grounds:

70 Steiner, Woods and Twigg-Flelsner, “The purpose behind the national rule is not relevant, although the ECJ will sometimes highlight when there is a protectionist motive (see e.g. Verkouijen (case C-35/98), para 34, Reisch (joined cases C-515, 519-540/99), para 32). It is the effect that is crucial and, as with the other freedoms, there is no de minimis exception.”, 2005, advanced sample, p. 4
72 OJ 1993 L 141/27.
73 OJ 1989 L 386/1.
74 OJ 1977 L 322/30.
77 Usher (1999), p. 17
78 Usher (1999), p. 27
National Taxation Systems

This is a specific exception to the free movement of capital provisions. Although taxation remains within the competence of Member States, this power must be exercised within the scope of Community law. The 1988 Directive proposals aimed at eliminating or reducing risks of tax evasion and tax avoidance were required to be put forward by the Commission and considered by the Council. The aim of Article 58(1)(a) was to permit discrimination in favor of non-residents. However, the provision must be taken in its context; in effect it was drafted as permission to take measures which might interfere with the free movement of capital and payments, rather than carte blanche to discriminate.

Balance of Payments and Market Disturbances

There are two further provisions which may be relied on where there is balance of payment difficulties (Articles 119 and 120 EC) for non-European Member States. Although this empowers such Member States to take unilateral action, the protective measures must cause the least possible disturbance to the common market and must not be wider in scope than is strictly necessary. The Commission shall declare what measures it recommends the State concerned to take.

Other Restrictions

Following the wording in Article 4 of the 1988 Directive, Article 58(1)(b) allows Member States to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on the grounds of public policy or public security.

Impact on Establishment

Under Article 58(2), restrictions on capital movement may result in restrictions on the right of establishment. Consequently, these restrictions must be compatible with the provisions of the freedom of establishment.

Interpreting the derogations

It is obvious that the ECJ interpretations on free movement of capital are crucially important to interpret the derogations. As the Court held in the Association Eglise de scientologie de Paris case, derogations from the fundamental principle of the free movement of capital must be interpreted strictly. A Member State cannot determine the scope of restrictions to free movement capital without any supervision by Community institutions.

Limited Safeguard

Article 3 provided a limited safeguard clause, allowing the Commission to authorize a Member State, involved to take protective measures for a period not exceeding six months with respect to certain defined capital movements; under Article 3(2), the Member State
itself might take such protective measures on the grounds of urgency, subject to review by the Commission. 90

3. Restrictions on Free Movement of Capital between Member States and Third Countries

As Usher indicates, at first sight, a fundamental distinction between these provisions and the original provisions is that movements to and from third countries are to be treated the same way as movements between Member States. However, in reality substantial differences still remain. 91

In principle, Article 56 of the EC Treaty secures the free movement of capital between Member States and third countries. However, the restrictions on free movement of capital set out in Article 58 apply equally to free movement with regards to third countries. There are also additional restrictions as regards to third countries.

Article 57

According to Article 57, Article 56 does not apply to national measures existing before 31 December 1993. Such restrictions may limit the freedom of capital between Member States and third countries. Member States are not required to abolish their existing lawful restrictions. Furthermore, the second paragraph of Article 57, empowering the Council to legislate on those capital movements, makes reference to endeavoring to achieve the objective of free movement of capital between Member States and third countries to the greatest extend possible. 92 However, the Council may act to remove such measures. 93

Article 59

Under Article 59, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of the Economic and Monetary Union. In exceptional circumstances, the Council may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

Article 60

According to Article 60, the Council may take urgent measures where Community action to interrupt or reduce economic relations with one or more third countries is required by a common position or in a joint action adopted under the EU provisions regarding a common foreign and security policy, in relation to the movement of capital and payments with regards to the third countries concerned. Indeed, Member States by themselves may take unilateral measures against a third country with regards to capital movements and payments for serious political reasons.

The reasons mentioned above conclude that capital movements to and from third countries seems to be less liberalized than intra-Com-
munity movements. Therefore, the freedom of capital movements is far from absolute.

V. Measures for Harmonisation with the EU Legislation and Implementation

As mentioned above, Turkey’s movement of capital legislation, too, has been liberalized since the 1980s. Compared to the EU legislation, many restrictions on free movement of capital have been removed. For instance, restrictions on foreign ownership in the telecommunications and mining sectors were removed in 2004.

However, there are still some other restrictions on foreign ownership in other sectoral legislation in the areas of civil aviation, maritime transport, radio and television broadcasting, and energy.

The acquisition of real estate in some areas of Turkey has been unclear since the Constitutional Court decision in March 2005. The Court annulled provisions establishing the reciprocity principle for foreigners’ real estate purchases “on the basis of possible threats to national integrity and the indivisible unity of the state.”

In sections below, other restrictions related to capital movements to Turkey and from Turkey will be analyzed. As mentioned above, the aquis provides that all restrictions on the movement of capital within the European Union and between the Member States and third countries are to be removed. Free movement of capital is one of the “four freedoms” and makes European financial services and markets integrated and open.

A. Foreign Investments in Turkey

Although Turkey has been removing restrictions on capital movements, some other restrictions affecting foreign investments, especially originating from EU countries, have still remained in some other economic sectors.

Furthermore, foreign investors are generally interested in the services sector in Turkey. Wholesale, retail, telecommunications, transport, real estate, constructions and manufacturing were the main attractive sectors for foreign investors in 2005 and 2006. The waste majority of foreign investors in Turkey were from the EU countries: Germany, (2338 companies), England (1147 companies) and Holland (1052 companies).

Tourism Incentive Law No. 2634 and Cabotage Law No. 815

In principle, Articles 1 to 5 of the Law on Maritime Transportation, Cabotage and Harbouring and Performing Crafts and Trade in Turkish Territorial Waters prohibit foreigners to do business and work in certain positions in the maritime business. However, Articles 27 and 29 of the Tourism Incentive Law regulate the yacht tourism. Foreigners are allowed to sail in Turkish territorial waters for private and commercial purposes.
mercial yachts with a foreign flag, where they are used for excursion, sports and amusement. In the same way, Articles 3 and 27 of the Law No. 2634 allow enterprises, established abroad, to work in the tourism service sector in Turkey. Foreigners are restricted from carrying people between Turkish harbours. Thus regulations clearly are not completely aligned with the acquis and it should be amended.

The Law on the Establishment of Radio and Television Enterprises and Their Broadcasts No. 3984<sup>101</sup>

Law No. 3984 regulates that the radio and television broadcast sector contains restrictions concerning foreign capital. In order to be in harmony with the EU acquis, paragraph (h) of Article 29 of the Law No. 3984 on “Establishment and Ownership Ratio,” which determines the allowable foreign capital ownership in radio and television enterprises, was amended to “the share of foreign capital in one private radio or television enterprise may not exceed 25 percent of the capital paid up.”<sup>102</sup> Previously, this ratio was limited to 20%. Also, paragraph (i) of the Article 29 prohibits foreign investors to obtain any share of other broadcasting companies. These are clearly obstacles for foreign investors in Turkey and limit capital movements to Turkey.

Insurance Law No.7397<sup>103</sup>

According to Article 15, insurance companies are not permitted to invest their reserves in foreign assets. This provision below is not aligned with the EU acquis.

Turkish Civil Aviation Law No. 2920<sup>104</sup>

This Law contains some restrictions for foreign investors in Turkey. Article 15 and 31 do not allow foreign companies to operate between domestic airports. Therefore, necessary amendments should be done during the negotiation process with the EU.

Petrol Law No. 6326<sup>105</sup>

Article 39 of this Law limits foreigners to operate in the field of petrol digging. It needs to be amended as well.

Restrictions on Financial Market

According to the Article 15 of Decree No. 32 Regarding the Protection of the Value of the Turkish Currency, non-residents are not permitted to buy and sell securities which are not listed by the Capital Market Legislation; also banks and intermediary companies must be used. In addition to this, residents are not permitted purchase and sell securities that are not traded in foreign financial markets outside of authorised financial institutions.

These provisions also limit capital movements to and from Turkey. They should be aligned with the EU Acquis also.

B. Foreign Investments from Turkey

According to the Article 13 of Decree No.32, residents may freely
transfer capital in order to establish companies for the purpose of investment or commercial activities abroad, up to USD 5 million or its equivalent. However, it is necessary to have permission from the Ministry for the investments amounting to more than USD 5 million. This obstacle is also not aligned with the EU acquis.

C. Foreign Trade and Obtaining Credit

In terms of international trade and international financing, Decree No.32 has some other restrictions for residents regarding the free movement of capital.

First, it is necessary for exporters in Turkey to bring and sell foreign exchange receipts of the goods, to the banks or special finance institutions according to the Article 8 of Decree No. 32 Regarding the Protection of the Value of the Turkish Currency.

Second, although, residents may freely obtain credit from abroad, the terms of pre-financing credits cannot exceed one year under Article 17(a) of the Decree No.32.

It is also clear to say that these regulations are not harmonized with the EU acquis.

D. Acquisition of Real Estate

Removing all restrictions affecting the acquisition of real estate in Turkey by the EU citizens and legal persons has the crucial importance in the process of the harmonization the acquis.

The Land Registry Law No. 2644

Article 35 of the Law regulates real estate acquisition by foreign natural persons in Turkey. It is regulated in accordance with the principle of reciprocity and legal restrictions. A foreign natural person can freely acquire real estate of up to 2.5 hectares in size; with the authorization of the Council of Ministers, the limit may be extended up to 30 hectares. Legal inheritance is outside of this provision. Acquiring more than 30 hectares of real estate is subject to the authorization of the Council of Ministers.

According to the foreign capital legislation, there is no restriction on the acquisition of real estate by foreign companies which are established in Turkey. However, there are some restrictions for non-resident legal persons as well. According to the Amendment Law, the same reciprocity principle for natural persons applies to the acquisition of land by non-resident firms.

Additionally, real property acquired by foreign legal and natural persons cannot exceed 0.5 percent of the region’s total land, however the Minister of the Cabinet is authorized to change the limit accordingly. The Council of Ministers is also authorized to specify the areas in which foreign natural persons and foreign trading companies are not allowed to buy on the grounds of public interest and security.
Military Forbidden Zones and Security Areas Law No. 2565

According to Articles 9/b, 27 and 28 of the Military Forbidden Zones and Security Areas Law No. 2565, foreign natural and legal persons cannot acquire any real estate in military forbidden zones, security areas, and strategic areas. However, foreigners can rent real estate in these areas with the permission of the Council of Minister.

During accession negotiations with the EU, Turkey will have to remove the restrictions, mentioned in this section, affecting the ownership of real estate by EU citizens and legal persons.

E. Turkey’s Progress towards Accession

The Turkish regime on the free movement of capital is, to a certain degree, aligned with the acquis, but some further efforts are required for the legislation to be fully in line. Liberalization must be extended to all transactions. Restrictions concerning foreign investment in various sectors, such as civil aviation, maritime transport, port enterprises, radio and television broadcasting, and mining and energy are still in place. There are also limitations on foreign investment in the transport sector (e.g. maritime and aviation companies) and in ports, where foreign participation may not exceed certain ceilings. The current system is not in conformity with the relevant Community acquis.

According to the 2005 report, Turkey’s alignment with this chapter is generally still poor. In spite of the removal of restrictions to foreigners’ access to property in part of the sectoral legislation, the situation in the area of the movement of capital and payments is still unclear after the recent decision of the Constitutional Court. The Turkish authorities will have to remove all barriers to the acquisition of property by citizens and legal persons of the European Union and also sectoral and structural obstacles. Turkey should bring this legislation into line with the acquis.111

Furthermore, in the field of capital movements, the situation concerning restrictions on investment by foreigners remains unclear after the recent decision of the Constitutional Court. Therefore, further progress is needed in removing all restrictions affecting the acquisition of real estate by EU citizens and legal persons as well as sectoral and structural barriers.

VI. Conclusion

The freedom of capital movement is one of the four fundamental freedoms alongside of the freedom of movement of goods, persons and services to assist the operation of the EU internal market. There is no doubt that the legal and natural persons from the EU would not be able to enjoy the other three freedoms without financial liberalization.

The Turkish regime on the free movement of capital is to a certain
degree aligned with the EU regulations. However, some restrictions still remain. The screening process started on 3 October 2005. Turkey is going through a dynamic process of legal, political and economic reforms on the road to European Union membership. The purpose of this process is to guarantee the functioning of the democratic system with all its rules and institutions. Participatory democracy, the rule of law, human rights and fundamental freedoms are not only universal values, but are also the most reliable bases for political and economic stability and development.

Turkey liberalized its capital account transactions in 1989, and flows of international capital immediately intensified, especially after 1990 when Turkey introduced full convertibility of the Turkish lira. Previous EU enlargements have demonstrated clearly that the accession process coincided with a leap in foreign direct investment (FDI) and creation of employment. By contrast, ten years ago, the establishment of the EU–Turkish Customs Union did not generate a similar growth in FDI. However, accession negotiations have already boosted FDI into Turkey.

The principle of the free movement of capital was agreed in Articles 56-60 (ex 67-73) of the EEC Treaty. These provisions of the EEC Treaty, according to Article 2 of the Treaty, are based on two basic principles of the EEC: the creation of a common market and the gradual approximation of the economic policies of States. Member States must remove, with some exceptions, all restrictions on the movement of capital both within the EU and between Member States and third countries. The acquis also includes rules concerning cross-border payments and the execution of transfer orders concerning securities. Without free movement of capital, the other freedoms would be less significant. Free movement of capital requires that first all restrictions should be lifted between Member States and between Member States and third countries, and, second, legal and natural persons should be treated equally within the EU.

Turkey’s capital movement legislation has been liberalized since the 1980s. For instance, restrictions on foreign ownership in the telecommunications and mining sectors were removed in 2004. However, there are some other restrictions on foreign ownership in other sectoral legislation in the areas of civil aviation, maritime transport, radio and television broadcasting, and energy and these restrictions should be removed as soon as possible.

Not only the requirements of the EU legislation but also financial globalization have forced Turkey to change legislation to come close to the EU acquis. It is obvious that Turkey still needs to change many regulations to align with the Community acquis regarding free movement of capital. However, capital movement, Chapter 4, seems to be one of the easiest topics to be adopted during the process of harmonization.
EU Countries and Visa Exemption for Turkish Nationals*

by Hamdi PINAR**

The Turkish Ministry of Foreign Affairs has commented on the judgement of the European Court of Justice that “it does not enable nationals of the Turkish Republic to travel to the EU countries without a visa and to freely move among the member countries of the Union.” However, such comment is inappropriate …

The partnership between Turkey and the European Union, which commenced with the Association Agreement signed in 1963, has been adding a new dimension with each and every new ruling of the Court of Justice of the European Communities (ECJ). The latest one of these rulings is the ‘Tüm and Dari’ decision that was delivered on the 20th of September, 2007. Regarding these discussions, the Turkish Foreign Ministry, in its announcement on 29 September, unlike the media frenzy, took a position on the judgement that ‘it does not enable nationals of the Turkish Republic to travel to EU countries without a visa and to freely move among the member countries of the Union.’

Improvement on the rulings

In retrospect, the ECJ, from its first ruling in 1987 in the “Demirel” case, together with the last one, which was delivered in 2007, has heard and adjudicated thirty seven (37) cases related to Turkish nationals.

After ‘Demirel,’ which was the first ruling of the ECJ in 1987, it was acknowledged that the provisions of the Additional Protocol could have direct effects. With the ‘Abatay’ judgement of October 2003, the ECJ settled some doubts in favor of Turkish nationals by widely interpreting Article 41 of Additional Protocol and Article 13 of the decision of the Association Council, No. 1/80.

With the ‘Tüm and Dari’ decision, dated 27 September 2007, the
ECJ delivered a judgement which runs parallel to the aforementioned decisions. Following the ‘Savas’ and ‘Abatay’ cases, the novelty of such a decision is that it became crystal clear that a member country has the authority over the issuance of a visa for the first entry.

**Freedom of settlement and free movement of services**

One can say that there is a freedom of settlement under circumstances where a commercial venture can be started by a commercial entity or a professional activity can be performed by a national of a member state on equal terms with the nationals or commercial entities of the state to which he/she has relocated.

In one of its judgements, the ECJ stated that the freedom of settlement would also include the performance of a profession, establishment and management of commercial entities, formation of a subsidiary or agent company and a branch.

Free movement of services completes the concept of free movement and settlement of persons (workers).

Concerning the free movement of workers, labor relations are there between worker and employer, whereas in case of free movement of services, the service is provided by the provider independently.

The condition, envisaged for the freedom of settlement, of changing habitual residence is not sought for the free movement of services.

As for the free movement of services, the service itself freely circulates abroad/overseas in a temporary fashion, whereas the service providers are absorbed into the economies of the relocated state within the context of freedom of settlement.

Article 50 of the Treaty establishing the European Community (ECC) points out four types of services: activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions.

Main services, touched upon in the ECJ judgements, are as follows: television broadcasting, legal counselling, insurance, negotiable instruments services, recruitment services, legal consultancy, construction, tourist guidance, games, advertisement, private security services, domestic services, travels for touristic, medical treatment or educational purposes or business travelling, etc.

**Analyzing the subject from the perspective of the EU and Turkey**

The ECJ’s ‘Savas’ judgement, dated 11 May 2000, primarily concerns the fields of freedom of settlement and free movement of services between the EU and Turkey. On 22 December 1984, the Savas couple went to the United Kingdom on a one-month tourist visa. The couple was later involved in different commercial activities without the necessary permits. In 1994, the authorities decided to deport the couple since, according to English law, an alien can obtain permanent
residence permit provided that alien has stayed in the country for ten (10) consecutive years on a legal basis or fourteen (14) consecutive years on an illegal basis.

Having been seised of the matter, the ECJ set some significant ground rules for the relationship between the EU and Turkey in terms of free movement of services and freedom of settlement. For the first time ever, it has been openly acknowledged that Article 41 of Additional Protocol, signed between the EU and Turkey and coming into force on 1 January 1973, has direct effect. According to the aforesaid Article, both sides shall not bring new restrictions on the freedom of settlement and free movement of services.

As a result of this, member countries, with regards to freedom of settlement and free movement of services, shall not introduce or apply national measures (for Turkish nationals) that are more stringent and restrictive than those which were applicable prior to the date on which Additional Protocol came into force; therefore the national measures that are more favorable shall be applicable for Turkish nationals. (the so-called “Stillhalteklausel/Standstill clause”).

“Tüm and Dart” Judgement

With its judgement on 20 September 2007, the ECJ adopted a more favorable approach of vital importance, in addition to the ground rules that were set in “Savaş” judgement. The case revolves around two Turkish nationals, both entering into United Kingdom and seeking refuge -- Mr. Veli Tüm, from Germany in 2001 and Mr. Mehmet Darı from France in 1998.

Subsequent to long court battles and unsuccessfully arguments before English courts, these two Turkish nationals invoked the application of Article 41 of the Additional Protocol, whereupon, the British House of Lords, as the highest court of appeals, turned to the ECJ for a preliminary ruling. After the ‘Savaş’ judgement, there was only one possible line of argument left for the British government to hold onto – the British government, by invoking ECJ case law, argued that regardless of the actual reason/purpose, the alien’s first entrance into the country is entirely at the country’s discretion. In other words, a Turkish national, who illegally entered into United Kingdom (without a duly issued visa) cannot invoke application of Article 41 of the Additional Protocol at all.

Having rejected this line of argument, the ECJ shed a clear and definitive light on the matter: in accordance with Article 41/1, application of the more favourable conditions should also be taken account for the first entry (Stillhalteklausel/Standstill clause).

To put it differently, if a member country did not used to require visas for Turkish nationals at the time the Additional Protocol came into effect, but did so later on, that particular member country can no
VISA EXEMPTION FOR TURKISH NATIONALS

longer apply such stringent and restrictive rules to Turkish nationals regarding their freedom of settlement and free movement of services. It is therefore not only necessary that each and every member country should be taken to account individually, in the light of ECJ’s ‘Savaş’ and ‘Tüm and Dari’ judgements, but also required to compare their legislation prior to, and subsequent to, 1 January 1973, when the Additional Protocol came into force, in order to ascertain whether they have introduced more restrictive measures into their national legal order.

The Additional Protocol was signed by Germany, France, Belgium, Italy, the Netherlands and Luxembourg on 23 November 1970; Denmark, United Kingdom and Ireland in 1973; Greece in 1981; Portugal and Spain in 1986; and Finland, Austria and Sweden in 1995 also signed when they acceded to the Union. For the big bang enlargement, the accession date of the Eastern European countries should be taken into account as they implement their national immigration policies.
TRIPS Agreement and Access to Essential Medicines

by Ayşegül ÖZDEMİR*

“The World Trade Organization (WTO) is the international organization dealing with the rules of trade between nations.”¹ The WTO was born in the Uruguay Round, trade discussions that lasted from September 1986 to April 1994, which transformed the General Agreement on Tariffs and Trade into the World Trade Organization. One of the most significant achievements of the Uruguay Round was the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This agreement, signed in Marrakech, Morocco, on the 15th of April 1994, requires all WTO Members to provide certain minimum standards of protection for all kinds of intellectual property rights, including patents, copyrights, trademarks, trade secrets and geographical indications. The agreement also requires countries to provide for effective IPR enforcement.² Since then, the TRIPS Agreement has come into force and become known as the most extensive multilateral agreement on intellectual property up to now, which has had a big influence on the pharmaceutical sector and access to medicines.

During the Uruguay Round, the US was very anxious to have an IPR agreement on the agenda, especially on patents, in order to strengthen the prospects of large multinational pharmaceutical companies.³ Since the US was successful in influencing aspects of the TRIPS agreement, it was able to universalize a system similar to the one in force in the United States. The TRIPS Agreement is the first broadly-accepted multilateral intellectual property agreement that is enforceable between governments, allowing them to resolve disputes through the WTO dispute settlement mechanism.⁴

**Transitional Periods**

The TRIPS Agreement allows different periods of time, called “Transitional Periods,” for the WTO members, based on each country’s level of development, to implement the agreement. After the lapse of the transition periods, it was expected that members would start to implement the agreement in full, including the enforcement provisions.⁵

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¹WHO, The Doha Declaration on the TRIPS Agreement and Public Health, Parallel Importation, para. 1.
Permitting developing countries additional time to bring national legislation and practices into conformity with its provisions, the TRIPS Agreement provides three main transition periods.

- The first was from 1995-2000, in which countries were required to implement the TRIPS Agreement.
- The second was the 2000–2005 transition period, which allowed specific countries to postpone the provision of product patent protection that had not been so protected at the time the TRIPS Agreement came into effect in that country. A further 5 years were allowed for these countries to put in place a product patent framework for technologies and products, such as pharmaceuticals and agro-chemicals. From 1995 onwards, patent applications were kept pending in a patent “mailbox” until the mailbox was opened in 2005, when the applications would be assessed.
- The TRIPS Agreement, because of its economic, financial and administrative constraints, allowed a third transition period for the least-developed countries (LDCs), which extended until 2006. To implement their obligations under the agreement at the request of an LDC Member, this period may be further extended. With respect to patents on pharmaceutical products and exclusive marketing rights, in accord with the Doha Declaration on the TRIPS Agreement and Public Health, LDCs now have a further time extension, until 2016. So, until 1 January 2016, LDCs need not provide for, nor enforce patents and data protection, with respect to pharmaceutical products. Generic competition is possible.

The transition periods have meant pharmaceuticals or medicines patented before developing countries implemented their TRIPS obligations will not receive patent protection. Since developing countries have implemented their TRIPS obligations, patented medicines are progressively coming onto the market and will constitute an increasing share of marketed medicines. Since 2005, when all developing countries were required to provide patent protection for pharmaceutical products and the mailbox patents were processed, considerable progress has been made.\(^6\)

**Public health issues**

Infectious diseases kill over 10 million people each year, more than 90% of whom are in the developing world.\(^7\) The leading causes of illness and death in Africa, Asia, and the South America-regions (areas that account for four-fifths of the world’s population) are HIV/AIDS, respiratory infections, malaria and tuberculosis. In particular, the magnitude of the AIDS crisis has drawn attention to the fact that millions of people in the developing world do not have access to the medicines that are needed to treat the disease or alleviate the suffering of those afflicted with it. An estimated eight thousand people die of AIDS in the developing world every day. There are many different reasons why developing countries do not have access to essential medicines, but one of the main reasons is the high cost of these medicines. Strong intellectual property protections and exclusive mar-

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\(^6\) WHO, The Doha Declaration on the TRIPS Agreement and public health, Parallel Importation.
Marketing rights have the effect of raising the price of the needed drugs, making them unobtainable in many developing countries. When the governments of such developing countries attempt to lower the price of medicines, they come under pressure from the multinational pharmaceutical industry, which is generally based in more industrialized countries. 8

It is also a problem that infectious diseases, which were once relatively easy to cure, are becoming increasingly resistant to existing drugs. 9 Focusing on these threats, improved access to enhanced and affordable medicines is essential, either through new patent protection or by the extension of old patent rights. The danger is that use of the next generation of drugs, needed to protect public health, will be restricted. 10

The subject matter of patentability under the TRIPS Agreement

What can be patented? TRIPs specifies that patents must be available for all discoveries which... “are new, involve an inventive step and are capable of industrial application.” 11 The TRIPs Agreement makes the scope of patent protection larger.

Producers of biotechnological processes and products have been extremely concerned about the impact of patenting in developing countries. These range in scope of from ethical subjects, e.g., patenting a plant life, to legal subjects, e.g., how to allocate rights between farmers in developing countries and multinational corporations, who are usually the patent owners. 12

The TRIPS Agreement requires an invention to be “new.” For a particular drug for malaria, if traditional native doctors have historically used the components of the drug in more basic forms prior to its discovery by a modern patentee, then a national court in a developing country must refuse a patent for the particular drug. Traditional medicines or cultural knowledge are likely to be treated as a product of nature by developed countries, in that they do not satisfy the requirement of discovery.

From this point, assuming all other requirements are present, may a developing country patent an invention that fulfills the requirement of “non-obviousness,” even though it may be a trivial invention? Another related question is the “novelty” requirement; is it a definite novelty requirement or a modified novelty requirement? Clearly, in order to encourage local research in developing countries, low-level inventions are an important stimulus. A modified interpretation of Article 27 may be important for development goals, in order to allow developing countries to patent inventions where the level of inventiveness is not as high as that in developed countries. 13

TRIPS plus provisions:

“TRIPS-plus”, a non-technical term that refers to national requirements that limit the availability of progress (such lengthening patent life beyond the 20-year TRIPS minimum), limiting compulsory licensing in ways not required, or limiting exceptions to facilitate

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8 Hoen, Ellen F. M., “TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: Seattle, Doha and Beyond.”
9 Brundtland, Dr. Gro Harlem, “A Call for Healthy Development,” WHO Report on Infectious Diseases, Removing Obstacles to Health Development.
10 Ibid.
12 Ibid.
13 Ibid.
the prompt introduction of generics.\textsuperscript{14} WHO recommends that developing countries should be cautious about enacting legislation that is more stringent than the TRIPS requirements, since the public health impact of TRIPs requirements have yet to be fully assessed.\textsuperscript{15}

\textbf{Parallel importation:}

Article 6 of the TRIPs Agreement clearly states that under the WTO dispute settlement system, practices relating to parallel importation cannot be challenged, provided that there is no discrimination on the basis of the nationality of the persons involved.\textsuperscript{16} Under TRIPS, the practice of importation of drugs from another country, where they are cheaper, is neither explicitly outlawed nor permitted. Whether or not this method of having lower price medicines will be covered by their intellectual property laws is for each country to decide. The United States is pressuring countries to make commitments to restrict parallel importation; this is a good example of what is meant when saying that allowing parallel importation is effectively a matter of national discretion.\textsuperscript{17}

\textbf{The Doha Declaration}

“The Fourth Ministerial Conference of the World Trade Organization,” held in November 2001 in Doha, Qatar, also adopted a landmark “Declaration on the TRIPS Agreement and Public Health.”\textsuperscript{18} For the first time in the 50-year history of GATT/WTO, a separate declaration on public health was adopted. The Declaration on The TRIPS Agreement and Public Health, resulting from the Doha Ministerial Conference (the “Doha Declaration”), enables the people of the world to see the efforts to reform the intellectual property regimes regarding public health.\textsuperscript{19}

While pointing out global health problems, the Doha Declaration showed the TRIPS Agreement to be a part of a wider national and international action, explaining the relationship between the TRIPS Agreement and public health. As the basis for compulsory licensing, especially for medicines to treat HIV/AIDS, tuberculosis, malaria and other epidemics, it clarified the interpretation of the TRIPS Agreement and declared a public health crisis.

Clarifying the flexibility in the TRIPS Agreement, the Doha Declaration entitles developing country members enough autonomy to make and implement domestic public health policies with respect to intellectual property protection. Nevertheless, this declaration does not fully dismantle the obstacles created by the TRIPS Agreement, which significantly constrain the autonomy of national legislatures to shape intellectual property laws from the public health perspective.

As the Doha Declaration states, intellectual property protection is important for the development of new medicines.\textsuperscript{20} However, the TRIPS Agreement does not and should not prevent Member States from taking measures to protect public health. Accordingly, the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.\textsuperscript{21}

\textsuperscript{14} Vitale, Ami, Oxfam, “Trips-Plus Provisions,” para. 1.
\textsuperscript{15} \textit{Ibid.}, para.1
\textsuperscript{16} WHO, The Doha Declaration on the TRIPS Agreement and public health, Parallel Importation, para.1.
\textsuperscript{17} \textit{Ibid.}, para. 1.
\textsuperscript{19} Haochen Sun, “Reshaping the TRIPS Agreement Concerning Public Health-Two Critical Issues.”
\textsuperscript{20} Declaration on the TRIPS Agreement and Public Health, WTO Ministerial Conference, Forth Session Doha, 20 November 2001, WT/MIN(01)/DEC/2, para. 3.
\textsuperscript{21} \textit{Ibid.}, para.4.
The Declaration clearly outlines all the key flexibilities available in TRIPS, including:

1) The right of Member States to use compulsory licensing and to determine the grounds upon which such licenses are granted;\(^{22}\)

2) The right of Member States to determine what constitutes a national emergency or other circumstances of extreme urgency, which can ease the granting of compulsory licenses;\(^{23}\)

3) The right of Member States to determine their own parallel import regimes, subject to the MFN and national treatment provisions of Articles 3 and 4;\(^{24}\) and

4) The right of least developed Member States to postpone providing pharmaceutical patents until at least 2016, and possibly longer.\(^{25}\)

“The Doha Declaration also gave a mandate to the WTO Council for TRIPS to find an expeditious solution to the problem of countries with insufficient or no manufacturing capacity in the pharmaceutical sector to make effective use of compulsory licensing and decided that the least developed countries will not be obliged to implement patent protection in pharmaceutical products until 2016.”\(^{26}\)

Situation analysis and monitoring are needed to make clear any issues and questions generated by discussions, although the TRIPS agreement aims to promote innovation by providing incentives to invest in the research and development which are required for new drugs.\(^{27}\)

**Paragraph 6 of the Doha Declaration**

In spite of the fact that the constant provisions of the TRIPS Agreement permit the granting of compulsory licenses to enable the generic production of medicines, countries without domestic manufacturing capacity cannot take advantage of this flexibility. The TRIPS Agreement requires production under compulsory licenses to be predominantly for the supply of the domestic market. The option to import generic medicines is restricted, so countries with insufficient or no manufacturing capacity may have difficulties importing sufficient quantities to meet their needs. The TRIPS Council was directed to find a solution before the end of 2002. The Doha Declaration, in Paragraph 6, recognized this problem: “WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.”\(^{28}\)

On 30 August 2003, in what is also called the August Decision, the General Council of the WTO, after two years of negotiations, adopted a decision on the Implementation of Paragraph 6 of the Doha Deceleration concerning the TRIPS Agreement and Public Health. Allowing the total amount of production under a compulsory license to be exported, the WTO solution is essentially a waiver of export restriction.\(^{29}\)
TRIPS & ACCESS TO ESSENTIAL MEDICINES

The full impact of the August decision will depend on the extent to which national laws allow for it and it will require specific changes to national laws.\textsuperscript{30}

Compulsory Licensing

Compulsory licensing enables a competent national authority to license the use of an invention to a third party or government agency without the consent of the patent-holder, reducing the adverse effects of patents on price and availability.\textsuperscript{31} It mitigates the restrictive effect of exclusive rights and strikes a balance between the title-holders’ interests and the public interest in the diffusion of knowledge and access to, and affordability of, the outcomes of innovation and creativity.\textsuperscript{32}

Governments issue compulsory licenses to broaden access to technologies and information in order to achieve a number of public purposes.\textsuperscript{33} Granting compulsory licenses for specific classes of technologies, especially in the pharmaceutical sector, is an important tool to promote competition and lower prices. In order to correct market failures, licenses are a fundamental government instrument, allowing them to intervene in the market and limit patent and other intellectual property rights. Because it may temper the exercise of market power, or abuse a patent, the authority to issue a compulsory license is important, even when the right is not exercised.\textsuperscript{34} As a result, compulsory licensing has become a crucial tool for protecting public health while promoting innovation, encouraging the distribution of newly-developed technologies, and reducing the adverse effects of patents on price and availability.

For compulsory licensing covering a wide range of topics, the United States government has precise statutes, as well as more general authority for compulsory licensing under antitrust and eminent domain laws. Other countries have their own approaches to compulsory licensing.\textsuperscript{35}

In Article 31, while TRIPS provides for compulsory licenses for patents, it also provides a number of restrictions on the use of them.\textsuperscript{36} The support of American and European Union trade officials for international treaties and policies that would ban or restrict the use of compulsory licensing for medicines is actively lobbied for by the Pharmaceutical Research and Manufacturers Association (PhRMA) and the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).\textsuperscript{37}

The United States uses bilateral agreements to stop developing countries from using compulsory licensing. For example, there is pressure on South Africa and Thailand by the US to stop the use of compulsory licensing of pharmaceuticals to treat AIDS or tropical diseases. In the dispute resolution framework, it is anticipated that disputes concerning compulsory licensing will eventually come before the WTO. Public health organizations want the WTO to acknowledge the superiority of public health in the resolution of these disputes and for the WTO to consult with the World Health Organization (WHO). Because they oppose the involvement of the WHO, PHRMA and IFPMA want these disputes to be framed as purely commercial disputes.

\textsuperscript{30} Ib., para. 4.
\textsuperscript{31} Sun, Haochen, “Reshaping the TRIPS Agreement Concerning Public Health: Two Critical Issues”, page 8, para. 2.
\textsuperscript{32} Ibid., para. 2.
\textsuperscript{33} Frequently asked questions about compulsory licenses, January 20, 1999, Question 2, Para.1.
\textsuperscript{34} Carlos M. Correa, Intellectual Property Rights and the use of Compulsory Licenses: Options for Developing Countries, South Centre, Trade-Related Agenda, Development and Equity Working Paper 5, p. 24. Professor Correa also emphasizes that countries should examine the potential negative impact of compulsory licensing, as with other measures limiting patentees’ rights. The consequences include the possibility of discouraging foreign investment, transfer of technology, and research, including research into local diseases. See Carlos M. Correa, Integrating Public Health concerns into Patent Legislation, South Centre, Books, 2000, pp. 91-100.
\textsuperscript{37} Gathii, James Thuo, “The High Stakes of WTO Reform.”
Compulsory licensing is essential to many developing country members in order to obtain generic or low-cost drugs. However, the problem is that many developing countries with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. Most of the developing countries do not have the capacity to manufacture essential medicines, so they cannot effectively use the compulsory license provisions. Accordingly, some commentators have pointed out that the only way to dismantle the barrier is through importation of low-price drugs under compulsory licenses.

India and its vital role to access essential medicine

India plays a vital role in providing affordable medicines to developing countries. For example, antiretroviral drugs (used to treat HIV/AIDS), produced by Indian companies are used to treat 80% of the 80,000 patients in Medicins Sans Frontiers (Doctors without Borders) projects today. It is thought that, in total, over half of the medicines currently used for AIDS treatment in developing countries come from India. The reason for this is because India is one of the few developing countries with the production capacity to manufacture quality essential medicines and these medicines are among the cheapest in the world. The reason for the low cost is because, until recently, India did not grant patents on drugs.

Competition among producers is the tried and tested way to bring prices down. Competition among generic manufacturers is what helped bring the cost of AIDS treatment down from $10,000 per patient per year in 2000 to $130 per patient per year today.

India has been a member of the WTO since its creation in 1995. Being a member of the WTO and a signatory of TRIPS imposes various obligations on the country. India was given 10 years, from 1995 to 2005, to amend its national laws and to comply with the TRIPS Agreement. The result is that the pressure applied by the international community forced the Indian government to comply with WTO trade rules. Therefore, in 2005, India changed its patent laws and was required to grant patents to drugs. The obvious effect of this will be an increase in the cost of medicines since Indian generic manufacturers will no longer be able to produce cheaper generic drugs. This will not only have an impact domestically, but also on developing countries who rely on India, as a source of cheaper generic medicines.

Prior to the introduction of the new law, the 1970 Patent Act was in force, which didn’t provide protection for medicines except in a few cases. With regards to Indian patent law, there were two changes made in 1999 and 2002. The first change, in 1999, was the introduction of the mailbox system and Exclusive Marketing Rights. The second change, in 2002, involved an agreement on the duration of patent protection.

However, two years after the new system for patents came into
force, only one pharmaceutical product, out of 9,000 requests, has ob-
tained the required patent protection.. This result is because the Patent
Act of 2005 only allowed patents to be granted if the patent precog-
nitions had been registered after 1 January 1995. Moreover, the In-
dian Patent Act acknowledges the compulsory licensing mechanism,
which allows the production of pharmaceuticals and their sale at a
cheaper price. \(^{47}\)

In spite of that, the third amendment to the Indian Patent Act pro-
vides that compulsory licenses can only be issued three years after the
grant of a patent. It is a unilateral measure which didn’t exist in the
TRIPS Agreement, but was only adopted by India. This provision in
the Indian patent law is unnecessary, since it sends a signal that the
state is not serious about public interest issues. Furthermore, the third
amendment to the Indian Patent Act also dilutes the scope of
patentability by allowing patent-holders to claim patents with the most
trivial of improvements. This could lead to a continued monopoly by
the patent-holder. \(^{48}\)

**The Novartis Case**

The pharmaceutical company Novartis applied for a patent in India
for the cancer drug imatinib mesylate, which the company markets
under the brand name Gleevec/Glivec in many countries. The patent
was rejected by the Indian patent office in January 2006 on the
grounds that the drug was a new form of an old drug, so it therefore
was not patentable under Indian law. The decision was based on the
low level of innovation which had been used to create the product.
Usually the grant of a patent requires that the innovation is also new,
not just obvious and useful; however, some modern scientific sectors,
including biochemical-pharmaceutical groups, have made it more dif-
ficult to make a clear demarcation for the fulfillment of the first and
second criteria; Indian law is extremely restrictive in this regard. \(^{49}\)

While appealing the decision of the Indian Patent Office, Novar-
tis claimed that the Indian patent law is not only not compliant with
TRIPS, but actually with all WTO member countries who signed the
2001 Doha Declaration. The declaration states “that the TRIPS Agree-
ment can and should be interpreted and implemented in a manner sup-
portive of WTO Members’ right to protect public health and, in
particular, to promote access to medicines for all.” India’s patent law
is based on this declaration.

Novartis, in an official note, asserts the irrelevance of the Glivec
case in comparison with the problem of access to therapy. However,
the price of the new product’s treatment will not be less than 26,000
US Dollars a year for each patient, an inaccessible sum for the ma-
majority of the Indian population, a fact admitted by the company itself.
For this reason, Novartis promoted a free distribution program of the
medicine, Glivec International Patient Assistance Program, (GIPAP)
that reached 5,000 people, but unfortunately the dimension of the
health problem in India is on a different level, as the Swiss NGO
“Berne Declaration” underlined, suggesting that there are 25,000 new
cases of chronic myeloid leukemia in India every year. The magni-

\(^{47}\) Ibid., para 4.
\(^{49}\) Donati, Silvio, “India: The De-
The national emergency seems even more evident if the diffusion of the HIV virus is considered: with 5 million infected people, India is in fact, according to the UN’s 2006 AIDS report, the nation with the largest number of infected individuals.\footnote{i} The major ruling came on 6 August 2007, from the Madras High Court, commenting on intellectual property rights over drugs; they rejected the petition of the Swiss drug company Novartis, giving Indian firms the go-ahead to continue making affordable generic drugs.\footnote{i} This ruling meant patients still had access to the drug at a much cheaper price, thereby allowing many patients better access to cancer medicines. If the ruling had gone the other way, a large number of patients would have been left without access to cancer treatment, and the precedent created would have prevented the manufacture of a wide range of other drugs, which Indian companies produce at a fraction of the cost of the originals.

The Madras High Court, however, directed Novartis to take up the patenting issue with the Geneva-based dispute settlement body. A report from Novartis headquarters, though, said it would not pursue the case further.\footnote{i} Medical aid organizations the world over declared the ruling a victory for the “rights of patients over patents.” Both the international pharmaceutical industry and global relief organizations have been scrutinizing the progress of this long-running case in Chennai, aware that the judgment would have profound implications for their work.

“This is a huge relief for millions of patients and doctors in developing countries who depend on affordable medicine from India,” Tido von Schoen-Angerer, director of the Médecins Sans Frontières (MSF) campaign for access to essential medicine, said in a statement released by the organization. On the other hand, Novartis warned that it would “discourage investments in innovation” and undermine drug companies’ attempts to improve their products. The head of research at Novartis, Paul Herrling, reacted sharply: “It is clear there are inadequacies in Indian patent law that will have negative consequences for patients and public health in India.”

“Medical progress occurs through incremental innovation. If Indian patent law does not recognize these important advances, patients will be denied new and better medicines.” This was disputed by the High Court, who argued that the court had no right to decide if Indian patent laws complied with the World Trade Organization’s guidelines pertaining to intellectual property law.

Similarly, if the court had ruled the other way, the decision could have set an important precedent which may have allowed other international companies to receive patents for newly modified versions of already known medicine, thereby extending the time frame of their exclusive right to produce the drug. MSF said it would be a “shutdown of the pharmacy for the developing world”.

**Application of TRIPS Agreement in Turkey**

Turkey is the country which has left its intellectual property laws unchanged for the longest period of time – from 1879 to 1995. Turk-
ish provisions concerning patents are contained in Decree-Law No 551 pertaining to the Protection of Patent Rights, as amended by Decree Law 566, in force since 1995, Law No. 4128 in force since 1995, Law No. 5194 in force from 25 June 2004 and the by-law implementing the Decree-Law in force from 5 November 1995, as amended on 6 December 1998. In addition to the organizations and convention concerning industrial property in general, Turkey is party to the Paris Convention, the Patent Cooperation Treaty (PCT), the Strasbourg Agreement and the Budapest Treaty on the Deposit of Microorganisms, as well as the European Patent Convention. Turkey has also signed the Patent Law Treaty. Turkey has also been a member of the European Patent Organization since 2000 and participates in European Patent Organization bilateral, as well as multilateral, cooperation programs.

Patents are granted for 20 years to any invention in any field of technology, which is novel, involves an inventive step and is susceptible to industrial applications. Inventions which are contrary to public order or morality, plant and animal varieties or breeding processes are not patentable.

Turkey has made considerable progress towards updating and harmonizing its legislation with universally-accepted principles. In this context, Turkey attaches great importance to the full implementation of the TRIPS Agreement. It is clear Turkey recognizes the need to wholly implement the TRIPS agreement.

Although having the five year transition period until the year 2000, Turkey adopted her national industrial and intellectual property legislation for patents, trademarks, industrial designs and geographical indications in June 1995. All elements of this legislation are not only compatible with TRIPS standards, but also contain much better and more effective provisions. Turkey was the first developing country to amend her national legislation in accordance with the TRIPS Agreement.

Considering the coverage and age of the previous legislation, the progress made, especially in the field of industrial property protection, is revolutionary. In this regard, Turkey has established a special government authority with administrative and financial autonomy, the Turkish Patent Institute, for the administration of Industrial Property Rights and established an efficient and contemporary industrial property system with Decree Law 544 on 24 June 1994.

Pharmaceuticals have been patentable in Turkey since 1999; in this manner the increased structural power of transnational capital has been the common factor underlying the recent changes in the pharmaceutical patent policies of the developing countries.

Administrative appeals are possible and may be lodged to the re-examination board in the Turkish Patent Institute (TPI), until the patent is granted. A re-examination of a rejected application is possible twice. An appeal for a third re-examination, or an appeal against a patent which is granted, may be made to the courts.

Compulsory licensing of patents may be obtained in Turkey. The rights obtained in this way may not be exclusive. A compulsory li-
license may be granted if the owner of a patent fails to use it within three years after obtaining the patent, or if the use of a patent is needed in order to use another one (dependency of the patent). Public interest is the other possible reason. In the first two cases, the request for a compulsory license is made to the competent Court, i.e. the Court specialized for IPR. If the rationale is public interest, the decision belongs to the Council of Ministers, based on the opinion of the Ministry that regulates the product concerned (e.g. the Ministry of Health for pharmaceutical products). Anyone requiring a compulsory license may also request the mediation of the TPI in order to obtain a consensual license by the patent owner. The latter may refuse to engage in the mediation, or the mediation may fail to lead to an agreement. The decisions of the TPI may be appealed to the IPR Court, and those may be appealed to the high court.61

Conclusion
Health care and medicines have to be treated differently than other products in relation to TRIPS implementation and, indeed, public health has received special attention with regards to TRIPS implementation. The Doha Declaration recognizes this fact by allowing countries a certain amount of discretion to counter the negative effects of TRIPS on health care. In doing so, it clearly stands for the promotion of good public health over protection of intellectual property.

The Doha Declaration was concerned with the fact that developing countries cannot afford existing patented drugs and ways of countering this problem. It has taken significant steps in doing so but it has not solved all the problems.

There is some concern that the richer countries have failed to meet the promises they made in Doha. During the discussions on Paragraph 6, a major concern was the backtracking of rich countries on the promises made in Doha. Since the agreement allows for the production and export of generic medicines in the face of the current health situation, in developing countries it gives little reason for optimism about the full implementation of the Doha Declaration. The implementation of the Doha Declaration is a test for the TRIPS Agreement.

Ultimately the following question will have to be answered: Is there a future for the TRIPS Agreement if in practice flexibility to ensure that “the TRIPS Agreement does not and should not prevent WTO members from taking measures to protect public health” does not exist?

61 Ibid., page 8.
Assessment of Proportional Litigation and Retainer Charges in Full Remedy Actions

by Ali Volkan ÖZGÜVEN*

I – INTRODUCTION

A type of administrative cases, Full Remedy actions are instituted on the grounds of the principle of administrative responsibility by those whose rights have been violated on account of the actions, operations or contracts issued by the administration, with the purpose to restore the violated rights and paying restitution for the resultant loss.1 Under the Law of Administrative Procedure No. 2577, Full Remedy actions are defined as actions instituted by those whose personal rights have been prejudiced due to administrative actions or operations.

The financial responsibility of the administration is included in the last subclause of Article 125 of the Constitution: “The administration shall be liable to compensate for damages resulting from its laws or actions.” This constitutional provision and “The Rule of Law” (Article 2 of the Constitution) constitute the constitutional basis for Full Remedy actions. Acting on this sentence, the administration is obliged to compensate losses caused by it through any type of actions or operations. However, it is common knowledge that an application to the proper administrative jurisdiction body is required in order to provide for the reinstatement of losses resulting from administrative actions. Although the losses incurred are assumed (under Article 13 of the Law of Administrative Procedure) to be entitled to reinstatement without the actual filing of a formal claim, provided that the losses incurred are requested from the administrative body creating the losses and that the said administrative body grants this request within the one- and five-year-foreclosing periods, the possibility that the administration will reject, in part or in whole, these requests is not an unlikely one, considering that the administration in our country is frequently observed, in practice, to slow down and even fail to fulfill the enforcement of...
court decisions. In fact, the statement in the same Law that “... in case of partial or total rejection of such requests, [the claimants] are entitled to institute a full remedy action as of the day following the notification of the proceedings or; if the request does not receive a response in sixty days, as of the date terminating this prescribed period” obviously reveals the main purpose of this inclusion to be the determination of the filing period pertaining to a full remedy action.

As can be concluded, within the framework of the principle of financial responsibility, the losses incurred by persons due to the actions or operations of the administration are entitled to reinstatement provided that the relevant administrative bodies are applied to. In other words, those persons whose rights have been violated should file a claim for the restoration of their rights and reinstatement of the losses incurred. The claimant bears the obligation to pay the litigation costs of the filed claim in advance. Like cases in the civil courts, the claimant may have to assume the litigation costs in administrative actions. These costs – litigation costs – include the court charges, as well as the retainer charges awarded by the court to be disbursed to the attorney for the other party. Nevertheless, the litigation costs should be reimbursed by the opposing party if the claimant succeeds in the action.

The charges incurred during the course of litigation and the retainer charges awarded at the conclusion of litigation process are, depending on the individual case, determined proportionally or on a fixed rate basis. In Full Remedy actions, however, the case before the court is associated with a certain value and the litigation charges and retainer charges are thus received in proportional sums. Parallel to the increase in the sum of incurred losses on account of the administration, this situation leads to an increase in litigation and retainer charges. Hence, the prospective litigation costs can show an increase from the sum prescribed in the actual filing of the claim, if the claimant fails in their action. On the other hand, especially taking into consideration the fact that administrative jurisdiction does not provide for partial action via case law – and we believe that partial action should be provided for in Full Remedy actions² – it is obvious that these costs become more pronounced from the claimant’s point of view in cases where the claimant is in a financially inferior status than the defendant administrative body.

Although limited mostly to the theoretical sphere, the question as to whether the collection of charges from the claimant restrains the right to legal remedy has always been a question in the minds of law practitioners. However, the collection of litigation and retainer charges as proportional sums has released this discussion from the limits of the theoretical sphere. Acting on this context, the topic of our article will be the question as to whether the proportional litigation and retainer charges collected during Full Remedy actions restrain the right to legal remedy; i.e. whether this procedure constitutes a contradiction to the Articles 2, 36 and 125 of the Constitution and Articles 6 and 13 of European Convention of Human Rights.

² Partial action within the context of full remedy action will be discussed below.
II – LEGAL JUSTIFICATIONS OF PROPORTIONAL LITIGATION AND RETAINER CHARGES IN FULL REMEDY ACTIONS

A – LITIGATION CHARGES IN FULL REMEDY ACTION

Charge, in its well-known definition, is “the financial obligation imposed compulsorily on persons benefiting from certain public services in order for them to contribute to the cost of these services or imposed during the application of certain procedures by persons.”

Similarly, in Full Remedy Actions, the persons whose rights have been violated are assuredly subject to charges since they are specifically benefiting from a public service, namely jurisdictional procedures, for the reinstitution of their incurred losses. Does the collection of proportional charges in said actions have relevant justification?

In order to properly respond to this question, the first element of consideration must be the Law of Administrative Procedure, which regulates administrative jurisdiction. Although the Law does not include a provision pertaining to litigation charges, Article 31, entitled the “Applicable Circumstances for Code of Civil Procedure and Tax Procedure Law” clearly refers in various locations to the Code of Civil Procedure for answers to the questions regarding “litigation charges.” Acting on these references, a look into the Code of Civil Procedure provides us with the corresponding Article 413. This article states that “[t]he claimant is obliged to disburse the litigation charges to the amount required by the tariffs.” As can be deduced, the Code of Civil Procedure refers, for the questions regarding litigation charges, to the Charges Law, Article 15 of which states that the litigation charges shall be received based on procedures stated in Schedule (1) on a proportional basis for cases of an established value and on a fixed basis for the type and nature of the procedure. In accordance with this Article, in practice Full Remedy actions are subject to a proportional basis for charges since the case has a measurable value.

B – RETAINER CHARGES IN FULL REMEDY ACTION

As is well known, under Article 168 of the Legal Profession Act No.1136, cases litigated by assignees are subject to a retainer charge determined at the end of proceedings and to be borne by the unsuccessful party in litigation or execution proceedings according to the minimum tariff issued yearly by Turkish Bar Association and enforced by the Ministry of Justice.

In Full Remedy actions, however, administrative bodies determine a proportional retainer charge under Section 3 of the Legal Profession Minimum Tariff -- “Charges Payable for Legal Assistance Provided in Jurisdiction Bodies and Bureaus of Execution and Bankruptcy and Pertaining to Monetary Issues or Appraisable in Value.”

III – DISCUSSION REGARDING PROPORTIONAL LITIGATION AND RETAINER CHARGES IN FULL REMEDY ACTIONS

A – DISCUSSION REGARDING THE CONTRADICTION OF PROPORTIONAL LITIGATION AND RETAINER CHARGES TO CONSTITUTIONAL PROVISIONS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As previously stated, the question as to whether the collection of charges in litigation restrains the right to legal remedy is, and has always been, an issue open to debate. There are two opinions on this issue, the first of which postulates that the collection of charges in proceedings is likely to restrain the right to legal remedy. This opinion thus advocates the need for the removal of litigation charges in order to preserve the right to legal remedy, which is one of the essential principles of law. Those arguing for the relevance of the collection of charges from the claimant postulate that there is a specifically-exploited public service and thus a nominal charge should be collected in return and that administrative offices might be subject to ungrounded preoccupations if the litigation procedures are deemed free of charge.

Even though the latter opinion is agreeable in terms of fixed charges, the cases where proportional charges are applicable and feature the administration as the opposing party eliminate the ability to rationally hold this opinion. In particular, those persons whose rights have been violated by the administration hesitate to pursue their right to legal remedy just because they will have to pay a litigation charge proportional to their incurred losses and because there is no guarantee that they will be successful in their action – even though the proportional charge is partially reimbursed if the case is rejected in Full Remedy actions, the claimant is obliged to pay the full sum of the proportional retainer charge.

As is also well known, the right of recourse is one of the general principles of law and a precondition required for ensuring the continuity of the Rule of Law. This right is included in our Constitution, similar to the constitutions of all governments operating under the Rule of Law. Article 36 of the Constitution establishes this right as an integral part of constitution with the expression that “[e]veryone has the right of litigation, either as plaintiff or defendant, and the right to a fair trial before the courts through lawful means and procedures.”

In my opinion, in light of this constitutional provision, it is hardly righteous to argue that the collection of proportional litigation and retainer charges in Full Remedy actions is a procedure fully compliant to the Constitution. In fact, proportionally-collected litigation and retainer charges can and do lead to the violation and restriction of the right of litigation, either as plaintiff or defendant, and the right to a fair trial before the courts through lawful means and procedures.

On the other hand, the collection of proportional litigation and retainer charges also constitutes a contradiction to the European Con-
vention on Human Rights, specifically to Article 6 that regulates the “Right to a Fair Trial” and Article 13 that regulates the “Right to an Effective Remedy.” The reason behind such a postulation lies in the necessity to consider the litigation costs payable by individuals during litigation within the framework of the right to recourse. As a matter of fact, according to the European Union Committee of Ministers, individuals should face no economic obligations that bear the potential to prevent the pursuit of rights or filing of a claim before courts that resolve civil, administrative, social and financial matters. Therefore, the European Court of Human Rights can also take into consideration the obligation to be represented by a lawyer and to bear litigation charges and the question as to whether these obligations damage the “Principle of Fair Litigation.”

Moreover, considering the fact that Full Remedy actions, much like actions for nullity, are a type of case that ensures jurisdictional control over the administration, proportionally-collected litigation and retainer charges can also be assumed to have a restricting effect on the judicial control over certain actions and procedures of the administration. The restriction of judicial control over the administration cannot be accommodated in “the Rule of Law.” As a matter of fact, Article 125 of the Constitution resolves the issue of judicial control over the administration as a sine qua non of “the Rule of Law” with the inclusion of the expression that “[a]ll actions and procedures of the administration can be subject to litigation…” and the last subclause of this article regulates the financial responsibility of the administration with the expression that “…[t]he administration shall be liable to compensate for damages resulting from its actions and acts.” Consequently, proportional litigation and retainer charges, that are of an extent to be considered a restriction of the right to legal remedy due to economic reasons, allow the exclusion of certain actions and procedures of the administration from the context of judicial control and therefore cannot be deemed legally appropriate.

**B – A SUGGESTION FOR FULL REMEDY ACTIONS: PARTIAL ACTION**

The actual contradiction between the proportional litigation and retainer charges collected in Full Remedy Actions and the Constitution, the European Convention on Human Rights and generally, to law has been deliberated as stated above. In order to overcome this contradiction to law, enforcement of relevant legal regulations might be considered to be a solution. However, in my view, such contradictions to law, at least on the level of legal regulations, can be corrected by allowing the institution of partial actions through case law issued by the Council of State (also the High Administrative Court – the Damştay), even if any legal regulation is not devised and enforced.

As is well known, partial action is defined as “a case where the filed claim is associated to a part, but not to the whole, of the claims and a partial action is instituted (and the right to recourse for the remainder of claims is reserved).”

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\(^4\) Signed in Rome on 04 November 1950. The Convention was finalized with the addition of the Protocol No.11 enforced on 01 November 1998. Turkey signed the convention on 04 November 1950 and published the convention in Official Journal (RG. 19.3.1954, 8662) upon approval of No.6366 of 10 March 1954.


\(^6\) YALTI, a.g.m., p.120.

However, in practice, partial actions are not allowed against administrative bodies and thus the phrase “provided that our rights to the excess amount are reserved” is ignored in the statement of claim for Full Remedy actions.

In many decisions of the High Court, arguments that partial action is not legitimate in Full Remedy actions and thus the actions instituted after the term of proceedings on the basis of the phrase “provided that our rights to the excess amount are reserved” should be rejected. Although this exemplifies the opinion adopted by the Council of State and High Military Administrative Court, there have been certain cases where positive decisions were forthcoming. For instance, a decision of the High Military Administrative Court stated that “... in cases where a financial reinstitution formerly defined as a yearly annuity becomes subject to an attrition due to the inflation rate observed over time, the institution of a new action years later by considering this attrition as a new loss is not contradictory to the principle of definitive judgment and the loss can be revised according to the altered situation in question.”

The case laws of the High Court regarding the possibility that a partial action be instituted in Full Remedy actions are justified on the grounds listed below:

The Law of Administrative Procedure does not include a provision that regulates partial actions.

Article 31 of the Code of Administrative Procedure does not make any reference to the Code of Civil Procedure in this respect. However, although the Civil Code and other material laws do include provisions that bears the potential to allow for partial action, subsequent actions instituted on the basis of the phrase “provided that our rights to the excess amount are reserved” are thought to be rejected, since similar provisions do not exist in administrative law.

I do not agree with these justifications.

First of all, I would like to discuss the justification pertaining to the lack of a provision regulating partial actions in the Law of Administrative Procedure and in the references in Article 31 of the Law of Administrative Procedure to the Code of Civil Procedure.

The claims that there are no provisions related to partial action in the Law of Administrative Procedure and that Article 31 of the Law of Administrative Procedure does not make any references regarding partial action are both true. However, the justifications listed are not sufficient, since partial action is not regulated in the Code of Civil Procedure. Partial action has been adopted via the case law of the Court of Appeals. Even though Article 4 of the Code of Civil Procedure presents itself as a convenient basis, this article does not regulate partial action, but specifies the court that will be in charge of partial actions, if any. In other words, this article merely clarified a problem – the issue of appointment – which is associated to an already existing – endorsed – legal situation. Therefore, the fact that the Law of Administrative Procedure and its Article 31 do not include a provision regulating partial action does not mean that partial action cannot be adopted into administrative procedure via case law.
Moreover, there are no provisions in the Law of Administrative Procedure that can potentially prevent the institution of a partial action. Thus, the interpretation that partial action is not legitimate in Full Remedy actions leads to the imposition, via interpretation, of a restraint on basic rights and freedoms, which is not included in the applicable law. This situation, in turn, constitutes a contradiction to Article 13 of the Constitution, resolving that basic rights and freedoms can only be restrained via laws, for this interpretation leaves no ground for the adoption of partial action even though there is no provision in our code of procedure that prevents the adoption thereof. Hence, “the Right to Legal Remedy” regulated in Article 36 of the Constitution is unlawfully restricted.

It is a point well worth emphasizing that the right to recourse, like all rights, has the potential to be made subject to exploitation; nevertheless, the claimant should be entitled to the right of instituting more than two actions via reserving their right to the excess sum, so long as the sum in question retains sufficient value to be preserved.12

Another justification for the rejection of partial action is the fact that administrative law does not feature provisions providing for partial action, unlike the Civil Code and other pertinent laws. However, the Supreme Court of Appeals does not require the existence of a specific regulation for the institution of a partial action and advocates the possibility that partial action could be a proper recourse in all cases where a legal benefit is concerned. In my opinion, partial action should be available to persons in Full Remedy actions if there is a legal benefit on the side of the given person whose rights have been violated.

IV – CONCLUSION AND OVERVIEW

Litigation charges and legal costs in general should never reach an extent to where the freedom of pursuing legal remedy is compromised, because the right to legal remedy is not only one of the basic rights and freedoms, but also a *sine qua non* of the Rule of Law. Therefore, legal regulations should be directed towards the correction of litigation and retainer charges currently collected proportionally and thus the existing contradiction to the Constitution and European Convention of Human Rights should be removed. In addition, as a proposal for solution, the institution of partial action can be considered for adoption by the High Courts as an integral option in Full Remedy action. If the current situation continues to govern legal practices, with such frequently encountered decisions in State Council and High Military Administrative Court as “… financial restitution claims of the claimant is determined in expert report to be 3.397.302.000-TL, … and since this sum exceeds the actual request of 1.900.000.000-TL… the proceedings were continued under the scientifically-approved expert report, but the awarded sum was the one declared in the claimant’s request,”13 the judicial system will continue to violate human rights, to fail to compensate in part or in whole the losses of claimants and thus to hinder the due fulfillment of duties of the judiciary, which in turn will damage the public trust therein.

12 KAÇAK, a.g.e., p.130.
I-INTRODUCTION

Today, international trade is growing rapidly. However, there isn’t any international court to resolve disputes between the parties to international commercial contracts. The lack of international courts makes international arbitration an excellent path to follow. Arbitration is an alternative to national courts. Specialization, informality, flexibility and speed are the advantages of international arbitration. The international arbitration agreement is the main element of international arbitration. The arbitration agreement gives the arbitrator the power to resolve disputes. The subject of the required attributes of an arbitration agreement is controversial. There are four theories about it: the contractual theory, the jurisdictional theory (the procedural theory), the mixed theory (the hybrid theory) and the independent theory (the autonomous theory). It is an undeniable fact that an arbitration agreement has both contractual and procedural characteristics. There are four elements of an international arbitration agreement: a legal relationship between the contract sides, a mutual understanding, arbitrability and a foreign element. An international arbitration agreement must be in written form. The written form is a must for validity but can appear in different ways. One of them is to make an international arbitration agreement by changing telecommunication tools. It has also the same effect if there is a reference to standard contract terms which contains an international arbitration clause. Everybody who has the capacity for legal transaction and the power of discernment can make an international arbitration agreement. However, an agent must have the specific power to make an arbitration agreement. There are three types of international arbitration agreements: a stand-alone arbitration agreement, an arbitration clause and a unilateral international arbitration agreement. An international arbitration agreement and the main agreement are two different types
of agreements. The invalidity of an international arbitration agreement is independent of the main agreement. That is called the “separability of the international arbitration agreement” in doctrine. However, in some cases the nullity of the main agreement may affect the arbitration agreement. The separability doctrine is contained within the Turkish International Arbitration Act, too. When the contracting parties make an international arbitration agreement, the arbitrators have the authority to settle the dispute and the courts do not. Making an international arbitration agreement has two effects: first is the positive effect and the second one is the negative effect. International arbitration ends when there is a compromise or when the legal relationship ends.

II-SEPERABILITY DOCTRINE

In line with article 4/IV of Turkish International Arbitration Act (MTK-IAA), an objection cannot be made to an Arbitration Agreement to the effect that the main contract is not valid or the arbitration agreement is related to a disagreement that has not emerged yet. In the same sense, in line with Article 7/H of the MTK, the arbitrator or Arbitration Tribunal can make a decision regarding its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement and in the decision-making process, an arbitration clause that is included in a contract is evaluated separately from the other conditions of the contract. The decision made by the arbitrator or the arbitrator committee to annul the main contract does not make the arbitration contract invalid automatically. This means that the arbitration contract should be considered separately from the main contract. It should be underlined that, despite the mention of “arbitration agreement” by the legislature, usually arbitration agreements is an arbitration clause that is part of the main contract and together with the main contracts is defined as the “separability principle.” The separability principle started to be discussed in Swiss courts after the Federal Saxon Law, see the same author p. 41. for the cases that are special in respect with the separability doctrine vis-à-vis the specific situations in respect with the Private International Law see same author, p. 37 vd. 2

The objective of the arbitration agreement is to solve disputes that emerge from privity of contract; indeed however, the objective of the main agreement is to set the obligations between the parties involved. 3 Furthermore, according to one approach, the main contract is a contract of law of obligations in the full sense; however, an arbitration agreement which has a double-sided nature is a substantial law contract whose judgment and consequences are directly related to procedural law. 4 In other words, the arbitration clause does not have an accessory nature so there are two independent contracts. 5

Another approach defends the independency of the arbitration contract from the main contract, originating from the fact that the arbitration contract is a procedural contract. 6 According to this approach, arbitration contract has the characteristics of a procedural nature and this separates the contract from the main contract which has substantial law nature. 7 The results of the differences between the two contracts on separability principle are that the mutual rights and obligations of the parties imposed by the arbitration contract and the

5 Samuel, A., Separability of Arbitration Clauses- Some Awkward Questions About The Law on Contracts, Conflict of Laws And The Administration of Justice, ADRLJ, Part 1, March 2000, s. 36 vd., p. 46. for the development process in Anglo-Saxon Law, see the same author p. 41. for the cases that are special in respect with the separability doctrine vis-à-vis the specific situations in respect with the Private International Law see same author, p. 37 vd.
6 Kalspsüz, T., Tahkim Anlaşması, Bilgi Toplumunda Hukuk, Ünal Tekinalp’e Armağan, C.II, İstanbul 2003, s. 1027 vd. (Kalspsüz, Agreement) p. 1042.
8 "The Main Agreement is a substantial contract however, arbitration agreement is a procedural law contract. Thus, two contracts are completely independent of each other....main contract is valid...arbitration clause is legally invalid as the attorney has no special power of signing an arbitration in attorney’s proxy... This is observed ex officio” (Kuru, B., Hukuk Muhakemeleri Usulü, ÇVL, İstanbul 2001, p. 5952).
9 Kalspsüz, Construction, p. 363.
10 Yeğenil, R., Tahkim (L’Arbitrage), İstanbul 1974, p. 176.
According to other approaches, despite the fact that the arbitration contract is not an additional right to guarantee the main contract, like warranty and guarantee contracts do, and is independent of the main contract, the annulment of the main contract should annul the arbitration contract as well in cases when it coincides with the invalidity of will, since this invalidity situation does not have the power of discrimination. In accordance with this approach, if the reason for invalidity is in the nature of lack of capacity to discriminate the reason for the invalidity or failure of the will or for being unconscionable, all of which have the capacity to affect both contracts, the invalidity of one contract may invalidate the other; under circumstances other than these, like when an arbitration contract was signed for a legal relationship that cannot be subject to arbitration, its invalidity will not invalidate the main contract, so invalidation of one will not affect the other. However, in all of the conditions listed above, the invalidity will not have an adverse effect on the independence of the main contract and arbitration contract since the arbitration clause, for the same invalidity reason, will lead to independent results for both contracts.

It should be further noted that the invalidity of the main contract or invalidity of both contracts simultaneously has no connection whatsoever with the condition involved in Article 20/II of Law of Obligations. Some authors defend the idea that the important point here to dwell upon is the fact that the parties involved included the arbitration agreement in the main contract as the arbitration clause, and even if they knew that the main contract was to be invalid for sure whether they will use the arbitration clause or not. In line with this approach, if the parties involved delegate to the arbitrators the power to examine the main contract, the invalidity of the arbitration clause will not be talked about. However it should be underlined that this approach has no meaning at all before the arbitral award, to the effect that the arbitrator or the arbitrator committee can reach a judgment on whether it is within their power or not to decide on the existence and validity of the arbitration contract included in the objections as stipulated by the Article 7/H of International Arbitration Law. Besides, as it is discussed sagaciously by Kalpsüz, actually Article 20 of the Law of Obligations deals with whether the contract will be invalid or not when one of the articles of the contract is invalid; however, in this case, the main question is what will be the fate of the arbitration clause, which is independent of the main contract but also included in it, when the main contract is invalid.

In the meantime, in some cases, the main contract became invalid for the reason that making a reconciliation agreement for the subject contract becomes almost impossible for the parties and so the arbitration agreement becomes invalid as well. The invalidity of the main contract because of unconscionability, which can be considered among these situations, is a conflict as to whether the arbitration contract will be affected or not. Some argue that this will have no effect arbitrator’s or the arbitrator committee’s ability to decide on its own jurisdiction (competency).
on the arbitration contract, however, some others who think to the contrary, argue that a main contract, which is unconscionable or contrary to public order, will invalidate the arbitration clause.\textsuperscript{16}

We can face the independency principle in various forms. The most important consequence of the independency principle is to consider the arbitration clause not to be a condition for the main contract—that is that the validity of the main contract cannot make the arbitration clause valid and the validity of the arbitration clause cannot make the main contract valid, in other words, the validity of these two should be considered separately and invalidity of one of them cannot affect the validity of other.\textsuperscript{17} For instance,\textsuperscript{18} let us consider a main contract which is not subject to a required legal form. The parties to the contract may decide to finalize the contract at a Notary office. However, if the contract is made in a simple written form contrary to the oral agreement of the parties, the invalidity of this contract does not affect the validity of the arbitration contract. Now let us consider that the parties make a purchase contract (sale of goods) based on a verbal agreement. The validity of the sales contract will not prevent the invalidity of the arbitration contract which was made verbally. Meanwhile, when a person signs a contract with another person, despite not having the requisite representation authority, and the contracting parties later on accept the conditions of the main contract and fulfill them, this will not make the arbitration clause valid, in other words, the arbitration clause remains invalid.\textsuperscript{19}

When deciding on, after performing the acts, whether claiming the invalidity of the arbitration contract is a misuse of the right or not (Civil Code, Article 2/II, prohibition of the misuse of right), the most proper approach with respect to the independency principle, is to look whether the performance of the application serving the objective of the arbitration contract has been committed or not, instead of looking whether the performances for the fulfillment of the main contract have been completed.\textsuperscript{20}

Another consequence of accepting this principle is that when the arbitrators decide that the main contract is invalid, since the arbitration clause is considered to be separate from the main contract, the judgment regarding the invalidity of the main contract affects the validity of the arbitration contract and naturally the validity of the arbitrator judgment.\textsuperscript{21}

Whether an arbitration clause will be valid for the assignee in the case of assignment of a claim, and the relationship with the independence principle, has been started to be debated recently, based on decisions recently reached by the French Supreme Court. It should be mentioned that the adoption of the opinion that the arbitration clause will be transferred with the assignment of the claim is clearly contradictory to the independence principle of the arbitration contract, because, after accepting the ideas of the independence of the arbitration contract from the main contract, it will be totally contradictory to the independence principle to consider that the arbitration contract automatically transferred in case of turnover of the main contract. In spite
of this, both in doctrine and in practice, it is generally accepted that the arbitration clause is assigned as well. However, the reasons of this assignment are different. According to one approach, this assignment originates from the economic dependence that exists between the arbitration clause and the main contract. In another approach, the reason for this is based on the fact that the arbitration clause is considered to be an accessory right. Here, we first explain the economic dependency approach, then the accessory right approach and finally we will explain our own approach towards the issue.

In accordance with the economic dependency approach, the reason for assignment of the arbitration clause, along with the assignment of a claim, is the economic connection between the arbitration clause and the main contract. French Courts frequently based their judgments to the effect that in case a claim is assigned, the arbitration clause included in the main contract related to this, should be assigned together with the claim, based on the economic dependence between the main contract and the arbitration clause; therefore, the person taking over the claim should get benefit of the mechanism to resolve it that was provided by the arbitration clause. However, this would only be an indirect usage.\(^22\)

I think the opinions of Şanlı, who defends the economic dependency approach should be mentioned at this point. According to the author, under the separability principle in arbitration law, two contracts of a completely different nature from each other exist separately in spite of the fact that one is considered to be the continuation of the other in substance.\(^23\) Under the circumstances, this unique nature given to the arbitration contract, and in particular only to the arbitration clause, by the separability principle, rejects the idea that the claim can be transferred to the one who takes over, because the arbitration clause is considered to be attached to the main claim and interpreted as an accessory to the main claim.\(^24\) In other words, the arbitration clause cannot qualify as a dependent part of the main contract.\(^25\) However, for the author,\(^26\) in spite of these opinions, the relationship between the arbitration clause and the claim transferred cannot be denied. Accordingly, after the actual transfer of the claim, the arbitration clause will have no legal meaning for the one who transfers the claim, because the objective of the arbitration clause is to resolve disputes that emerge from the legal relationship and the disagreements that emerge are the transferred claims. In other words, the existence of a legal relationship is a prerequisite for the existence of the arbitration clause. Besides, French Courts also have accepted that the arbitration clause is not the accessory of the main contract. Consequently, the opinion that the arbitration clause is transferred to the one who possesses the claim, together with the claim and other accessory rights, was adopted. The author maintains that this should be valid also in Turkish law and there is no reason against this view. In other words, the author argues that, in Turkish Law, the ar-

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24 Ibid.

25 Ibid. p. 784.

26 Ibid.
Severability of the Arbitration Agreement

In accordance with the accessory right approach, the reason for the transfer of the arbitration clause upon assignment of the claim is that the arbitration clause is an accessory right. According to French doctrine, there exists a strong complementary connection between the main contract and the arbitration clause; the reason for considering the arbitration clause independent of the main contract is because of this complementary status (being the accessory). The validity of the arbitration clause is not affected by this connection but since it is an accessory of the main contract, it is assigned along with the claim; in other words, because of this connection, the arbitration clause is considered to be one of the characteristics of the claim. According to the author, since the arbitration clause shows the authority who will resolve the disagreement in case the assignee did not fulfill its obligations, it becomes a characteristic of the claim and should be transferred to the one who is assigned with the claim. The French Court based their decisions on this approach; a statement was made to this effect that “since the arbitration clause is an accessory of the relations covered by the contract, it is transferred in the course of assignment of the claim” but also decided in this case that the arbitration clause in the claim could not be transferred since it was made despite a prohibition against assignment in the contract. In line with this judgment, some authors argued that there might be two issues involved within the context of Article 178 of International Private Law Act (IPRG): first, the approach that the arbitration clause be considered as the integral part of the claim, and second, that the arbitration clause is considered as a secondary characteristic.

Berber defended the idea that the arbitration clause is an accessory right within the context of Article 168/I of Code of Obligations, and by this token, the assignee of the claim will be subject to this condition. Eren argued that in case of transfer of the claim, the rights of suing, undertaking and execution are considered to be accessory rights and are transferred to the assignee.

According to our approach, a concrete result cannot be achieved without examining the result of the acceptance of the separability principle. As a matter of fact, the reason here to accept the principle related to the independence of the arbitration clause (and in general sense, the arbitration contract as a whole) from the main contract, is to keep the possibility of arbitration open by keeping the main contract and arbitration contract independent of each other. Otherwise, in many cases, the arbitration contract may become invalid and resolution of any dispute through arbitration will be performed only in a very limited area of application. Thus, despite the fact that this characteristic of the separability principle requires us to keep it independent of the main contract with respect to the validity, this will not change the fact that it is a part of the main contract, and will not contradict the sepa-
rability of the arbitration clause if it is a separate contract to accept the transfer of the arbitration clause in partial or total succession and the natural transfer of the claim.\(^\text{35}\) In other words, the arbitration clause, included in the main contract, is legally an accessory of the main contract. Despite this, the main contract and the arbitration contract, as the arbitration clause, are considered separate from each other in line with the separability principle. Within this context, this independence should be interpreted to mean that individual reconciliations should be considered for both (Article I, Law of Obligations). Furthermore, it would be a proper solution to accept the fact that when the main contract is transferred, the arbitration contract is transferred together with it as a material part of the main contract.\(^\text{36}\) This will not change the fact that the arbitration contract and the main contract are contracts of a different nature and, most important of all, the arbitration contract is an individual contract as a whole.\(^\text{37}\) In other words, despite the fact that the arbitration clause is considered independent of the main contract, it is considered to be a part of the main contract, so the transfer of the main contract must result in the transfer of the arbitration agreement as well.\(^\text{38}\) In short, it is possible to transfer the arbitration contract to the one whom the claim was assigned.\(^\text{39}\) For this reason, in case of the assignment of the claim and transfer of the debts, the arbitration clause in the contract or the stand-alone arbitration contract is considered to be transferred to the successors in interest.\(^\text{40}\) Although the arbitration contract is independent from the main contract, the reason for the transfer to the successor, because of the elementary succession that existed, is that the nature of the impact of the succession is involved as well.\(^\text{41}\) In fact, Kılıçoğlu argued that when authorization or arbitration contracts exist, both in assignment of the claim and legal succession cases, these are all valid for the successor as well.\(^\text{42}\)

\(^{\text{35}}\) Gélinas defended an opinion similar to that of us. According to the author, arbitration clause is an integral part of the main contract. Thus, it is normal to have the rights comprised by the main contract. The existence of the separability principle will not change this. As a matter of fact, the only reason of adopting the separability principle is to open the arbitration way for the parties involved; see Ekşi, at p. 128.

\(^{\text{36}}\) Kalpsüz, Construction, p. 360; same author, Agreement, p. 1042.

\(^{\text{37}}\) Kalpsüz, Construction, p. 360 v.d.

\(^{\text{38}}\) Kalpsüz, Construction, p. 360.

\(^{\text{39}}\) Kuru, p. 5982; Balci, p. 184; Akınco, Construction, p. 212; Ansay, p. 408.

\(^{\text{40}}\) Ertekin /Karataş, p. 48.

\(^{\text{41}}\) Akınco, Construction, p. 212.

TRIBUTE TO VETERAN ATTORNEYS – ATİLA SAV

The President of Ankara Bar Association, V. Alşen Coşar, presided over another gathering at the Bar Education Center (Ankara) on November 16th 2007 in order for paying tribute to a veteran attorney, Mr. Atıla Sav, who was regarded by Turkish legal community as a beacon of professional dignity and personal dedication to human rights and fully-functioning democratic society.

Venerable members of the panel, such as Yekta Güngör Özden, Former President of Constitutional Court, took the opportunity to both expand on their deep affection for and convey their great respects to Mr. Sav.

SYMPOSIUM
– A Europe without Visa Requirements and Our Vested Rights on European Level

Mediterranean University, in close cooperation with Hamburg University, Strategic Research Center, Germany Alumni of Turkey, Verein Für Akademiker Mit Studienabschluss In Deutschland, Research Institute for Europe and Turkey in Hamburg, organised a four-day long international symposium commencing on 22nd November 2007.

The symposium successfully drew considerable attention not only from academia, but also from the business world and unions. To name but a few, Professor Mustafa Akaydın, Rector of Mediterranean University; Murat Saraylı, President of European Confederation of Young Businessmen; Salih Kılıç, President of Confederation for Workers Unions of Turkey; Öğüz Satıcı, President of Council of Exporters; Özdemir Özok, President of Union of Turkish Bars; Bülent Pirler, Secretary General of Confederation for Employers Unions of Turkey; Celal Toprak, Journalists’ Association of Turkey.

The presentations and discussion by speakers and panel members in large number of sessions ranged over vastly diverse issues -- for instance: Implications of EU Law on Services Sector, Judicial Activism by Member States before European Court of Justice, The Principle of No Limitation on Rights granted by Ankara Association Agreement, and Free Movement of Turkish Students in Europe.

‘FLAWLESS DEMOCRACY’ SYMPOSIUM

The Turkish Bars Association held a symposium called “Flawless Democracy” on October 18-19 2007 in Ankara, in memory of former leaders of the Turkish Bar Association - Faruk Erem, Teoman Evren and Eralp Özgen.

A FORUM ABOUT “THE PROBLEMS OF YOUNG ATTORNEYS”

A forum called “The Problems of Young Attorneys” was held with the contribution of Turkish Bar Association in Ankara on November 17, 2007. In the opening speech, the President of Turkish Bars Association, Özdemir Özok, stated that the forum is going to be organized in other cities throughout Turkey and the speeches in the forum are going to be published in the form of a book.
“CASCADE TRAINING OF TURKISH LAWYERS ON EUROPEAN CONVENTION ON HUMAN RIGHTS”

The Turkish Bars Association and the Council of Europe are conducting the project of “Cascaded Training of Turkish Lawyers on European Convention on Human Rights”. In the framework of the Project, lawyers are informed about the fundamental principles and articles of the European Convention on Human Rights, the methods of application to the European Court of Human Rights and the procedures of the European Court of Human Rights in a one day course by lawyers who were educated by the experts of the Council of Europe.

International Criminal Court, Introduction and Information Meetings held in 3 cities (Ankara, Izmir and Diyarbakır) within the context of International Criminal Court Coalition’s 2007 activity Schedule.

İzmir

Konak Municipality, Alsancak Cultural Center between 14:00 - 17:00. Twenty-four people, consisting of lawyers registered to the Izmir and Manisa Bar Associations, MazlumDer, forensic Medicine Specialists Society, Izmir Women’s Solidarity Society, 9 Eylül University Law School’s Students, Guardian Family’s Society attended the meeting, where “ICC and Women” was discussed as a separate topic and general information about ICC was given regarding crimes related to the ICC, judgments, pending cases, and the ICC and the US was given.

Ankara

The meeting in Ankara was held on 22 September 2007 in the Ankara Bar Association Education Center, between 14:30-16:30. The ICC Coalition’s vocal proponent Öztürk Türkdoğan made an introductory speech about the ICC and its activities. Twenty-two people consisting of lawyers and trainee lawyers registered to the Ankara Bar Association, MazlumDer, UAO, IHD, Kaos GL, Yar-Sav and trainee Public Prosecutors attended the meeting. Devrim Aydın, research assistant at Ankara University, Faculty of Political Sciences, attended the meeting and made a presentation about International Criminal Law. In the meeting, information about the ICC, crimes related to the ICC, judgement and pending cases was given.

Diyarbakır

The meeting in Diyarbakır was held on 27 September in Diyarbakır Bar Association’s (a founder member of the coalition) Conference Hall between 11:30-14:30. Fifty-six people consisting of lawyers and trainee lawyers registered to the Diyarbakır Bar Association, IHD, MazlumDer, members of Amnesty International attended the meeting.

Healthcare Law Conference at Ankara Law School

On 1-3 November 2007, Ankara University Law School and the Ankara Bar Association jointly hosted a conference on health law that attracted lawyers, judges, doctors, academicians, government officials and pharmacists from universities, hospitals, and organizations from all over Turkey. The event was a huge success. Topics covered were patient rights, civil liabilities of lawyers and doctors, criminal liability and health insurance.


The Turkish Economic and Social Studies Foundation (TESEV) held an international conference in Istanbul with contributions from the European Commission Delegation to Turkey and the Geneva Centre for Democratic Control of the Armed Forces on October 23, 2007. The Conference was
held in three panels: the first panel was on the legal aspects of the relationship between human rights and security. Developments in some countries after 9/11 were discussed from a comparative perspective in the second panel. The one-day conference finished with a roundtable discussion on the future of human rights and security in Turkey during the EU accession process.

Speakers and panel members included members of NGOs, academicians, parliament members and EC officials; to name some: Can Paker, TESEV (Turkish Economic and Social Studies Foundation); Diego Mellado, EC Delegation to Turkey; Alex Dovvling, Geneva Centre for the Democratic Control of Armed Forces (DCAF); Dilek Kurban, TESEV; Clive Walker, University of Leeds; Vahap Coşkun, Dicle University Law Faculty; Reed Brody, Human Rights Watch, Brussels; Derya Demirler, TESEV; Volkan Aytar, TESEV; Thierry Balzacq, Center for European Policy Studies (CEPS); Dila Ungan, CEPS; Aristotle Gavriliadis, European Commission, Directorate General Justice Freedom and Security; Etyen Mahçupyan, TESEV; Dengir Mir M. Fırat, Justice and Development Party; Aysel Tugluk, Democratic Society Party; and Onur Öymen, Republican People’s Party.

Ankara Bar has been a collective member of UIA (Union Internationale des Avocats) for almost a decade and has been an active participant to the seminars and conferences of UIA throughout these years.

In order to better coordinate its relations with UIA to introduce the organization to its members and to strengthen its members’ network with other international practitioners, Ankara Bar established the UIA Committee in 2006. The Committee attended UIA at the Conference organized jointly by the Turkish Bar Association and Ankara Bar under the topic “The Views of Lawyers pertaining to the Attacks made to Lebanon and the Palestine Issue, Their Effects on the International Law, Human Rights and the World Peace”.

The UIA Committee participated to the International Seminar on “Mediation and Arbitration – Effective ADR Methods in Civil and Commercial Matters and the Role of Lawyers” organized by UIA in cooperation with Istanbul Bar in Istanbul, between the dates 18-19 May 2007. The activities of Ankara Bar on Mediation and Arbitration and the improvements achieved in this field through Ankara Bar’s Arbitration and Mediation Committee have been shared with the Vice-President and the members of UIA Mediation Commission and UIA International Arbitration Commission.

UIA Committee has also contacted with Mr. Carlo Mastellone, the Director of Legal Projects - Seminars UIA and informed him of Ankara Bar Association’s willingness to organize a seminar in cooperation with UIA in the near future.

UIA Committee, in cooperation with other Committees of Ankara Bar is performing its best endeavors to support the international multi-beneficiary legal environment with the participation of members of Ankara Bar and UIA. In this respect, Mr. Sami Akl’s (Attorney at Law, Near & Middle East Regional Secretary of UIA) presence amongst the distinguished members of the Board of Advisors of the Ankara Bar Review has a significant importance and is a promising commitment of Ankara Bar for future cooperation with UIA.
The Committee Responsible for the Relations with the American Bar Association (ABA) (the “Committee”) commenced its activities on September 2007. Headed by Attorney Altan Liman, the Committee is comprised of 20 distinguished members including lawyers, trainee lawyers, law students and academicians.

The Committee aims to establish and strengthen communication and cooperation between Ankara Bar Association and the ABA and to organize joint projects to contribute to the legal profession and the Ankara Bar Association.

President of the Ankara Bar Association, Mr. V. Ahsen Coşar, sent a letter to the Chair of Section of International Law of the ABA, Mr. Jeffrey B. Golden, indicating Ankara Bar Association’s willingness to have stronger relations with the ABA and an affirmative response was received in this respect.

The President of the ABA, Mr. William H. Neukom; the Chair of ABA International Section, Mr. Jeffrey B. Golden and President-Elect of the Assembly of Turkish-American Associations, Mr. Günay Evinch were invited to the international congress of the Ankara Bar Association which will be held in Ankara from 9-11 January 2008.

The Committee plans to organize joint events cordially in cooperation with the ABA. First project in this respect is a one-day panel discussion on professional ethics which will be held in Ankara at the first week of February 2008. The second project on the Continuing Legal Education system of the American Bars will be held in May 2008.

Further information on the activities of the Committee can be received from the Ankara Bar Association.
ANKARA BAR ASSOCIATION
INTERNATIONAL LAW CONGRESS

- Ankara Bar Association holds its traditional biennial International Law Congress between the dates 8-11 January 2008 at Ankara Sheraton Hotel & Convention Center

Ankara Bar Association being one of the most progressive institutions in Turkey holds its traditional biennial International Law Congress between the dates 8-11 January 2008 in Ankara, with the attendance of many precious local and international participants.

The sections of the Congress are designated as:
- Basic Problems and Recent Developments at the Beginning of 21st Century.
- Informatics and Law
- Law in the Light of Justice
- Economy and Law
- There will be also workshops in three separate rooms during the Congress.
- Creative Drama at Law
- Analyzing the Lawyer’s Role by Creative Drama Methods, to Understand the Judging Culture Formation. Law Perception in Popular Culture.
- Informatics and Law: UYAP (National Judicial Network Project)
- Civilized judging Methods: the reasons and the results of the procedural delays in judgment
- Professional Ethics of Attorneyship
- Violence against Children
- Participatory Democracy and Social Organization (Volunteer Organizations)

- For further information please visit the website of the Congress: www.hukukkurultayi.org