Annales de la Faculté de Droit d'Istanbul

Cilt/Volume: 49 • Sayı/Number: 66 • Yıl:2017

Annales de la Faculté de Droit d'Istanbul **Cilt/**Volume: 49 • **Sayı/**Number: 66 • **Yıl:** 2017
ISSN: 0578-9745 • DOI: 10.26650/annales

Annales de la Faculté de Droit d'Istanbul **uluslararası ve hakemli dergidir.**
Yayımlanan makalelerin sorumluluğu yazarına/ yazarlarına aittir.

Annales de la Faculté de Droit d'Istanbul **is the peer-reviewed, international journal of the Istanbul University Faculty of Law. Authors bear responsibility for the content of their published articles.**

Yayın Sahibi/Owner **İstanbul Üniversitesi/Istanbul University**

Yayın Sahibi Temsilcisi/Owner's Representative
İstanbul Üniversitesi Hukuk Fakültesi Dekanı
Prof. Dr. Abuzer Kendigelen

Sorumlu Müdür/Responsible Director
İstanbul Üniversitesi Hukuk Fakültesi Öğretim Üyesi, Türk-Alman Üniversitesi Rektörü
Prof. Dr. Halil Akkanat

Yönetim Yeri/Head Office
İstanbul Üniversitesi Hukuk Fakültesi

Yayın Türü/Type of Publication
Yaygın Süreli Yayın/International Periodical

Yayın Dili/Language
Almanca, Fransızca, İngilizce/German, French and English

Yayın Periyodu/Publishing Period
Yılda bir yayımlanır/Annual

Tarandığı Endeksler/Indexed by
TÜBİTAK ULAKBİM Sosyal ve Beşeri Bilimler Veri Tabanı/TUBITAK ULAKBIM Social and Human Sciences Database

Tasarım ve Uygulama/Graphic Design
Semih Edis

Baskı ve Cilt/Printing Office
Hamdioğulları İç ve Dış Ticaret A.Ş.
Adres: Zübeyde Hanım Mah. Elif Sokak No: 7/197 Altındağ, Ankara
Sertifika No: 35188
Tel: (0542) 695-7760 • **e-Posta:** hamdiogullari@hotmail.com

Basım Tarihi: Ekim 2018

İSTANBUL ÜNİVERSİTESİ YAYINEVİ

İletişim/Correspondence
İstanbul Üniversitesi Hukuk Fakültesi
İstanbul Üniversitesi Hukuk Fakültesi 34116 Beyazıt/İstanbul e-posta: hukuk_dekan@istanbul.edu.tr
HYPERLINK "http://www.istanbul.edu.tr/" www.istanbul.edu.tr/hukuk
Tel: +90 (212) 440 01 05
Fax: +90 (212) 512 41 35
Web: http://dergipark.gov.tr/iuafdi
Elektronik posta: hukuk_dekan@istanbul.edu.tr

Cilt/Volume: 49 **Sayı/**Number: 66 **Yıl:** 2017

İçindekiler Table of Contents

MAKALELER ARTICLES

Annales de la Faculté de Droit d'Istanbul, 49(66): 7–25

DOI: 10.26650/annales.2017, *49*(66).0001

http://dergipark.gov.tr/iuafdi

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Résumé Comparatif des Règles Régissant le Contrôle du Contribuable dans les Systèmes de Droit Fiscal en Turquie et en France

Prof. Dr. Mahmut KAŞIKÇI[1]

Le Résumé De L'article

Dans cette étude scientifique on a fait un résumé comparatif des règles régissant le contrôle du contribuable dans les systèmes de Droit Fiscal en Turquie et en France. Aussi on a fait une étude détaillée sur les méthodes de contrôle fiscal en Droit Turc et on a cherché des solutions aux problèmes fondamentaux dans les opérations de contrôle et d'investigation fiscale.

Les Mots-Clé

Le Droit Fiscal Turc • L'étude comparative sur les méthodes de contrôle fiscal en Droit Turc et en Droit Français • Les problèmes fondamentaux dans les opérations de contrôle et d'investigation fiscale en Turquie • Les suggestions pour le Droit Fiscal Turc

1 **Corresponding Author:** Mahmut Kaşıkçı (Prof.), Istanbul University, Department of Fiscal Law, Istanbul, Turkey.
Email: mahmut.kasikci@istanbul.edu.tr

To cite this article: Kasikci, Mahmut: "Résumé Comparatif des Règles Régissant le Contrôle du Contribuable dans les Systèmes de Droit Fiscal en Turquie et en France Les Méthodes de Contrôle et d'Investigation des Contribuables d'Impôts dans le Droit Turc-Problèmes- Problématiques et Suggestions'', *Annales de la Faculté de Droit d'Istanbul, 49*(66), 2017, p.7-25. https://dx.doi.org/10.26650/annales.2017.49.66.0001

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Les Méthodes de Contrôle et d'Investigation des Contribuables d'Impôts dans le Droit Turc -Problèmes- Problématiques et Suggestions

Prof. Dr. Mahmut KAŞIKÇI[1]

Abstract

A comparative study has been carried out in our scientific work regarding the ways of supervising the tax payers in the Turkish and French legal systems. Firstly the ways of supervising the tax payers in French Law were discussed and then the information about the Turkish Legal System regarding the subject was given.

In the following sections of the study, the problems encountered in the supervision of the tax payers in Turkish Law were discussed, judicial decisions were examined from a critical point of view and some basic institutions and applications were given. In some cases, which are considered important in this context, detailed information is given by taking advantage of judicial decisions and original proposals have been introduced.

Keywords

Turkish Tax Law • French Tax Law • Supervision Methods in Turkish Tax Law and French Tax Law • Basic Problems Regarding Supervision of Tax Payers in Turkish Law • Recommendations for Turkish Tax Law

Makale Özeti

Bu bilimsel çalışmamızda Türk ve Fransız Hukuk Sistemlerinde yükümlünün denetlenmesi yollarına ilişkin karşılaştırmalı bir inceleme yapılmış, önce Fransız Hukukunda yükümlünün denetlenmesi yolları konusu ele alınmış, sonrasında da konuya ilişkin Türk Hukuk Sistemi ile ilgili bilgiler verilmiştir.

Çalışmanın izleyen bölümlerinde Türk Hukukunda yükümlülerin denetlenmesi konusunda karşılaşılan sorunlar ele alınmış, yargı kararları eleştirisel bir bakış açısı ile irdelenmiş, temel bazı kurum ve uygulamalar hakkında bilgi verilmiştir. Bu bağlamda önemli görülen bazı konularda yine yargı kararlarından yararlanılarak ayrıntılı bilgiler verilip özgün öneriler getirilmiştir.

Anahtar Kelimeler

Türk Vergi Hukuku • Fransız Vergi Hukuku • Türk Vergi Hukukunda ve Fransız Vergi Hukukunda Yükümlülerin Denetlenmesi Yolları • Türk Hukukunda Yükümlülerin Denetlenmesi Konusunda Karşılaşılan Temel Sorunlar • Türk Vergi Hukukuna İlişkin Öneriler

Partie I

Résume Comparatif Des Règles Régissant Le Contrôle Du Contribuable Dans Les Systèmes De Droit Fiscal En Turquie Et En France

Tout D'abord Pour Une Meilleure Compréhension Des Institutions Et Des Notions Mentionnées Dans Notre Etude, Nous Jugeons Nécessaire Un Résumé Comparatif Des Règles Régissant Le Contrôle Du Contribuable Dans Les Systèmes De Droit Fiscal En Turquie Et En France.

I) Le Droit Turc

Dans la législation, sans utiliser une notion supérieure, le contrôle et l'examen sont définis dans les sous-parties du même article. Dans la doctrine toutes ces institutions sont appelées les « moyens de contrôle »

Selon nous les moyens de contrôle sont ; *(i)* Yoklama (examen), *(ii)* Inceleme (investigation) et (iii) bilgi toplama (enquête). Aux termes de l'article 142 du Code de Procédure Fiscale, la perquisition sur la personne et son office à laquelle on pourrait avoir recours avec la décision du juge, basée sur des indices importants qu'un délit ou qu'une infraction de contrebande fiscale ont été commis ou sur une investigation ou sur une dénonciation, n'est pas une opération de contrôle. Ce sera une mesure de protection en vue d'une recherche de preuves. Pour cette raison, nous considérons la perquisition comme une mesure de protection qui, par la décision d'un juge, résulte à restreindre les droits fondamentaux comme inviolabilité de chez soi (office dans ce cas) et l'unité physique de la personne. En résumé la perquisition est une mesure (precaution) de protection fiscale, ayant pour but d'atteindre les documents et l'information.

A) Yoklama (examen)

l'Article 127 et 133 du Code de Procédure Fiscale définissent l'Examen; l'article 127 le dispose comme « rechercher et constater les évènements matériels, les registres et les sujets concernant les contribuables et leur qualité de contribuable »

Les fonctionnaires autorisés à examiner peuvent, de plus:

a) S'ils ont une autorisation spéciale émise dans le cadre des règles et usances définies par le Ministère des Finances et des Douanes, constater le chiffre d'affaires quotidien,

b) Pour ceux qui sont sous la portée de la Loi 3100 et qui sont obligés d'utiliser une caisse enregistreuse, contrôler s'ils respectent cette obligation, s'ils utilisent ces appareils selon les règlements, constater leurs chiffres d'affaires,

c) Contrôler et constater, l'existence des livres qui requiert des registres quotidiens obligatoires, l'établissement et l'utilisation des documents selon les lois fiscales, l'existence de marchandises sans facture; les saisir s'il existe des signes de contrebande fiscale (à cause du fait que les instructions d'un juge ne sont pas requises, cette disposition, bien que légale, va à l'encontre de la Constitution et les règles ad hoc de la Convention Européenne des Droits de l'Homme)

d) Arrêter les véhicules de transport avec une signe spécial défini par le Ministère des Finances et des Douanes, constater en mesurant , pesant et comptant, le timbre fiscal, la liste des passagers, facture ou lettre de transport qui doivent se trouver dans le véhicule, comparer le contenu, en quantité et en qualité, de la liste des passagers et de la lettre de voiture avec les passagers et marchandises transportés à bord,

e) Suspendre le véhicule du trafic si la lettre de voiture, lettre de transport et la facture ne sont pas à bord et ce jusqu'à ce que ces documents soient présentés, faire attendre et mettre sous surveillance la marchandise jusqu'à la détermination du propriétaire, si celui-ci n'est pas connu.

B) Inceleme (Investigation):

Selon l'article 134 du Code de Procédure Fiscale, l'investigation « est une opération de contrôle pour rechercher et constater l'exactitude des impôts à payer, lors de laquelle, si les personnes autorisées le jugent nécessaire, l'investigation peut s'élargir à l'établissement de la liste des avoirs économiques de l'exploitation et à la précision des éléments qui doivent paraître sur la déclaration d'impôt ».

En résumé, selon les règles, malgré des exceptions comme le décès etc… l'investigation se fait dans l'office de la personne. L'examen se réalise comme une mesure de protection et par la loi il a été reconnu au fonctionnaire l'autorité de saisir (illégalement) sans avoir les instructions d'un juge. Ces sujets seront largement examinés dans les parties suivantes de cet article.

C) Bilgi Toplama (enquête):

Il est défini comme le droit du Ministère des Finances ou des personnes autorisées pour l'investigation fiscale, de demander de l'information aux établissements publics, aux contribuables ou aux personnes physiques ou morales qui ont à faire avec les contribuables. L'information peut être requise sous forme écrite ou verbale. Si l'information n'a pas été donnée verbalement, on la demandra par écrit. Toutefois, les individus ne peuvent pas être amenés à l'administration par la force. La sanction de dissimuler l'information est, au premier cas, une petite amende monétaire, et une sanction pénale au suivant. Cependant, il existe des lacunes dans la Loi quant aux sanctions à appliquer sur les cas suivants.

II) Le Droit Français

En Turquie, les moyens de contrôle fiscale définis dans quelques articles au sein du Code de Procédure Fiscale, ont été élaborés de façon beaucoup plus large en France.

Les moyens de contrôle ont été disposés dans un Code « Livre des Procédures Fiscales » possédant 289 articles. Le deuxième chapitre de la Loi étant « le Contrôle Fiscal », le droit au contrôle de l'Administration est défini en détail entre les L10 et L80 de la première partie. Dans cette ordre d'idée, des sujets comme la visite, la saisie, informer le contribuable au sujet des documents et renseignements reçus de tiers, le droit à l'audition des témoins, le droit à la copie des documents, le contrôle électronique des factures sont largement traités et des règles respectives ont été établies.

Dans la deuxième partie, le droit à la communication a été définie. La communication consiste dans son fondement au droit à l'Administration de demander des documents et des renseignements. Ceci est un droit ayant une portée très large et couvrant tous les moyens de contrôle mentionnés dans le Droit Turc. Toutefois il définit un moyen de contrôle beaucoup plus large et doté d'une multitude de compétences. Il couvre plusieurs règles de communication avec le droit à se renseigner et de demander d'autres documents, de faire des copies sur des métiers comme les artistes, ceux qui mènent des activités non-commerciales, transport et assurance. L'article qui dispose la portée et définition générales de la Loi est l'article 81. Plusieurs droits relatifs à copier les documents, demander des renseignements et documents, à effectuer le contrôle sur place (dans l'office) ou bien par voie de correspondance y sont exposés.

Dans la partie 3, les règles du secret professionnel sont définies et classées selon chaque métier et activité, dans des articles différents.

La quatrième partie est réservée aux règles de prescription et les délais.

Sous le deuxième chapitre de la même Loi, on trouve plusieurs sujets : les procès fiscaux avec des solutions, la procédure des procès pénaux, les moyens de prouver et les voies de preuve.

Dans la doctrine du Droit Fiscal Français, deux chapitres principaux ont été définis. Ce sont les moyens d'investigation et de vérification.

L'investigation est étudiée sous deux parties principales en prenant en compte les autorités fondamentales de l'administration. Ce sont les moyens d'investigation communs à tout type d'impôt; et moyens d'investigation spéciaux à certains impôts comme la TVA. Les moyens d'investigation communs à tous les impôts s'étudient en 3 chapitres qui sont: i) le droit de communication ii) le droit de demande d'éclaircissements et de justifications et iii) le droit de visite et de saisie.

Les moyens de vérification se partagent entre i) le droit à la vérification de la comptabilité et ii) le droit à l'examen contradictoire de la situation fiscale des personnes physiques (ESFP)[2].

III) Comparaison Et Résolution Du Probleme De Terminologie

Comme on le comprend des parties précédentes où les deux systèmes légaux sont étudiés, les moyens de contrôle des contribuables sont définis dans des notions et théories très différentes. Le Livre des Procédures Fiscale Français, étudie, ce que nous appelons les moyens de contrôle de façon plus large, en mettant des règles spécifiques pour chaque domaine d'activité et d'opérations. Elle a défini deux fondamentaux, contrôle et communication, mais a, parfois rassemblé dans chacun d'eux des règles relatives au renseignement, à l'examen et à l'investigation que nous utilisons également dans le Droit Turc. De ce fait, même si les notions se correspondent, comme les portées sont différentes, il est impossible d'expliquer les moyens de contrôle du Droit Turc avec les termes communs.

Par conséquent nous avons utilisé le mot « contrôle » pour le terme « denetleme « qui représente le chapitre principal de la doctrine du Droit Fiscal Turc, le mot « perquisition » qui correspond au terme «arama », le mot « investigation » pour le terme « inceleme », le mot «examen » pour le terme « yoklama » et le mot « enquête » pour remplacer le terme « bilgi toplama ».

Partie II

Les Méthodes De Contrôle Et D'investigation Des Contribuables D'impots Dans Le Droit Turc-Problèmes-Problématiques Et Suggestions

I)Introduction-Les Méthodes De Contrôle Du Contribuable-Qualification Légale

Le contrôle fiscal a longtemps été considéré comme une incohérence au Droit dans son sens légal et constitutionnel, sans le lier aux droits et libertés de base. Par la suite la considération et l'étude du sujet ont été élargies au cadre des droits du contribuable étant le reflet des droits et libertés fondamentaux sur le Code des Impôts et à leur association.

D'un côté il y a l'Etat établissant les règles, fiscalisant tous genres d'activité lucrative des citoyens, fixant les taux d'impôts appliqués à leur dépenses et consommations, appliquant des mesures pour garantir la collection de ses créances, délimitant et utilisant son pouvoir de saisie, régularisant et appliquant les contraventions administratives; et de l'autre côté face à tous ces pouvoirs on a un contribuable soumis et impuissant.

2 **Grosclaude Jacques / Marchessou Phillippe**, Procédures Fiscales, 7ème Édition, Dalloz, 2014, p.115 et suite.

Dans un État de Droit, l'Etat souverain établit les limites de ses prérogatives par les règles de Droit qui sont définies par lui même. Ce même pouvoir souverain, est libre de se limiter à un niveau très bas comme à un niveau adéquat avec la Justice. Ce pourquoi les efforts des Organismes Supranationaux se concentrent à placer les droits et libertés individuels fondamentaux au dessus de la hiérarchie des Lois (Constitution, normes etc…) afin de délimiter ce pouvoir absolu et discrétionnaire des États.

Une des disciplines du Droit qui examine intensivement ces efforts de protection de la situation vulnérable du contribuable et délimitation du pouvoir législatif l'Etat dans le cadre des règles de Droit, est le Droit Fiscal. Cet effort est né depuis Magna Carta dont les buts étaient de limiter le pouvoir d'imposition du monarque et supprimer l'injustice des impôts.

De nos jours ces efforts continuent dans notre pays, à travers Le Code Turc de Procédure Fiscale considéré comme une Loi générale dans le cadre du Code Turc des Impôts et partiellement à travers les lois fiscales spéciales, pour établir des procédures fondamentales de protection des droits des contribuables, imposables et des autres intéressés.

Certains organismes et formations internationaux et les règles établies par eux, dont nous mettons, depuis longtemps, l'accent sur l'importance dans nos articles et monographies, sont les pionniers de ces efforts.

Comme chacun sait, concernant les droits et libertés fondamentaux, ceux provenant des Conventions Internationales, approuvés et mis en vigueur selon la procédure, lient les institutions de justice turques, voire même, ces règles prévalent aux lois locales en cas de conflits. Ce fait est devenu une obligation constitutionnelle apparente par la disposition suivante, ajoutée le 07.05.2004, au dernier paragraphe de l'article 90 de la Loi 5710: dans les conflits éventuels entre les dispositions de lois locales et celles des conventions internationales approuvées et mises en vigueur selon la procédure, les dispositions des conventions internationales prévalent.

Cette modification a mis fin aux discussions de suprématie des lois et a établi celle des lois internationales comme une disposition constitutionnelle[3].

De ce fait, tous les réaménagements légaux, même dans le Code des Impôts, concernant l'établissement et délimitations des droits et libertés fondamentaux devraient être effectués en tenant compte des conventions internationales auxquelles nous sommes partie.

En résumé, chaque norme sujet du Code des Impôts, devrait être interprétée par le Droit sous la lumière de l'intelligence, conscience et de la justice. Le Droit exige

3 Pour les spécialistes, pour toute information détaillée concernant les références et opinions légales réelles mentionnées dans la plupart de nos études, veuillez consultez **Mahmut Kaşıkçı,** "Mesure de Protection et de Perquisition dans le Droit Fiscal (Perquisition Fiscale)", Vergi Hukukunda Arama Koruma Önlemi (Vergisel Arama), Ethemler Yayıncılık, İstanbul, 2007, p.51-52.

quelquefois d'aller au-delà des normes au nom de la justice et de ne pas les appliquer en ignorant ces injustices. À notre avis outrepasser la Loi devrait être légitime tant que le but est la Justice et le Droit est le moyen.

Comme on peut lire dans l'essence de ce dicton Latin « Hora fugit, stat jus /le temps passe, le Droit reste », ce qui est permanent est le Droit et l'habitude d'interpréter la loi avec le Droit (les droits subjectifs).

Nous visons dans cette étude, à expliquer, en intégrant les développements récents, la façon d'interpréter légalement les méthodes de contrôle des contribuables (en se basant sur les droits des contribuables) dans le cadre d'investigation fiscale.

L'Objectif de l'investigation, qui est la méthode principale de contrôle dans le Droit Fiscal est expliqué dans l'article 134 du Code de Procédure Fiscale, intitulé « l'Objectif ». Selon cette explication, l'objectif de l'investigation fiscale est de rechercher, déterminer et assurer, la véracité des impôts et des sanctions qui devraient être acquittés.

L'objectif général étant d'assurer l'équité de la fiscalisation, la raison principale d'existence des règles de contrôle est la protection des droits et libertés des contribuables lors de l'investigation de la réalité matérielle par les fonctionnaires des Impôts.

Ces règles sont également un moyen pour les fonctionnaires de délimiter leur responsabilité ou irresponsabilité, de déterminer la légalité de leurs actions et procédures. Par exemple, la perquisition effectuée par un fonctionnaire des Impôts (dans ce cas une Société), est une action typique constituant l'élément matériel du délit de transgression de l'inviolabilité du domicile. Or grâce aux dispositions du Code de Procédure Fiscale, au nom du principe de la conformité au Droit lors de l'exécution d'une mission, l'action sera jugée légale et ne constituant pas un délit. Si les limites sont fixées par les règles régissant une investigation, les mêmes règles seront appliquées, en cas de discussion sur les responsabilités légales et pénales, comme critères pour déterminer si les limites de la légalité ont été dépassées. Ses règles sont, également, les critères de considération de la légalité des actions et leurs effets.

Parfois, même si l'action et l'autorité sont conformes à la règle, la règle ne pourrait pas être conforme à la loi. Les exemples les plus classiques de ce cas sont visibles dans les normes de la Loi donnant l'autorité à confisquer lors d'un examen, d'une perquisition et voire lors d'une investigation[4]. Dans ces cas là, ce qui doit être considéré simplement légal, ce sera de laisser de côté la discussion sur les responsabilités et de

4 L'Autorité de confiscation lors d'un examen est définie dans l'article 127/3 du Code de Procédure Fiscale, l'Autorité de confiscation lors d'une perquisition dans l'article 141/2 et celle de confiscation lors d'une investigation dans l'article 143. À notre avis et même si c'est en dehors de notre sujet, toutes ces dispositions sont anticonstitutionnelles selon le 2ème paragraphe de l'article 20 de la Constitution dont le contenu est: « s'il n'y a pas un mandat établi respectant la procédure par un juge , ni par une instance habilitée par La Loi dans les cas où le retard de procédure pose un danger, on ne peut effectuer une fouille corporelle et ni sur les papiers privés d'une personne et ni confisquer ceux-ci.»

considérer comme illégales et irrecevables cette action, la fiscalisation et toutes les autres conséquences qui en découlent.

Les mêmes explications sont valables pour tout les méthodes de contrôle. En contradiction avec les procédures habituelles et acceptées, nous considérons et nous qualifions la perquisition parmi ces méthodes comme une mesure de protection compte tenu de sa caractéristique légale aberrant. Selon notre opinion, le terme d'investigation fiscale avec perquisition est aussi erroné que le terme d'enquête pénale avec perquisition.

Même s'il s'agit d'une discussion de fond qui dépasse le cadre de notre étude et même si elle représente une disparité entre les effets légaux et leur évaluations, nous planifions d'étudier les problèmes et problématiques communs du contribuable relatifs à la perquisition et les méthodes de contrôle.

De ce fait dans les parties et sous-parties suivantes de notre étude, les problématiques que nous allons traiter et la façon d'approcher l'analyse des droits et des libertés, sont des sujets qui doivent être pris en compte par rapport à toutes les méthodes de contrôles et les mesures de protection.

Pour préciser le cadre de cette étude, nous voudrions également mentionner qu'afin de mieux la cibler nous n'allons pas traiter tous les problèmes et problématiques liés à ce sujet mais juste parler de certains que nous jugeons indispensables et les développements récents.

Dans un Etat de Droit, les normes délimitant les processus et les actions donnent, en même temps, aux individus, le droit de demander le respect des droits lors de l'investigation; et lors de la phase judiciaire en cas de conflits.

Les méthodes de contrôle et d'investigation privés, forment dans le Droit Fiscal, l'équivalent dans Droit Pénal, du processus d'enquête préalable à l'ouverture du procès public. Si ce processus est réalisé conformément à la législation et en respectant les droits, le nombre des conflits se réduira d'autant et voire même, l'Administration se trouvera moins en tort dans les conflits. De ce fait, ce processus est également, un processus légal de caractérisation et d'estimation de ceux qui seront nécessaires ou insuffisants, spécialement dans la perspective de preuve. Nous appelons ce processus « processus d'investigation fiscale » et sa fonction «fonction de dépistage de l'investigation fiscale ».

Ainsi, les droits reflétés dans le Droit Fiscal, dérivés des droits reconnus dans le cadre de la Constitution et des Conventions Internationales, devraient avoir comme but l'élimination de la protection du plus fort par rapport au plus faible et des situations présentant des difficultés de prouver en cas de conflits et aussi d'assurer les principes constitutionnels et la juste imposition.

Une investigation bien préparée et menée serait également un moyen permettant à l'Administration de surpasser le question de preuve et des problèmes éventuels.

Dans la doctrine, ce qu'on appelle « les droits des contribuables » sont classifiés en tant que des droits généraux et spéciaux. Selon cette classification; les droits généraux sont ceux comme, « être informé, assisté et renseigné », « pouvoir d'objecter », « de ne pas payer d'impôts plus que le montant juste », « de précision », « d'intimité », « de confidentialité » que les contribuables peuvent demander de la Direction des Impôts lors de l›application des dispositions des lois fiscales, dans le respect de la gouvernance (conception de gestion liée au droit).

Quant aux droits privés, ce sont des droits reconnus aux contribuables par le respect des règles et usances lors de l'application des dispositions des lois fiscales aux cas concrets. Selon la doctrine, il est possible de classifier les droits spéciaux selon les séquences des usances comme suit: « droits lors de l'imposition et perception », « droits pendant le contrôle fiscal » et « droits lors du règlement des conflits fiscaux »[5]. Les droits relatifs à l'investigation et aux autres méthodes de contrôles font partie « des droits spéciaux appliqués lors des contrôles ».

À ce stade nous jugeons nécessaire de mentionner une disposition, qui risque d›engendrer des résultats néfastes et beaucoup de discussions, de l›éventuel futur Code de Procédure Fiscale dont l›ébauche du projet a été proposée à l›opinion publique sur Internet . C'est de la disposition de l'article 124 dont nous voulons parler.

Dans cet ébauche mise sur internet, après avoir énuméré les droits des contribuables dans les articles précédents, 122 et 123, l'article 124 dit exactement ceci: « il n'est pas possible de rendre nulles et non avenues les opérations qu'un agent fiscal a effectuées dans le cadre de la législation administrative, sous prétexte du non-respect des droits disposés dans les articles 122 et 123 de cette présente Loi »

Cela revient à dire : voilà ces droits existent, nous les reconnaissons également et nous les avons disposés dans l'ébauche du projet du Code. Mais il est possible de les transgresser, leur sanction est disciplinaire et leur transgression ne rendra pas nuls les contrôles effectués.

L'acceptation de cet article n'a rien à voir avec la conception contemporaine du Droit. Qui plus est il est en total incohérence avec les règles et usances relatifs aux droits mentionnés dans plusieurs textes légaux nationaux et internationaux.

Ce genre de disposition est, tout d'abord, incompatible avec l'article 125 de la Constitution. En effet, dans cet article on a défini que « toutes actions et opérations

5 Voir **Turgut Candan**," Point de Vue du Conseil D'Etat des Droits des Contribuables Relatifs aux Contrôles fiscaux/Vergi İncelemeleri Bağlamında Mükellef Haklarına Danıştay'ın bakışı", https://turgutcandan.com/2016/03/04/vergi-incelemeleri-baglaminda-mukellef-haklarina-danistayin-bakisi/

de l'Administration sont ouvertes au contrôle judiciaire ». Cette nouvelle disposition forme également un antagonisme avec les principes de l›ingérence du pouvoir législatif dans le pouvoir judiciaire et la séparation souple des pouvoirs.

Nous considérons cette disposition comme une erreur de parcours pour éviter un critique encore plus sévère. Les Droits et libertés sont la résultante des leçons à tirer et les tributs à payer d'un combat pour la démocratie et les droits de l'homme. Par conséquent, Il ne suffit pas de poser simplement les règles et droits sur un texte.

Sans que les effets légaux soient connus ni les résultats en soient tirés, les droits et libertés n'auront aucun sens. Sans aller plus loin dans nos explications, nous nous contentons d'affirmer que ce genre d'approche est inacceptable et cette partie de la disposition devrait être enlevée.

Plus bas certains problèmes et problématiques relatifs aux droits du contribuable seront exposés sous différentes parties.

II) Les Problèmes Fondamentaux Dans Les Opérations De Contrôle Et D'investigation Fiscale

A) Points relevés pour les Procès-Verbaux

Un procès-verbal, étant un moyen de preuve d'un fait matériel, doit être absolument lié aux droits des contribuables lors d'un contrôle et au droit de se faire traiter équitablement. Afin que ces documents puissent être un moyen de preuve et que puissent en découler des jugements judiciaires, ils doivent, impérativement, être établis selon les conditions légales.

Ici on devrait faire attention au fait que les procès-verbaux qui ne respectent pas les règles légales vont causer des mauvais résultats fiscaux et pénaux. Autrement dit, le montant d'imposition calculé sera invalide, comme le délit de malfaçon n'a pas eu lieu, on ne pourra pas appliquer d'amendes administratives et finalement le délit même ne sera pas prononcé[6].

Le Code de Procédure Fiscale contient plusieurs articles mentionnant le procès-verbal. Par exemple l'article 131 concernant l'examen : « les résultats de l'examen seront transcrits sur la feuille d'examen, qui tient lieu de procès-verbal ». Dans l'article 141 concernant l'investigation, on lit : « lors de l'investigation, si besoin est, les faits liés à l'imposition fiscale, la situation des comptes pourraient être identifiés et authentifiés séparément dans des procès-verbaux. S'il y en a, les réclamations et

6 Dans le Droit Turc, si l'action a causé une perte d'impôts est considérée comme un délit de contrebande fiscale, dans le cadre de l'article 359 du Code de Procédure Fiscale, elle sera sanctionnée d'une amende administrative majorée de trois fois la malfaçon commise; et si l'action qui a causée la perte d'impôts, n'est pas considéré comme un délit, on applique une amende administrative égale au montant perdu. On n'y mentionne pas de plafond pour cette sanction.

observations des intéressés, seront également transcrites dans le procès-verbal. Il est impératif de laisser une copie des procès-verbaux établis au contribuable ou à la personne auprès de qui l'investigation a eu lieu ». Quant à l'article 143, on retrouve la disposition qui prévoit que «les livres et documents trouvés lors de la perquisition et susceptibles d'investigation seront enregistrés en détail sur le procès-verbal ».

Même dans les règles légales on trouve plusieurs lacunes concernant le procès-verbal. S'il faut donner un exemple, l'article 143 du Code de Procédure Fiscale ne contient aucune disposition concernant « le droits des intéressés de mentionner des réserves sur le procès-verbal et ni pour la liste des personnes qui doivent participer à la perquisition et celles qui doivent établir le procès-verbal dans un souci d'objectivité lors des opérations et de la solution du problème de preuve »[7].

En effet, dans la modification effectuée dans l'article 140 du Code de Procédure Fiscale, par la Loi 6009, a été introduite une disposition fixant le procès-verbal comme la date du début de l'investigation, annulant ainsi des discussions de longue date sur le sujet de la date du début de l'investigation surtout dans le cas des repentis fiscaux. Contre ceci, dans la Loi il n'y a aucune disposition en ce qui concerne la forme et l'endroit et avec la participation de quelles personnes les procès-verbaux devraient être établis. Dans le règlement relatif, on mentionne seulement qu'il devrait être établi en présence du contribuable. À ce stade, nous voulons éviter de faire des explications détaillées et préférons déclarer que nous joignons l'opinion selon laquelle cet article devrait être interprété avec l'article 139 du Code de Procédure Fiscale. Dans cet article 139, on mentionne comme obligation légale que l'investigation devrait être effectuée dans l'office du contribuable et le procès-verbal d'investigation établi dans les mêmes lieux.

Notre dernier mot dans cette sous partie serait qu'établir, en respectant les règles légales , ces procès-verbaux, qui constituent un moyen de preuve contenant la constatation de l'événement, porte, en plus d'être une condition procédurale, une grande importance quant au problème de preuve; et il est impératif pour ce sujet, de respecter les règles légales, car dans le cas contraire, ces situations engendreront la non-recevabilité devant la Loi des opérations fiscales.

B) Le lieu de l'Investigation

Le lieu de l'Investigation est un domaine sur lequel le Conseil d'Etat se concentre sérieusement depuis longtemps, et, peut-être, l'application la plus correcte des règles procédurales, relative au sujet de l'incompatibilité de l'opération fiscale par rapport au Droit. Selon l'article 139 du Code de Procédure Fiscale, le lieu de l'investigation est l'office du contribuable. Or cette règle a des exceptions. L'inconvenance de l'office, le décès du contribuable, l'arrêt des affaires (des cas similaires qui

7 **Kaşıkçı**, Perquisition…,p. 113 et suite

rendent impossible l'investigation dans l'office) ou dans le cas de consentement du contribuable d'effectuer l'investigation à l'Administration sont des exceptions.

Le Conseil d'Etat, dans sa jurisprudence, fait très attention à cette règle et accepte comme cause de non recevabilité une investigation qui n'a pas été effectuée dans l'office du contribuable[8].

La même sensibilité de façon encore plus ardue, est également exprimée par la Cour de Cassation pour des actions causant un délit[9].

Il est impératif que le procès-verbal montrant l'indisponibilité de l'office pour l'investigation fiscale soit établi selon les appréciations du fonctionnaire d'investigation qui s'est rendu sur place. Sur le procès-verbal la cause d'indisponibilité doit également être mentionnée. Dans certaines de ces décisions, le Conseil d'Etat, a interprété les faits selon lesquels le contribuable qui est requis, sans aucune raison, d'apporter ses livres et documents à l'administration, s'exécute sans contestation; voire même sans exécuter la requête, s'il n'a pas d'objection expresse à ce que l'investigation soit faite à l'administration, comme un consentement à ce que l'investigation soit faite dans l'administration. Il accepte également que l'investigation soit menée dans l'administration sans aller à l'office dans les cas où les matières examinées ne sont visibles que sur les livres et documents[10].

---

8 Conseil d'Etat Fiscal Commission (Générale) des Directions de Procès: Dan. VDDGK, Décision ref. 2002/275-411 datée du 08.11.2002 «il n'est pas recevable devant la Loi, le montant imposé, dans le cas où le contribuable n'a pas présenté ses livres et documents pour l'investigation mais a informé l'Administration que son office était disponible pour l'investigation»;
Décision ref.2001/285-412 datée du 26.10.2001 « les investigations fiscales se font en principe, selon l'article 139 du Code de Procédure Fiscale 213, dans l'office du contribuable ou bien dans l'Administration dans cas où il est impossible d'investiguer dans l'office de celui-ci à cause des motifs essentiels comme l'indisponibilité de l'office, décès, l'arrêt des affaires, ou bien dans le cas de la demande expresse du contribuable et responsables fiscaux .Par contre le Code de Procédure Fiscale n'a pas émis de disposition pour le cas où le **contribuable n'a aucune demande** envers l'officier d'investigation de faire l'investigation dans son office, afin que l'Administration puisse procéder à l'opération et décider en absence, d'une amende d'impôts»
Dans la Décision numéro 2001/242-388 datée du 09.11.2001, Il précise que le tribunal de premier niveau, ne pourrait investiguer ce sujet en fond seulement dans le cas où « le contribuable n'exprime pas de souhait au fonctionnaire d'investigation sur la nécessité d'effectuer l'investigation dans son office.».

9 «… le fond de l'investigation fiscale se fait dans l'office de celui qui est investigué. Il y a deux exceptions à ceci. La première : la demande du contribuable ou des responsables de l'impôt, d'avoir l'investigation dans l'administration et la deuxième : l'existence de cas comme l'indisponibilité de l'office, le décès, l'arrêt des affaires et la constatation officielle de ces cas.
Dans notre cas, non seulement le contribuable n'a pas émis de demande à faire effectuer l'investigation dans l'administration, celle-ci n'a pas, non plus, constaté préalablement, les conditions rendant impossible l'investigation dans l'office du contribuable. Dans ces conditions, comme la notification faite selon les dispositions de l'article 14 de la Loi 213 ne remplit pas les conditions requises dans l'article 139 de la même Loi, les éléments légaux du délit jugé contre le contribuable ne sont pas réunis. La décision d'opposition, qui est conforme aux procédures et à la loi, devrait être accordée…» (Yar. C.G.K. 21.03.1988, E:1988/6-94, K:1988/122);
«… à l'examen du dossier il a été constaté que dans le procès verbal, établi après le contrôle, on a mentionné le délai requis pour la présentation des livres et documents au bureau des impôts, et aucune autre notification n'a été envoyée au contribuable et voire, aucune investigation complémentaire n'a été effectuée par le tribunal… si les livres ne sont pas présentés par le contribuable malgré une notification conforme aux articles 14,94 et 139 de la même Loi, la condamnation dans le cadre de l'article 346/6 de la Loi 213, pourrait être prononcée. Dans ce cas, l'absence des éléments légaux du délit de dissimulation, et le fait d'arrêter un jugement de condamnation avec insuffisance d'enquête, sans investiguer si l'action décrite dans l'article 344/1 ait été matérialisée ou pas…ont exigé l'abrogation de la décision…» (Yar.9. C.D. 20.12.1993, E:1993/4720, K:1993/5585. Pour d›autres décisions ayant les mêmes caractéristiques veuillez vous référer à Yar.9.C.D. 02.12.1992, E:1992/9909, K:1992/10728; 12.03.1993, E:1993/176, K:1993/1349 et 02.03.1994, E:1994/226, K:1994/1094

10 Voir **Candan**, la présentation du même nom.

Dans le cas où les conditions légales d'une investigation dans les locaux de l'administration sont réunies, les intéressés devraient bénéficier d'un délai et selon l'article 14 du Code de Procédure Fiscale, ce délai ne pourrait pas être moins de 15 jours.

Toutes les opérations du même genre et similaires effectuées à l'encontre des règles légales, et les résultats qui en découlent devraient être acceptées non-recevables. En résumé, dans ce genre de situation, on ne peut ni sanctionner d'une fiscalisation, ni appliquer une amende fiscale contre l'infraction, ni même la juger comme un délit.

C) Quel est le processus d'investigation dans le temps et dans quel délai il devrait être effectué ?

L'investigation pourrait se dérouler à l'intérieur du délai de prescription de l'imposition défini dans l'article 114 du Code de Procédure Fiscale. Selon le Code, ce délai commencera le premier jour de l'année suivant celle pendant laquelle l'événement engendrant l'impôt a eu lieu et prendra fin 5 ans après. Or, ce délai est suspendu si la Direction des Impôts a décidé de consulter la Commission d'Evaluation pour évaluer le montant des impôts. Le délai de prescription, ainsi suspendu, reprendra depuis là où il avait été arrêté, à partir du lendemain de la remise du rapport de ladite Commission. Dans tous les cas, la durée de suspension ne peut pas dépasser un an. Selon le Code, si les conditions sont requises pour consulter la Commission, le délai s'allongera à six ans.

Même si les décisions du Conseil d'Etat diffèrent, récemment, il y a eu des arrêtés intéressants qui ont considéré comme invalide la demande de consultation et épuisé le délai de prescription dans le cas où la sincérité de la demande de consultation a été jugée suspecte ayant pour but la suspension du délai de prescription et le détournement de la Loi[11].

Suite aux plaintes qui ont atteint le Ministère, en mettant en avant les décisions judiciaires constantes, cette discussion a été très récemment traitée au niveau de l'administration avec un règlement général régulateur. En effet, en date du 27.04.2017, avec « la Circulaire Interne de Contrôle et d'Investigation Fiscales » numéro 2017/1, on a apporté la régulation suivante : « concernant la durée de prescription fiscale,

11 Décision de la 9eme Direction du Conseil d'Etat (Dan.), référencée 2012/9726 E, 2013/5028 K. en date du 22.05.2013, « … comme l'envoi auprès de la Commission d'Evaluation, expressément fait juste pour suspendre le délai de prescription, ne va arrêter le délai de prescription selon l'article 114, du Code De Procédure Fiscale 213, et comme ce cas de plainte contre le plaignant qui, en prétextant l'écoulement du délai de prescription, a demandé l'envoi d'une demande d'évaluation à la commission d'évaluation après le délai de prescription et comme imposer le paiement de la taxe de valeur ajoutée majorée d'un amende avec un simple rapport d'évaluation établi après le délai de prescription, n'est pas compatible avec la Loi, la décision du tribunal fiscal qui a débouté cette demande, n'est pas juste. » Et la décision de la Direction4 du Conseil d'Etat datée du 14.10.2014 référencée E:2013/3222 K:2014/5621 »… comme cette procédure est utilisée pour outrepasser la disposition définie dans l'article 114, selon laquelle, l'utilisation de procédures pour outrepasser la règle de délai de prescription de 5 ans d'obligation de paiement depuis l'année de la naissance de la dette d'impôt, est contraire au principe de la garantie de sécurité légale et la notion d'administration légale se trouvant dans le Droit Administratif, donc, conséquemment considéré illicite », peuvent être énumérées comme exemple.

la dernière date de la saisine de la commission ne peut intervenir, au plus tard, qu'à la fin du mois de Juin de la dernière année ». Ainsi, la durée de la prescription en matière d'imposition a été ramenée à 4 ans et 6 mois pas par une loi mais par un règlement général régulateur administratif.

C'est un développement très récent.

Qui plus est, avec la modification de l'article 140 de la Loi 6009, des règles importantes ont été introduites quant à la durée de l'investigation qui, auparavant, ne pouvait se faire que pendant la période de prescription et sans avoir une limite de durée. Selon la nouvelle disposition, il existe maintenant une distinction entre investigation entière et restreinte, tout en mettant une limite de durée maximale à 1 an dans le premier cas et 6 mois dans le deuxième, avec une prorogation exceptionnelle de 6 mois dans les deux cas[12].

Le calcul de ces délais sera basé comme date de départ, sur la date d'établissement du procès- verbal de commencement d'investigation.

Dans la justification de cette modification, la protection des droits des contribuables a été prise en compte. Même, seulement ce fait est la preuve que cette modification, au contraire de ce que les autres chercheurs prétendent être une modification qui reste sur papier, n'est pas une modification« comme une régulation incompréhensible du délai administratif, créant des résultats disciplinaires seulement au niveau administratif et ne résolvant pas l'illégalité de l'opération fiscale ». Le délai a été défini par rapport aux droits des contribuables et son dépassement devra rendre l'opération fiscale invalide.

La situation étant ainsi, ce que nous entendons et certaines déclarations laissent penser que la tendance générale du Conseil d'Etat se porte vers le fait que le dépassement de ce délai ne représente pas en soi une cause d'illégalité de l'opération fiscale mais juste un délai de régulation ayant des résultats disciplinaires. Nous n'avons pas encore pu atteindre une décision à ce sujet.

Nous avons pu trouver 2 cas de jurisprudence dont un du Tribunal Administratif Regional d'Istanbul et l'autre du Conseil d'Etat, qui ont décidé sur illégalité et annulation de l'imposition pour cause de dépassement du délai d'investigation. Toutefois, dans ces cas, le dépassement de délai n'a pas été mentionné, et les décisions ont été approuvées avec des raisons diverses d'annulation.

D) Le Droit d'être entendu auprès des Commissions De Lecture

La modification faite avec la Loi 6009 dans l'article 140 du Code de Procédure Fiscale, a introduit des dispositions importantes sur les Commissions d'Evaluation de

12 Le sujet a également été défini dans le « Règlement au sujet des Règles et Usances de l'Investigation Fiscale » qui est entré en vigueur après publication au Journal Officiel numéro 27802 daté du 31.12.2010.

Rapport. Comme les types, la création et les fonctions de ces commissions sont bien définis et discutés en détail dans la doctrine, nous évitons ici d'en approfondir l'étude.

Par contre nous jugeons nécessaire d'aborder un sujet. Dans l'application de la loi, le contribuable à le droit d'être entendu auprès des commissions de lecture après l'établissement du rapport d'investigation, et suivant la demande de l'intéressé on lui fixe un rendez-vous pour l'écouter. Ce progrès est positif dans le sens de l'acceptation du droit de plaidoyer et du droit d'être entendu légalement au niveau de l'instruction. Malheureusement, dans la pratique, lors de l'audition, seuls les membres de la commission et l'intéressé sont présents et on lui demande de parler et on ne fait que l'écouter. Or le but de l'audition devrait être, avec la participation du fonctionnaire d'investigation, de discuter sur le rapport afin de trouver un terrain d'entente et de trouver les vérités matérielles en donnant le parole aux parties de la Défense et civile.

De ce fait, nous jugeons nécessaire de modifier ladite disposition afin qu'elle puisse permettre l'existence du droit d'être écouté et d'exercer ce droit, en présence du fonctionnaire d'investigation pour assurer une possibilité de discussion sur le rapport préparé. Dans le cas contraire, cette écoute n'atteindra pas le but escompté et sera considérée comme une opération illicite.

E) Obligation de présenter livres et documents et le droit au silence

Dans les articles 253 et les suivants du Code de Procédure Fiscale, les obligations de conservation et de présentation des livres sont prescrites comme un devoir. Dans le Droit Turc, ce délai est de 5 ans. Parmi ces obligations celle de dissimulation est considérée comme une infraction et un délit selon l'article 359/a-2 du Code de Procédure Fiscale.

L'Article 359/a-2 du Code de Procédure Fiscale présente comme un délit le fait de dissimuler des livres, registres et documents mais aussi décrit la dissimulation comme « l'action ne pas présenter, lors d'une investigation, les livres et documents aux personnes autorisées à mener l'investigation malgré que l'existence de ceux-ci ont été constatés dans les registres d'authentification des notaires ou diverses copies ».

Ce sujet est lié au droit au silence dont on discute l'existence depuis des siècles à travers l'Inquisition et Thomas d'Aquin. L'Article 38 de la Constitution de la République Turque, définit ce droit comme suit; « Nul ne peut être contraint à prononcer des accusations contre lui-même et contre ses proches légaux, ni présenter des preuves dans ce sens ».

La Cour Européenne des Droits de l'Homme mentionne ce droit dans plusieurs de ses décisions. Dans son arrêté daté du 19/09/2000 référencé 29522/95 du procès opposant L.J.L, G.M.R et A.K.P contre L'Angleterre, a déclaré que le fait de « …l'utilisation lors du procès des déclarations, obtenues sous menace de sanction

pénale par les inspecteurs investiguant la cession de la firme » pourrait causer la transgression du droit au jugement équitable. Qui plus est, selon la décision datée du 06.06.2000 du procès opposant Averill contre l'Angleterre et celle datée des 21.12.2000 opposants Quinn contre l'Irlande, la condamnation des accusés en utilisant comme preuve l'utilisation de leur droit au silence, a été considérée par la Cour Européenne des Droits de l'Homme comme transgression de leurs droits au jugement équitable. De ce fait, la Cour Européenne des Droits de l'Homme a jugé incompatible avec le droit au jugement équitable, la condamnation d'une personne pour le fait d'abstention de dévoiler les documents aux contrôleurs fiscaux[13].

Quant à la Cour Constitutionnelle, elle n'a pas jugé comme violation du droit au silence, d'une décision de la 8eme Tribunal Pénal de première instance d'Adana, qui a décidé que le délit de dissimulation selon l'article 359/a-2 du Code de Procédure Fiscale, constituait une violation du droit au silence[14]. La sanction de ce délit est l'emprisonnement de 18 mois à 3 ans.

Selon notre avis, la disposition en question, présente les caractéristiques de la violation du droit au silence définie dans l'article 38 de la Constitution et l'article 6 de la Convention Européenne des Droits de l'Homme et selon l'article 90 de la Constitution qui prévoit que les décisions de la Convention Européenne des Droits de l'Homme doivent être appliquées dans la législation nationale.

F) La notification aux intéressés des documents contenant des décisions, constatations et résultats relatifs au Recouvrement et/ou aux Pénalités fiscales

Le sujet est lié aux droits comme le droit à la défense, le droit de s'informer, les dérivés des autres droits du contribuable tel que le droit à un jugement équitable (droit aux armes égales)/l'obligation de jugement équitable/droit à une procédure équitable/droit de réaliser une procédure juste.

Toutes les opérations, accusations, documents et informations créant des effets légaux devraient être notifiés à l'intéressé et on devrait l'en informer. Cette caractéristique est valable pour toutes les opérations, en commençant par celles qui concernent le fond des droits comme le droit à la propriété et à une procédure équitable. Il en a été de même au sujet des décisions du Conseil d'Etat. Spécialement, la question de notification, lors de l'investigation des rapports appelés Rapport de Technique Fiscale (RTF-VTR), au contribuable a été discutée dans la législation et il en a généralement résulté comme une violation de droits et motif d'annulation. Il y a eu des décisions revêtant des caractères très divers à ce sujet[15].

13 Şeref **Gözübüyük** / **Feyyaz Gölcüklü**, Convention Européenne des Droits de l'Homme et son Application, 4eme édition p.294

14 Voir la décision de la Cour Constitutionnelle du 31.01.2007 référencée E:2004/31, K:2007/11

15 Dans la décision du 24.03.2015 sous référence E:2011/4773, K:2015/1594 de la 3eme Direction du Conseil d'Etat, le fait de ne pas notifier à la partie adverse les documents (dont le Rapport de Technique Fiscale) présentés dans la requête

Récemment, malgré de la derniere décision contraire de VDDK sur ce sujet; Le Tribunal Fiscal d'Istanbul et de BIM (Tribunal Administratif Regional) qui entérine les décisions de celui-ci, a entériné, en appel, que la non notification du Rapport de Technique Fiscale(RTF-VTR) au contribuable à la fin de l'investigation constitue une irrégularité du droit. Ce n'est qu'un progrès positif concernant les droits du contribuable[16].

En résumé, tous les documents et informations concernant le recouvrement fiscal, les majorations des infractions fiscales, les délits fiscaux et les majorations, doivent être notifiés par lettre officielle aux intéressés lors de l'investigation, un comportement contraire constituera la violation du droit à une procédure équitable et l'obligation de mener une procédure équitable. Le fait de donner ces documents lors du procès n'est pas une caractéristique qui compense la violation du droit au jugement équitable et le droit aux armes égales qui en dérive. En effet, il ne sera pas très honnête de négliger légalement une plaidoirie qui dit, «si vous m'aviez envoyé ces documents lors de l'investigation, j'aurais pu savoir de quoi j'étais accusé à ce moment-là, et en comprenant que l'Administration avait raison, j'aurais pu éviter les frais légaux et majoration de l'impôt en ne pas tentant un procès».

G) Le fait de présenter les livres et documents au Tribunal Fiscal après que l'investigation ait été réalisée.

Les plaignants ont tendance à présenter les livres et documents au Tribunal de grande instance lors du procès d'appel ouvert contre les jugements de recouvrement d'impôts dont les montants ont été définis de façon arbitraire lors du procès initial à cause du fait que les livres et documents, dont le contribuable à l'obligation de conserver et de présenter selon le Code de Procédure Fiscale, n'ont pas été donnés au fonctionnaire d'investigation. La dimension relative à la conservation et notre opinion avaient été mentionnées précédemment. Sous cette partie nous allons discuter des effets fiscaux et délictuels de la présentation des documents à l'instance judiciaire. Dans l'application, la question de la compatibilité de faire investiguer par les tribunaux des livres et documents délivrés aux instances judiciaires et celle d'utiliser ces résultats comme base du jugement, est discutable. La Commission des Directions de Procès du Conseil d'Etat, considérant

de plaidoirie, est considéré comme une irrégularité du Droit et un motif d'annulation. Par contre la même Direction ne considère pas comme un motif d'irrégularité, le fait de ne pas notifier le Rapport de Technique Fiscale (RTF-VTR) lors de l'investigation. Example: La décision de la 3eme Direction du Conseil d'Etat du 30.04.2015 ref. E:2015/2834, K:2015/2734. À l›encontre de ces décisions nous pouvons citer les décisions des Directions 4 et 9 du Conseil d'Etat, sur l›obligation d›annoncer le Rapport Technique Fiscale (RTF-VTR) après la finalisation de l›investigation et avant d›entamer un procès. La décision de la 4eme Direction du Conseil d'Etat du 24.09.2013 ref. E:2013-1182, K:2013/6242 et celle de la 9eme Direction du Conseil d'Etat du 30.09.2015 ref. E:2015/6077, K:2015/10015.
Quant à la Commission de Jugement des Procès Fiscale du Conseil d'Etat (VDDK), elle a signé des décisions contradictoires, considérant d'abord comme violation du droit et par la suite comme conforme à la législation, le fait de ne pas notifier le Rapport de Technique Fiscale (RTF-VTR) lors de la phase d'investigation. Dans leur décision du 10.02.2016 sous la référence de 2016/91-91, ils ont établi la décision selon laquelle « même si la règle principale est la notification du rapport de technique fiscale, il est possible de remédier à son manque pendant le procès avec une décision intermédiaire du tribunal la requérant ou en l'insérant, sans en informer les intéressés, permettant ainsi au plaignant d'en prendre note et apporter les preuves pour prouver son innocence.

16 Décision de la 3ème Direction du Tribunal Administratif Regional d'Istanbul datée du 29.03.2017 ref. 2017/547-1560 (elle n›a pas été publiée)

comme une substitution entre l'Administration Fiscale et les tribunaux, les faits de présenter les livres et documents au tribunal fiscal au lieu de l'Administration Fiscale et les accepter comme preuve, admet qu'il est impossible pour les tribunaux d'investiguer ces livres et documents. Avec cette décision, la jurisprudence été modifiée[17]. Selon le point de vue de VDDK, dans des cas de force majeure seulement les livres et documents qui n'ont pas été donnés à l'Administration peuvent être présentés aux tribunaux. Cette jurisprudence engendrera l'empêchement des parties de présenter les preuves équitablement. En effet, seulement les livres et documents investigués de l'administration fiscale peuvent valoir qualité de preuve par rapport aux tribunaux. Dans le cas contraire, il va falloir chercher l'existence d'un cas de force majeure.

Dans les décisions du Conseil d'Etat concernant les jugements fiscaux il n'y a pas d'unité jurisprudentielle quant à l'acceptation de présentation des livres et documents aux tribunaux. À l'instar de VDDK, le Conseil d'Etat dans certaines de ses décisions, a jugé conforme à la loi le fait de présenter les livres et documents non-présentés au moment de l'investigation mais par la suite au tribunal et le fait de les faire investiguer par ce dernier[18]. Parmi les jugements en question, ceux qui vont dans le sens que l'investigation devrait être effectuée par la direction des impôts en question, doivent être considérés non conforme au Droit. Il est, légalement, inacceptable qu'une des parties au procès ait une telle appréciation. Ce serait une application similaire à demander l'avis d'un expert pour cette partie.

Conclusion

Les droits des contribuables sont ceux qui doivent être assurés et encadrés légalement afin d'exercer une utilisation lors des opérations de contrôle et d'investigations.

La violation de ceux-ci causerait, non seulement, la non-conformité de l'opération de recouvrement par rapport à la législation mais empêcherait également l'application des amendes administratives en cas d'infraction et de pénalités en cas de délit.

Afin de ne pas dépasser le cadre de notre étude, malgré l'existence d'une multitude de problèmes et problématiques sur ce sujet, nous avons seulement traité ceux que nous jugeons importants.

Nous conseillons que nos opinions reflétées plus haut soient prises en compte dans les jugements et servent à construire l'unité de la jurisprudence pour une lecture équitable des droits.

17 Décision de la Commission Fiscale des Directions de Procès du Conseil d'Etat datée du 09.04.2014 ref. E:2013/214, K:2014/208

18 Décision de la 3ème Direction du Conseil d'Etat datée du 25.06.2015 ref. E: 2013/4447, K: 2015/5091. Dans cette décision, cette Direction a accepté illégale l'investigation faite par un expert commandité par le tribunal fiscal et ordonné que l'investigation des livres et documents soit faite par l'administration.
À l›encontre de cette décision, la 9ème Direction a accepté que l›investigation soit faite par un expert. Décision de la 9ème Direction du Conseil d'Etat datée du 21.11.2013, ref. E: 2013/5070, K: 2013/10662. Suivant la contestation du tribunal fiscal dont le jugement a été réfuté ainsi par la 9eme Direction, la Commission Fiscale des Directions de Procès du Conseil d'Etat (Dan. VDDK) a ratifié la demande de contestation du tribunal fiscal avec sa décision du 17.06.2015 ref. E:2015/536, K:2015/317

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 27–42

DOI: 10.26650/annales.2017, *49*(66).0002

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Une Évaluation Actuelle Relative Aux Délits De Contrebande Fiscale- Problème Et Les Problématiques Lies Aux Délits Fiscaux Selon La Loi Pénale Turque Numéro 5327*

Prof. Dr. Mahmut Kaşıkçı[1]

Le Resume De L'article

Dans cet article, nous essayerons tout d'abord, de donner des informations générales relatives aux délits; par la suite, l'historique des délits fiscaux dans notre pays sera étudié; et dans les parties suivantes, nous discuterons des problèmes et problématiques que nous jugeons importants.

Cette étude sur les délits de contrebande fiscale et délits fiscaux; a été élaborée par une perspective et appréhension différentes en prenant en considération les problèmes et problématiques; tout en tenant compte de la jurisprudence et du systématique du droit pénal. Tous les problèmes rencontrés depuis 18 ans, après la mise en vigueur de l'Article 359 du Code de Procédure Fiscale (VUK) et nouvelles suggestions y sont exposés.

Et dans cette étude on a aussi envisage la reforme pénale et La Loi Penale Turque No : 5327.

Les Mots-Clé

Les Delits Fiscaux en Droit Turque • l'historique des délits fiscaux et la contrebande fiscale en Droit Turque • La Loi Pénale Turque No : 5237

* Pour une meilleure compréhension du lecteur francophone il est important de noter que dans le système legal (le Droit Penal) Turc il n'y a pas de distinction entre crime et delit comme ceci existe en France. En Droit Penal Turc le seul mot «suç» suffit de couvrir tous ces termes (crime et delit). Récemment le terme de « Kabahat » a été ajouté pour décrire tous les manquements mineurs aux lois en vigueur . Ces manquements sont souvent frappés d'une contravention financière donnée par l'administration.Par soucis de compréhension nous avons préféré le terme « délit » au terme crime pour traduire le terme « suç » et le terme « infraction administrative » pour le terme « kabahat ».

1 **Corresponding Author:** Mahmut Kaşıkçı (Prof.Dr.), Istanbul Universiy, Faculty of Law, Department of Public Law, Istanbul, Turkey. Email: mahmut.kasikci@istanbul.edu.tr

To Cite This Article: Kasikci, Mahmut: ''Une Évaluation Actuelle Relative Aux Délits De Contrebande Fiscale- Problème Et Les Problématiques Lies Aux Délits Fiscaux Selon La Loi Pénale Turque Numéro 5327'', *Annales de la Faculté de Droit d'Istanbul, 49*(66), 2017, p. 27-42. https://dx.doi.org/10.26650/annales.2017.49.66.0002

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Une Évaluation Actuelle Relative Aux Délits De Contrebande Fiscale- Problème Et Les Problématiques Lies Aux Délits Fiscaux Selon La Loi Pénale Turque Numéro 5327*

Prof. Dr. Mahmut Kaşıkçı[1]

Abstract

In this article, we will first try to give general information about crimes and tax crimes in Turkish law, in the following section we will examine the history of tax crimes and then discuss important issues and problems related to the issue.

Again, this study will be dealt with from a different point of view taking into consideration the judicial decisions regarding tax evasion crimes and the basic qualifications of Turkish Criminal Law. Specific proposals on the regulation that should be made by taking into consideration the problems encountered within the 18 years from the adoption of Article 359 of the Tax Procedure Code to tax evasion crimes will be brought up.

When all this is done, the system of the Turkish Penal Code numbered 5237 will be also taken into consideration.

Keywords

Tax Crimes in Turkish Law • History of Tax Crimes in Turkish Law • Tax Evasion • Tax Crimes Issues • Turkish Penal Code

Özet

Makalede öncelikle Türk Hukuku özelinde suçlara ilişkin genel bilgiler verilmeye çalışılacak, izleyen bölümde vergi suçlarının tarihçesi inceleme konusu yapılacak, sonrasında da konuya ilişkin önemli sorun ve sorunsallar ele alınacaktır.

Yine bu çalışmada Vergi kaçakçılığı suçları konuya ilişkin yargı kararları ve Türk Ceza Hukukunun temel nitelikleri dikkate alınarak farklı bir bakış açısıyla ele alınacak ve Vergi Usul Kanununun vergi kaçakçılığı suçlarını düzenleyen 359. maddesinin kabulünden günümüze kadar geçen 18 yıl içinde karşılaşılan sorunlar da dikkate alınarak olması gereken düzenleme ile ilgili özgün öneriler getirilecektir.

Tüm bunlar yapılırken 5237 Sayılı Türk Ceza Kanununun sistematiği de göz önünde bulundurulacaktır.

Anahtar Kelimeler

Türk Hukukunda Vergi Suçları • Türk Hukukunda Vergi Suçlarının Tarihçesi • Vergi Kaçakçılığı Suçları • Vergi Suçları Konusunda Karşılaşılan Sorun ve Sorunsallar • Olması Gereken yasal Düzenleme • 5237 Sayılı Türk Ceza Kanunu

* Pour une meilleure compréhension du lecteur francophone il est important de noter que dans le système legal (le Droit Penal) Turc il n'y a pas de distinction entre crime et delit comme ceci existe en France. En Droit Penal Turc le seul mot «suç» suffit de couvrir tous ces termes (crime et delit). Récemment le terme de « Kabahat » a été ajouté pour décrire tous les manquements mineurs aux lois en vigueur . Ces manquements sont souvent frappés d'une contravention financière donnée par l'administration.Par soucis de compréhension nous avons préféré le terme « délit » au terme crime pour traduire le terme « suç » et le terme « infraction administrative » pour le terme « kabahat ».

1 **Corresponding Author:** Mahmut Kaşıkçı (Prof. Dr.), Istanbul Universiy, Faculty of Law, Department of Public Law, Istanbul, Turkey. Email: mahmut.kasikci@istanbul.edu.tr

To Cite This Article: Kasikci, Mahmut: ''Une Évaluation Actuelle Relative Aux Délits De Contrebande Fiscale- Problème Et Les Problématiques Lies Aux Délits Fiscaux Selon La Loi Pénale Turque Numéro 5327'', *Annales de la Faculté de Droit d'Istanbul, 49*(66), 2017, p. 27-42. https://dx.doi.org/10.26650/annales.2017.49.66.0002

I) Information Générale Et Causes De La Difficulté D'investigation Des Délits De Contrebande Fiscale

Les notions de Délits économiques et fiscaux ont vu le jour suivant, spécialement, la révolution industrielle qui a engendré la complexité de la vie économique et l'accroissement des relations commerciales. Ce genre de délits ont ainsi formé une des domaines spéciaux de la Loi Pénale. La sanction pénale, appliquée auparavant seulement aux faits qualifiées de délit naturel, revêtait désormais, suivant le développement de la vie économique la forme d'une sanction visant l'action politique et les politiques économiques des États, devenant ainsi, un instrument de pression important sur l'exécution de ces mêmes politiques[2]. Spécialement durant le XXeme siècle, tous les États, quel que soit leur système de gouvernement, ont eu recours à des lois spéciales contenant des préceptes pénaux et visant le bon fonctionnement de la vie économique, en sus des Lois Pénales Générales.

Dans cette étude, pour ne pas dépasser son cadre prédéterminé, on n'insistera pas en détail sur les fondements légaux des « Autorité Fiscale et Droit à Pénaliser » de l'Etat. Il est tout de même important de rappeler le fait que l'Etat, dans cette relation, est la Partie fiscalisant, fixant les sanctions contre les irrégularités fiscales et finalement celui qui applique ces sanctions selon ses préférences de la politique criminelle. De l'autre côté de la relation fiscale, à l'exception de quelques cas, se trouvent incombées de devoirs fiscaux, des personnes physiques et morales qui sont auteurs des irrégularités[3].

Ces derniers forment le côté passif de la relation. En tant qu'accusées, selon le Principe d'Etat de Droit, dans la relation fiscale et lors de la procédure du jugement criminel, n'ayant que certains droits, elles ne jouent pas un rôle déterminant. De ce fait, il est inévitable que les États, de nos jours, dans le processus de fiscalisation, la détermination des irrégularités fiscales et l'application des sanctions relatives, doivent se comporter selon les Principes d'Etat de Droit[4], dont les qualités de base ont été fixées dans la Constitution. L'Etat, malgré le fait d'être le côté dominant dans la relation, doit, à tout moment veiller, à un équilibre entre ses intérêts économiques et politiques et les droits et libertés des individus. Le fait de choisir proprement une sanction adéquate fait également partie des nécessités de cet équilibre très sensible.

En plus de cela, on rencontre certaines difficultés de base dans l'examen des délits de contrebande fiscale. Les chercheurs rencontrent deux difficultés de base dans leur

2 **ERMAN Sahir** Delits Fiscaux Loi Commerciale Pénale IV, Istanbul,1988, p 1, **KAŞIKÇI, Mahmut** Delits de Contrebande Fiscale dans La Loi Turque, Ethemler, Istanbul, 2007, p 184

3 **KAŞIKÇI**, Delis de, p 184; ŞENYÜZ, **Doğan**, Droit Pénal Fiscal, Manquements et Délits Fiscaux, Ekin, Bursa, edit. 2015, p 359; **TAŞDELEN, Aziz** Manquement Fiscaux selon le Code de Procédure Fiscale, Turhan, Ankara, 2010, p. 23.

4 Selon l'Article 2 de la Constitution, l'Etat de Droit est celui dont, les actes et les procédures sont selon le Droit, se basant sur les droits de l'homme, développant et protégeant ces droits et libertés, établissant et améliorant dans tous les domaines un ordre équitable de Droit, évitant des situations et comportements anticonstitutionnels, se considérant lié par les règles suprêmes de la Loi, ouverts au contrôle judiciaire. Les décisions de la Cour Constitutionnelle E.2017/47, K.2017/84 datée du 29.03.2017; E.2016/130, K.2016/197 et datée du 28.12.2016 http://http:// kararlar.yeni. anayasa.gov. tr.

examen sur les délits de contrebande fiscale. La première relève du fait que l'action qui engendre la taxe, à cause de sa dimension financière, devient assujettie à la fois à la Science des Finances mais aussi au Droit Pénal. À cause de ce fait, l'examen de cette question rencontre une difficulté importante. Quant à la deuxième difficulté de base, c'est la rareté des ressources scientifiques pouvant guider les chercheurs. Malgré l'existence de plusieurs études traitant les sujets et problèmes dans le cadre du Droit Fiscal et du Droit Pénal, à part un nombre limité d'œuvres, il est difficile de trouver des études scientifiques dans le domaine du « Droit Fiscal Pénal ». Comme indiquent aussi les juristes criminalistes intéressés par le sujet, un autre facteur rendant encore plus difficile les recherches, est le fait que les chercheurs dans ce domaine ne sont pas des juristes criminalistes[5]. Cette difficulté perdure de nos jours.

Même si ce n'est que d'importance secondaire, une autre difficulté valant d'être mentionnée, est la tendance à changer fréquemment les sentences criminelles dans les lois fiscales. À cause de ces changements fréquents, les recherches dans ce domaine perdent naturellement leur actualité. Ainsi, les changements intervenus dans la Loi 4369 datée du 22.07.1998 et dans le système de fraude et sanction prévus dans le Code de Procédure Fiscale (VUK); et le chamboulement total de la définition des actes nécessitant des sanctions monétaires administratives et les décrets pénaux, sont le dernier exemple de cette difficulté[6].

La Loi numéro 4369, lancée comme une réforme fiscale par le Ministère des Finances, contient, selon notre considération, plusieurs lacunes, incertitudes et mal fonctionnements spécialement quant aux amendes administratives sanctionnant les irrégularités fiscales et les délits de contrebande fiscale. Dans les systèmes de droit modernes, ce genre de changements fondamentaux se fait après une longue période de préparation durant laquelle des recherches sérieuses sur le sujet sont menées, la proposition et la discussion avec l'opinion publique finalisées et les avis des scientifiques obtenus. Il ne nous est pas possible d'affirmer que ce genre de recherches détaillées ont été menés pour les changements apportés par la Loi 4369. Malgré le fait qu'on a essayé d'effectuer des changements dans le système fiscal Turc, pendant la préparation du texte de la Loi, les propositions de changements dans toutes leurs dimensions n'ont pas été ouvertes à la discussion de l'opinion publique assez longtemps, et le point de vue des scientifiques n'à pas été obtenu[7]. Les dispositions qui sont en vigueur de nos jours, à part certaines relatives aux sanctions, sont la suite du système apporté par la Loi numéro 4369.

5 **TOSUN Öztekin**, Delit Fiscal Frauduleux, Istanbul 1962, p. 1.

6 Date et publication au Journal Officiel 29.07.1998; registre 23417 (1) J.O.

7 Dans « La Motivation Générale » de la Loi numéro 4369, on mentionne qu'avec cette Loi 1/20eme des dispositions présentes dans toutes les lois fiscales ont été modifiées. (Voir Réforme Fiscale (Ancienne Loi/Nouvelle Loi/Motivation), Direction Générale des Revenus auprès du Ministère des Finances, Ankara 1998)

II) Développement historique

Dans notre Droit, pendant les premières années de la République, on s'est contenté de mettre de l'ordre dans les taxes héritées de l'Empire Ottoman et de majorer les sanctions; après 1926, on a essayé de liquider le système hérité et de mettre sur pied un système fiscal contemporain et finalement avec la Loi numéro 5432, on a réussi à réunir diverses taxes dans une seule Loi ayant des Principes, Institutions et dispositions relatives aux sanctions[8]. Cependant ni dans les dispositions de sanctions dispersées dans diverses lois fiscales avant la Loi numéro 5432, ni dans la forme initiale du Code de Procédure Fiscale datée du 07.06.1949 en vigueur avant la Loi numéro 213, on n'a jamais mentionné de Délit Fiscal digne de ce nom. Durant toute cette période, ont été arrangées, seulement, les irrégularités engendrant les amendes administratives. Dans le Droit Fiscal Turc, le terme de Fraude a été cité pour la première fois, même si c'était parmi les délits sanctionnés d'amendes administratives, dans l'article 324 du Code de Procédure Fiscale numéro 5324.

La disposition en bonne et dûe forme du délit de fraude fiscale n'a pu être finalisée que par le changement effectué, par la loi numéro 5815 du 18.07.1951, dans la Loi numéro 5432[9]. Avec ce changement, on a prévu pour la première fois, dans notre système légal, des sanctions engageant la liberté (d'emprisonnement) contre des irrégularités liées à l'imposition et les actions qui seront jugées dans les tribunaux pénaux, ont été qualifiées de « délit de fraude fiscale ».

Le Code de Procédure Fiscale numéro 5432 a été supprimé le 04.01.1961 par le Code de Procédure Fiscale numéro 213[10]. Même si son système de sanction a été modifié plusieurs fois, le Code de Procédure Fiscale numéro 213 reste en vigueur de nos jours. Des actions constituant un délit réel jugeable dans les tribunaux pénaux, déjà qualifiées de délit de fraude fiscale avant même ce Code de Procédure Fiscale modifié par la Loi numéro 2365 du 30.12.1980 et ont été structurées sous l'article 357[11]. Le terme de Délit de Contrebande Fiscale a été introduit dans le Droit Turc comme un vrai délit, par la Loi 2365 modifiant la Loi 213. Par ce changement « Le délit de fraude fiscale» a été organisé comme « délit de contrebande fiscale » dans l'article 344.

Après que le Code de Procédure Fiscale a été modifié par la Loi numéro 4369, ce Délit est aujourd'hui détaillé dans l'article 359 se trouvant dans la troisième partie du deuxième chapitre du « Quatrième Livre » intitulé Les Dispositions Pénales du Code de Procédure Fiscale. Les actions définies par le légiférant sous cet article portant l'intitulé de « Délits et sanctions de Contrebande » couvre, de nos jours, le terme de délit de contrebande fiscale.

8 Date de divulgation et publication dans le Journal Officiel : 15.06.1949 JO numéro 7233

9 Date de divulgation et publication dans le Journal Officiel : 24.07.1951 JO numéro 7866

10 Date de divulgation et publication dans le Journal Officiel : 10.01.1961, 11.01.1961 et 12.01.1961; numéros de JO 10703,10704 et 10705

11 Date de divulgation et publication dans le Journal Officiel : 31.12.1980; numéro de JO 17207

III) Problème de Terminologie et Propositions Systémiques

Comme il a été cité plus haut, l'Article 359 du Code de Procédure Fiscale couvrant les dispositions légales, s'intitule « délits et sanction de contrebande fiscale «. Lors de nos études, nous avons observé que dans la doctrine il n'y avait pas d'harmonie, ni d'opinion commune quant aux nombres et à la qualification des délits. Il en va de même pour celle qui montre le nombre de délits disposés dans l'article comme 13. La cause principale de cette confusion vient du fait que plusieurs actions formant l'élément financier du délit et nécessitant d'être considérées sous le même type de délit, sont éparpillées sans aucune systématique dans plusieurs paragraphes de l'article de loi.

Afin de pouvoir résoudre ces problèmes de terminologie et ainsi régler les problèmes systémiques , il faudrait, préalablement, examiner les délits de contrebande dans notre Législation et par la suite, avec l'aide des notions, trouver les termes justes et la méthode systémique adéquate.

1) Délits de Contrebande dans notre Législation

La question que nous voulons souligner par le problème de terminologie, consisterait à se demander quel terme devrait être utilisé pour les irrégularités (manquements) selon le Régime Fiscal et les actions énumérées dans l'article 359 modifié par la Loi 4369 du Code de Procédure Fiscale.

L'importance de ce problème consiste à assurer une unité terminologique entre notre Législation et la Procédure d'application.

La tendance générale du système de Droit Turc, en dehors de La Loi Pénale Turque, est que les types de Délits disposés, dans des Lois économiques spéciales s'identifient à l'intitulé de ces mêmes Lois. Comme un exemple, on pourrait dire que les délits disposés dans la Loi Bancaire numéro 5411 sont appelés des délits bancaires et ceux disposés dans la Loi du Marché des Capitaux sont appelés des délits de marché des capitaux. La même situation se trouve partiellement dans le Code de Procédure Fiscale 213 qui qualifie de « délits fiscaux « , les actions frappées de sanctions engageant la liberté (emprisonnement?). En fait et comme ce sera expliqué en détail plus loin, par ce terme on n'entend pas une irrégularité fiscale frappée d'une amende administrative mais un vrai délit nécessitant une sanction engageant la liberté (d'emprisonnement ?).

Les autres délits que nous examinons dans la présente étude, avec les « délits de Contrebande Fiscale « du Code de Procédure Fiscale, sont ceux disposés sous l'Article 362 « délit de violation du secret fiscal » et ceux disposés sous l'Article 363 « délit de suivi des affaires personnelles du contribuable.

Dans notre Législation les actions constituant la Contrebande selon le Droit Pénal, sont définies dans plusieurs Lois dont principalement dans la Loi de Lutte

contre la Contrebande numéro 5607. Sous l'article 3 nommé « Délits et Infraction Administrative» de la 2eme partie intitulée « Actions de Contrebande » de cette même Loi, sont énumérées les actions constituant l›élément matériel. S›il faut résumer ces actions sont, l›importation ou exportation, le transport d›un endroit à l›autre sur le territoire national, la vente ou l'entreposage de certaines marchandises ou produits sans compléter la Procédure administrative selon Le Régime des Douanes et de certaines marchandise ou produits sous monopole étatique. Ce sont les seules actions qui sont réellement considérées comme Contrebande dans notre Législation.

On appelle des délits de contrebande spéciaux dans certaines Lois spéciales qui utilisent Le terme de « Contrebande « dans notre Législation. Comme exemple nous pouvons citer : dans le cadre de la Loi 6136 sur Les Armes à Feu, Armes Blanches et Autres Instruments, importation illégale des instruments (sauf certains qui requièrent un permis) qualifiés d'arme est sanctionnée par l'article 12 et les actions contre elle sont qualifiées de contrebande; selon l'article 3 de la Loi Des Produits Pharmaceutiques et Médicaux numéro 1262, l'importation de certains produits médicaux et chimiques fabriqués à l'étranger sont assujettis à un permis du Ministère de la Santé et selon son article 19, paragraphe 2, le fait d'importer ces produits sans autorisation dans un but commercial sur le territoire national est considéré comme « Contrebande », finalement l'article 79 de la nouvelle Loi Pénale Turque numéro 5327, sanctionne le délit de « Contrebande d'émigrants ». Encore l'article 79 de la Loi Pénale Turque dispose le délit de « Contrebande d'émigrants ».

La situation dans notre Législation et ses applications étant comme cité plus haut, on rencontre le terme de Contrebande aussi dans l'Article 359 du Code de Procédure Fiscale modifié par la Loi numéro 4369; et les délits qui y sont disposés sont appelés des délits de contrebande fiscale.

Si l'on fait attention, le dénominateur commun des actions constituant la contrebande, exposées dans le paragraphe précédent, est le fait de faire entrer ou sortir du territoire national sans autorisation ou de façon illégale certaines marchandises dont l'importation ou l'exportation sont assujetties à une autorisation ou bien des marchandises sous monopole Etatique. Autrement dit, la caractéristique commune des réglementations des actions dont les exemples sont cités ci-dessus, est l'entrée ou la sortie de certaines marchandises du territoire national de façon illégale.

Il est évident que, comme aucun des délits cités dans l'Article 359 du Code de Procédure Fiscale ne comporte cette caractéristique; il est erroné d'utiliser le terme de Contrebande pour ceux-ci.

2) Problème de Terminologie

De nos jours ces délits sont appelés par certains, délits de contrebande, par d'autres, délits de fraude fiscale; et finalement d'autres les qualifient de délits fiscaux. Tenant compte de notre jurisprudence et du sens propre du mot « Contrebande » c'est une erreur de qualifier ces délits de délits de contrebande. Qui plus est, le terme de fraude ne suffit pas à décrire ces délits. En effet, la fraude étant une des caractéristiques commune à la plupart de ces délits, voire même leur principe, il est loin de satisfaire la description de ces délits.

Le « Fugitif/Contrebandier » est, selon le sens propre du mot, quelqu'un qui s'enfuit ou qui a été enlevé d'une fonction, d'une condamnation ou d'une mission; ou une marchandise qui est entrée dans le territoire national en infraction au régime douanier[12]. Dans notre langue, le mot contrebandier, dérivé du mot contrebande, décrit une personne faisant entrer ou sortir des marchandises de façon illégale sur le territoire national et non pas une personne qui fuit une mission ou une condamnation. Quant au sens propre du mot « contrebande», c'est l'action de faire entrer sur le territoire national ou d'en faire sortir des marchandises contre la réglementation en vigueur et en faire le commerce illégal[13]. Conséquemment, il est indéniable que le sens propre du mot ne correspond pas non plus aux délits décrits dans l'Article 359 du Code de Procédure Fiscale.

Il n'est pas possible non plus d'affirmer que le terme a été utilisé en se basant sur une perte d'impôt. En effet, par rapport aux actions décrites par l'Article 359, la perte d'impôt n'a pas été requise comme une condition.

Dans les langues occidentales comme le Français « Fraude », l'Anglais « Fraud », l'Italien « Frode » [14]prenant racine du mot Latin Fraus (synonyme de Dolus), on trouve des mots utilisés dans le langage courant pour décrire la fraude [15]. Dans les législations respectives de ces pays, ce terme ne décrit pas la Contrebande mais la Fraude.

Le mot « hile » (Fraude) dans notre langue est d'origine arabe dont le sens propre est « moyen et précaution » . En effet, dans le Droit Islamique, Le terme de « hileişer" est également utilisé dans le même sens[16]. Fraude est décrit comme tout intrigue,

12 http://.tdk.gov.tr

13 http://.tdk.gov.tr

14 **SARAÇ Tahsin**, Grand Dictionnaire Français-Turc; Paul Robert, Dictionnaire Alphabetique et Analogique de la Langue Française

15 **BERGER Adolf**, Encyclopedic Dictionary of Roman Law, Philadelphia 1953, p.477.
"...Dolus" en Latin décrit la fraude dans les affaires de droit. Il décrit le fait de tirer profit en trompant quelqu'un en créant une fausse conviction dans son esprit et poussant une personne à faire une transaction qu'il n'aurait pas faite s'il avait su la vérité. Par conséquent, en Latin, tous ruses, artifices, intrigues et irrégularités utilisées pour tromper, induire en erreur et prendre quelqu'un à l'improviste, sont « dolus ». Le mot « Fraus » porte la même signification décrivant tous les faits visant à tromper autrui et l'intention de circonvenir. Les termes de « Fraus Legi Facta et In Fraudem Legis » expriment le fraude vis à vis de la Loi. (**UMUR Ziya**, Roma Hukuku Lügatı, İstanbul 1983, p.279
Quant à HONIG, il a défini que ces termes signifient en Latin tous les faits illégaux et injustes visant à encourager et persuader quelqu'un à commettre une action (**HONIG Richard**, Droit Romain, Traduit par Semsettin Talip, Istanbul 1938, p.280

16 **YÜCEL N.Necmi**, Tatbikatta Vergi Cezaları (Les amendes fiscales dans la pratique)

combine et manigance commis pour tromper, induire quelqu'un en erreur[17] [18]. Dans cette signification, toutes sortes d'altération de vérité et mensonges abstraites, sont des fraudes et il est important que la fraude ait engendré une sanction[19]. Si on ne considère que cette caractéristique, la fraude étant seulement un mensonge abstrait, il est préférable de la considérer comme une cause du délit au lieu de délit lui même. Si on tient compte de ces explications sur le terme Fraude, nous arrivons à la conclusion qu'il est plus juste par rapport au terme de Contrebande concernant les délits que nous étudions mais il est toujours difficile de l'utiliser dans le sens des faits disposés dans l'Article 359.

Un autre terme que nous devons considérer est celui de l'évasion fiscale. Il est accepté de façon unanime par des chercheurs des sciences traitant de ce sujet que l'évasion fiscale a un sens beaucoup plus large comparé aux faits sujets aux délits de fraude ou contrebande fiscaux.

La Notion d'évasion fiscale n'a pas été définie dans la Législation Fiscale Turque[20]. Elle porte des significations différentes dans la doctrine. Alors que selon une opinion l'évasion est définie comme l'effort légal déployé pour rester en dehors de l'obligation fiscale sans causer de faits qui engendrent l'impôt[21], la doctrine accepte également la description selon laquelle l'évasion, sans être illégal vis à vis de la Loi, pourrait être, de façon indirecte, considérée irrégulière vis à vis du droit[22]. Ce terme d'évasion fiscale, avec ces 2 significations, reste insuffisante à cause du fait qu'il a une portée plus large que les types de faits considérés comme les délits en question.

Sous la lumière de ces explications et selon notre opinion, il n'est, non seulement, pas juste d'utiliser le terme de contrebande pour le type de délit étudié par la présente, mais on ne peut pas non plus considérer le terme « fraude » comme entièrement juste, même si toutes les actions disposés dans cet Article sont des actions visant à tromper l'Administration Fiscale et des agissements frauduleux dont le but est de duper, due à sa signification qui dépasse le champ[23].

3) Aménagement nécessaire/Suggestions systématiques

Suivant les explications précédentes et l'existence de plusieurs faits dans l'essence

17 http://tdk.gov.tr

18 La Fraude dans le Droit Fiscal regroupe les actions, qui ne peuvent pas être considérées de bonne foi, auxquelles les contribuables ont recours pour réduire leur dette fiscale ou payer moins d'impôts. **KAŞIKÇI** age, p.7 et suite

19 Voir **ERMAN**, Sahtekarlik Suçları (délits de falsification) Istanbul 1987, p.1; ÖNDER, Şahıslara Karşı Cürümler (Délits contre les Personnes) p.368 et suite

20 Voir pour plus de détails: **MEHL Lucien**, Science et Technique Fiscales, Tome II, Collection « Thémis », p.733; **MARGAIRAZ André**, La Fraude Fiscale et ses Succédanés, Lausanne 1973, p.28-29; **ROSIER Camille**, L'impot, Paris 1936, p.152 st; **DI MALTA Pierre**, Droit Fiscal Penal-Fiscalité, Paris 1992, p.182 st.

21 **AKDOGAN Abdurrahman**, Kamu Maliyesi (Finances Publiques), Gazi, Ankara 2005, p.164

22 **YALTI, Billur**, « Prévention de l'évasion fiscale dans les Conventions Fiscales ; Jurisprudence Turque pour l'Exemple de l'Echange de Conventions » Vergiden Kaçınmanın Önlenmesi (Prévention de l'Evasion Fiscale), Bêta, Istanbul, 2014, p.456-481

23 **ERMAN**, à son tour mentionne qu'il serait adéquat d'utiliser les deux termes ensemble et pour isoler ce délit d'autres délits nécessitant une amende administrative, de l'intituler « délit de contrebande frauduleuse ».

même de ce type de délit, nous sommes de l'opinion que dans un souci terminologique, il est nécessaire d'intituler différemment chaque fait.

Meme si notre opinion est ainsi formulée, dans un souci d'unité de termes et pour ne pas créer une confusion terminologique, nous allons continuer à les intituler « délits de contrebande fiscale » tout en se forçant de les étudier séparément selon leurs caractéristiques.

Si nous considérons le systématique de l'Article, nous constatons que plusieurs types de délits y sont disposés. Malgré ce fait, une bonne partie des délits de cet Article constituent des délits de Falsification selon le Code Pénal.

Le sujet qui attire l'attention est le fait que les délits de contrefaçon, sans que cette caractéristique soit prise en compte ou omise, sont frappés de sanctions différentes dans différents paragraphes.

Le délit de contrefaçon pourrait être étudié sous deux formes, la contrefaçon matérielle et la contrefaçon intellectuelle. La contrefaçon matérielle est le fait de créer un faux document. Vis à vis des délits fiscaux, le délit d'imprimer des faux documents pourrait constituer un exemple. Quant à la contrefaçon ou falsification intellectuelle, elle se matérialise en falsifiant le contenu d'un document créé légalement[24].

Quand on considère ces caractéristiques résumées plus haut, les délits de contrefaçon sont éparpillés dans l'Article 359 du Code de Procédure Fiscale en suivant une fausse méthodologie d'énumération: « réaliser des astuces de comptabilité et de calculs dans les documents et livres (art.359/p-1), ouvrir des comptes pour des personnes fausses ou qui n'ont aucune relation avec les transactions concernées (art 359/p-1), falsifier les livres, registres et documents, établir des documents dont le contenu est trompeur ou bien utiliser ce genre de documents (art.359/p-2), détruire les livres, registres et documents enregistrés, établis et archivés selon les lois fiscales, détruire certains pages des livres en les remplaçant par d'autres pages ou bien ne pas mettre de nouvelles pages, ou bien établir les originaux et copies des documents entièrement ou partiellement de façon frauduleusement, ou bien utiliser ces documents (art.359/b), imprimer des documents, sans avoir un contrat avec le Ministère qui ne peuvent être imprimés que par des personnes ayant un contrat avec le Ministère des Finances

24 Les faits de contrefaçons sur documents officiels, qui ne peuvent être commis que par des fonctionnaires publics, sont séparés en deux types : contrefaçon matérielle et contrefaçon intellectuelle. La contrefaçon matérielle est relative au physique du document tandis que la contrefaçon intellectuelle est liée au fond et contenu du texte du document.
Les contrefaçons matérielles sont celles qui changent l'aspect extérieur du document. Dans ces cas là les falsifications, changements et destruction sont visibles et peuvent être prouvés par des moyens physique, chimique, voire en cas de falsification grâce à la graphologie. Quant à la contrefaçon intellectuelle, le document contrefait, dans sa forme physique externe ne présente aucune différence illégale par rapport à l'original. Le côté contrefait et considéré non original du document est son fond et son contenu. L'auteur a établi un document qui a une forme légitime mais un contenu contrefait. Pour ce genre de contrefaçon, il n'y a pas de document pré-établi. L'auteur étant déjà habilité et autorisé à établir ce document spécifique, respecte toutes les règles et procédures de forme mais change le fond de son contenu. Il transcrit illégalement, par exemple, dans ce document des paroles et des événements qui n'ont pas été dits ou ne se sont pas déroulés en sa présence comme s'il les avait entendus ou vus. Cour Suprême CD numéro 21 E.2015/3529, K.2015/5676 http://http://emsal.yargitay.gov.tr.

selon les dispositions du Code de Procédure Fiscale ou bien les utiliser consciemment (art.359/c), sont indéniablement des faits réels de contrefaçon.

Tous ceux-ci sont qualifiés de contrefaçon aux yeux du Code Pénal. Le genre de faits comme, établir des documents dont le contenu est trompeur, réaliser des astuces de calcul et comptables dans les livres et documents, ouvrir des comptes au nom de personnes fausses ou qui n'ont pas de relation directe avec la transaction, sont tous des faits de contrefaçon intellectuelle.

Quant aux faits comme, dénaturer les documents, arracher les pages, ou les arracher et les remplacer, établir un document contrefait ou imprimer un document qui ne peut être imprimé que par des personnes habilitées à le faire, sont considérés des contrefaçons matérielles.

Qui plus est, falsifier les livres, registres et documents, détruire les livres, registres et documents qui sont tenus, archivés et présentés à la demande obligatoirement par la Loi fiscale , en remplaçant certains pages des livres après avoir détruit les originaux ou ne simplement pas les remplacer ou contrefaire en partie ou partiellement l'original et la copie des documents sont des faits considérés également comme contrefaçon matérielle.

L'utilisation de ce genre de documents est également considérée comme une contrefaçon par la technique de Droit Pénal et il est possible de faire un arrangement avec des délits de contrebande fiscale en tenant compte du systématique des Articles 207 et 208 du Code Pénal Turc. Ce à quoi nous devons faire attention ici, est le fait de considérer comme un délit les faits d'imprimer ou d'établir des documents contrefaits sans qu'il y en ait eu une utilisation, ou bien considérer comme délit, l'utilisation de documents contrefaits sans les avoir illégalement établis ou imprimés. Le Code de Procédure Fiscale prévoit des dispositions dans ce sens mais comme nous l'avions dit plus haut elles sont complexes et manquent totalement de systématique.

Dans notre opinion, il faudrait réorganiser tous les faits engendrant une contrefaçon matérielle ou bien intellectuelle sous le même paragraphe ou alinéa. Au lieu de suivre une méthode d'énumération qui pourrait créer une complexité non nécessaire, et d'imposer des sanctions différentes aux faits ayant les mêmes caractéristiques et contrevenant les mêmes droits, nous devrions définir une gamme de sanction et confier au Juge le pouvoir d'appréciation selon la gravité de l'infraction.

Cette réorganisation systématique devient encore plus urgente quant on considère les caractéristiques très complexes entre les faits d'imprimer illégalement des documents et établir un document contrefait ; la confusion engendrée par la mention « imprimer partiellement ou totalement », le fait qu'établir partiellement un document contrefait pourrait être considéré comme une contrefaçon intellectuelle.

Si l'Article est ainsi réorganisé, les faits constituant une contrefaçon intellectuelle ne seront considérés comme un délit que s'ils sont réalisés simultanément avec l'utilisation. Selon les dispositions actuellement en vigueur, le fait est considéré comme un délit sans chercher cette caractéristique très importante des délits de contrefaçon. Sans que l'Article soit modifié et/ou la perte d'impôt n'est par recherchée comme motif de délit, ce que nous devrions avoir est que tant qu'il n'a pas eu l'utilisation, ce genre de fait constituant la contrefaçon intellectuelle, devrait être considéré dans le cadre de la notion de contrefaçon superflue ou bien en partant du motif d'intention et considérant le manque de motif moral , ils ne seraient pas passibles de sanctions.

Il est ainsi indéniable que la situation est très inconvénient et pourrait engendrer des résultats injustes et sérieux.

Comme on pourrait remarquer, modifier l'Article de cette façon, réduirait le nombre de type de délits à deux.

Le premier de ces deux délits serait d'enregistrer partiellement ou totalement les calculs et les transactions dans d'autres livre, registre ou autres supports que ceux tenus, gardés et archivés selon les dispositions des lois fiscales, dans le but de réduire le montant imposable (delit intitulé également Tenue de double livre). Le second est le délit de dissimulation des livres, registres et documents.

Éviter la présentation des documents au contrôle, c›est à dire le fait de les dissimuler, constituant ainsi une violation du droit au silence, serait, à notre avis contraire à la Constitution du 1982 et à la Convention Européenne des Droits de l'Homme. Quant à notre Cour Constitutionnelle avec des justifications erronées[25], a décidé que ce fait ne viole pas les dispositions le décrivant comme un délit [26].

En résumée, les modifications nécessaires pour juguler les méfaits des dispositions complexes et injustes, sont, à notre avis les suivants: rassembler dans un seul paragraphe sous l'appelation « contrefaçon » avec les définition et caractéristique de base que nous avons donnés plus haut, au lieu d'énumérer les délits pouvant être considérés comme « contrefaçon »; enlever le délit de dissimulation des documents parmi les délits, considérer dans un autre Article le delit dénommé tenue de double livre.

Nous, les experts du sujet, qui, à chaque fois, cherchons dans cet article pour trouver où le fait et la sanction sont disposés, réfléchissons sur les moyens d'en finir avec cet Article complexe et inconvenant qui révèle des situations et applications incompréhensibles, donne des résultats injustes.

25 La décision du Tribunal Constitutionnelle du 31.01.2007 sous ref. E.2004/31, K.2007/11 http://anayasa.gov.tr

26 Pour une étude détaillée sur le sujet Voir **SENYUZ Dogan**, Sismanoglu Hakkı Karşısında Vergi Usul Kanunundaki Defter ve Belgeleri Gizleme (Kaçakçılık) Suçu (Delit (contrebande) de Dissimulation des Livres et documents selon le Code de Procédure Fiscale contre le Droit au Silence), Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi fasicule:15 numéro 1,2013, p.29-40

IV) Les Autres Sujets À Étudier, Problèmes Et Problématiques

Parmi ces problèmes principaux, nous pouvons citer l'incohérence engendrée par la Loi et/ou la Procédure au niveau de l'investigation administrative des délits de contrebande fiscale. L'Importance de ce problème se trouve dans des preuves qui peuvent être considérées illégales par la La Loi même, rendant ainsi difficile le fait de prouver un délit.

Dans l'exemple de certaines décision du Conseil d'Etat[27] qui considèrent conforme au Droit même si l'Administration a failli à son obligation d'investigation dans les locaux malgré la présence, selon les dispositions de l'Article 139 du Code de Procédure Fiscale, de consentement des requis pour une investigation dans les locaux de leur société et la disponibilité des locaux, on remarque que le point où nous sommes est très préoccupant. Même si nous pouvons considérer comme une bonne avancée pour le droits des requis, les dispositions fixant la durée des investigations, on remarque encore une fois que, les règlementations publiées par l'Administration en Décembre 2010, ont apporté des règles et application allant à l'encontre de l'objet et l'esprit de la loi[28]. Dans le même esprit, le fait que les modifications faites dans l'article 140 du Code de Procédure Fiscale, contenant des normes de protection procédurale pour les requis, a choisi comme la durée (date limite de finalisation des investigations) non pas la date de la notification officielle de la sanction fiscale mais date à la quelle le rapport des experts a été délivrée au comité d'investigation, forme également une autre incohérence et problématique.

Qui plus est, les inégalités entre, les dispositions de l'Article 367 du Code de Procédure Fiscale, qui régit le Comité d'enquête, et l'application réelle, serait un autre sujet de discussion. Le sujet a été porté auprès de la Cour Constitutionnelle, d'abord en 1992 et puis en 2008 suivant la fin du principe de l'interdiction décennale de proposition identique. Or La Cour Constitutionnelle a rejeté les deux demandes d'annulation[29]. La première a été rejetée selon le dernier paragraphe de l'article provisoire numéro 15 de la Constitution sans même juger le fond de la demande; quant à la deuxième, le rejet a été basée sur le fait que les conditions de la demande n'allaient pas à l'encontre des dispositions mentionnées sous les articles 2,10,11 et 138 de la Constitution.

27 Decision du Conseil d'Etat du 29.04.2010 ref. E.2009/5837, K.2010/2349. Jurisprudence de Kazancı

28 Voir le JO du 31.12.2010 numéro 27802 avec l'Intitule « les 4 Réglementations sur l'Investigation Fiscale » spécialement celle intitulée « Règlementation sur les Principes et Procédures à respecter dans les Investigations Fiscales »

29 Voir les décisions de la Cour Constitutionnelle du 17.03.1992 ref. E:1992/21, K:1992/19 (AMKD fascicule 27 année 93 p.221 suite) et celle datée du 10.02.2011 ref. E:2009/89, K: 2011/40. Dans la première la demande a été rejetée en se basant sur les dispositions du dernier paragraphe de l'article provisoire numéro 15 (qui a été abrogé par l'article 34 de la Loi 4709 datée du 03.10.2001) sans même être juger sur le fond: « ... la deuxième demande, qui a été formulée après l'abrogation du dernier paragraphe de l'article provisoire qui prévoyait que jusqu'au l'établissement du Conseil de Présidence après les élections législatives pour le Parlement Turc, les décisions du Conseil de Sécurité National (MGK), formé le 12.Septembre.1980, conféré des pouvoirs législatifs et exécutifs au nom du Peuple Turc, celles prises par les gouvernements formés pendant l'éxistance de MGK, les Lois passées par le Conseil Consultatif formé dans le cadre de la Loi 2485, les décret-lois légiférés et toutes les décisions et dispositions prises selon La Loi 2324 sur l'Ordre Constitutionnel ne seront pas juger de leur inconstitutionnalité, a été refusée par les prétextes que les conditions de la demande ne portent pas d'atteinte au principe d'égalité, ni ne revêtent un caractère d'ingérence au pouvoir judiciaire et ne vont pas à l'encontre des principe d'_obligatoiriété et de supériorité.

Le fait que l'Administration opte pour des applications incohérentes concernant des cas semblables voire similaires, (faire une requête dans une demande et pas dans l'autre), pourrait créer des discussions sérieuses sur le caractère inconstitutionnel de la clause. Des dispositions similaires existent également dans d'autres Lois comme la Loi Bancaire, Loi des Marchés de Capitaux. Dans notre opinion, il faudrait régler les problèmes relatifs à l'application de cette disposition même si elle ne va pas à l'encontre des règlements constitutionnels. Ceux-ci ne pourrait se faire que par l'activation des conditions et principes liés à la sous-culture, l'administration légale et transactions objectives.

Ce que nous pouvons affirmer ici concernant cette condition de jugement que tant qu'il n'y a pas de requête , il est impossible d'entamer une investigation ni de poursuite, et que si au moment de l'investigation, la condition de réquete n'est pas réalisée, il faudrait prévenir les unités concernées et la suspendre; lors de la poursuite, selon les dispositions du 8eme paragraphe de l'article 223 de la Loi de Jugement Pénal 5271, dans les cas où la condition de jugement pénal n'est pas encore présente, il faudrait prendre la « décision suspensive » et voire la « décision de débouter » s'il est sur que la condition ne sera jamais réalisée[30].

En plus de ceci, dans le cas où l'avis d'experts est requis, la requête devrait être adéquate à l'avis d'expert [31], et [32]que la requête d'avis soit formulée a une personne physique et qu'elle soit formulée par des personnes habilitées dans le cadre de l'article 367 du Code de Procédure Fiscale; et si la requête a été formulée par des personnes non autorisée[33], il faudrait tenir compte du risque de ne pas compléter les conditions préalables de poursuite.

30 Ministère public constatant qu'un délit de contrebande a été commis doit informér immédiatement le Bureau des Impôts concerné et requiert une investigation. Il retarde le procès public jusqu'à l'obtention du résultat de l'investigation. C.G.K décision réf E:1988/6394 K:1989/1042 du 23.02.1989.
« étant donné qu'on prétend que l'accusé aurait commis le délit de contrebande (fraude) fiscale, la décision de suspendre devrait être prise pour entamer le processus requis selon le Code de Procédure Fiscale... » (Yar 9. CD. decision ref E:1980/939, K: 1980/1107 du 31.03.1980; (YKD fascicule VI numéro 8, Août 1980 p.1180); Yar.9.CD Décision ref E:1982/105, K:1982/1408 du 15.01.1982; Yar CD Decision ref E:1990/3441, K: 1990/3635 du 05.11.1990

31 « Procès civil pour utilisation de fausse facture a été entamé contre l›accusé selon le Rapport de Délit de Contrebande; il a été compris, de l›avis d›expert de la Direction Régionale des Revenus faisant partie des conditions du procès, que le délit était l›établissement de fausse facture, par conséquent, selon l›article 367 de la Loi 213, continuer le procès pour le délit décrit dans l›acte d›accusation et prononcer un jugement sans avoir au préalable obtenu l›avis d›expert des Impôts (Defterdarlık) ou bien de la Direction Regionle des Revenus, devrait causer le débout du procès. Yar.11 decision Ref E:2004/4181, K:2005/4108 du 29.06.2005 Programme de Jurisprudence de Kazancı.

32 « …il est erroné de continuer le procès et de prendre une décision contre une société dont l›avis d›expert donné, a été invalidé à cause du fait que la Société n›a pas de responsabilité pénale selon l›article 367 de la Loi 213, et que l›avis aurait dû être donné pour les personnes responsables selon le principe d›individualité pénale; et qui plus est, cet avis aurait dû être demandé, au du responsable de la société donc l'accusé au près des Impôts (Defterdarlık) ou bien de la Direction Régionale des Revenus » Yar. 11 CD décision ref. E:2012/4921-K:2013/5662 du 13.11.2002, Programme de Jurisprudence de Kazancı.

33 « si le délit n›a pas été identifié par un inspecteur des finances, un expert des comptes ou son adjoint ou bien un contrôleur des revenus, il faudrait décider de suspendre le procès en attendant l›obtention de l›avis des Impôts... » Yar.9 décision ref.E:1990/2860, K:1990/3641 (YKD. Fascicule 17, numéro:2 Février 1991, p.306)

« ...si le délit n›a pas été identifié par un inspecteur des finances, un expert des comptes ou son adjoint ou bien un contrôleur des revenus, il faudrait décider de suspendre le procès en attendant l›obtention de l›avis des Impôts... » Yar.9.CD.décision ref.E:1990/2860, K:1990/3641 (YKD. Fascicule 17, numéro:2 Février 1991, p.306), Voir aussi Yar.9. CD.. Décision E:1992/10773, K:1992/11119 du 17.12.1992 et Yar.9. CD Décision E:1994/935 K:1994/11250 du 09.03.1994

À ce niveau, concernant les délits des impôts municipaux, le Ministère public rencontre le probléme de, à quel entité il faut demander l'avis d'expert; du Maire même ou des Directions d'Impots. En effet, dans l'article 102, de la Loi des Revenus Municipaux, cet autorité a été confié au Maire au nom bon fonctionnement de cette Loi spéciale, malgré le fait que dans le dispositions du Code de Procédure Fiscale couvrant les autorités conférés au fonctionnaire le plus gradé de l'endroit, cet autorité d'investigation fiscale a été séparé. À ce sujet, dans la doctrine, il a été considéré convenable que le Ministere Public demande l'avis des Maires à cause du statut de Loi Spéciale de la Loi des Revenus Municipaux. À notre avis, à cause du fait le sujet de l'avis requis est un sujet relatif aux impôts, et comme la Loi des Revenus Municipaux n'a pas délégué cet autorité au Maire (à l'exception de cet autorité, tous les autres ont été délégués aux municipalité), les dispositions générales définies par l'article 367 devraient être appliquées dans ce cas.

Un autre sujet qui vaut le détour est le contenu du dernier paragraphe de l'article 359 du Code de Procédure Fiscale. Ce ci dit; « l'application des sanctions aux accusés qui ont commis des délits de contrebande, ne présente pas un obstacle à l'application de la peine contre l'évasion fiscale définie dans l'article 344 ». Celui-ci représente peut-être un problème qui est plus important que les précédents et devrait être étudié de plus prêt. Le sujet, pouvant être résumé, comme le fait de pouvoir sanctionner une personne qu'une fois contre ses delits et infractions administrative, fait naître la discussion d'être coherent avec le principe de non bis in idem.

À ce point il faudrait tenir compte de l›article 15/3 de la Loi des Infractions Administratives 5326 qui régit réunion des delits (Regardez note no :1) selon le quel « si un fait a été défini à la fois comme un delit et comme une infraction administrative, il n'y a que les sanctions contre le délit peuvent être appliquées, et de l'article supplémentaire numéro 1 qui a été ajouté à l'article 15/3, qui dit « les dispositions relatives aux tribunaux fiscaux, du Code de Procédure Fiscale 213 daté du 4.1.1961, restent valables».

Dans notre opinion sanctionner une personne pour le même fait, à la fois par le tribunal pénal dans le cadre de l'article 359 du Code de Procédure Fiscale et parallèlement sanctionner pour l'infraction administrative fiscale d'évasion fiscale, va définitivement contre ce principe.

Par souci de dépassement de cadre d'étude, le résumé de notre opinion consiste à affirmer que même le principe de réunion de l'article 15/3, dont le contenu a été écrit plus haut, de Loi des Infractions Administratives (qui a été mise en vigueur après l'article 359 du Code de Procédure Fiscale malgré le fait qu'elle soit une Loi générale), représente un obstacle légal pour sanctionner en même temps le même fait constituant un délit de contrebande fiscale et une infraction administrative d'évasion

fiscale. L'article supplémentaire 1 ne peut pas en soit, introduire une exception pour infraction d'évasion fiscale. En effet, non seulement le Code de Procédure Fiscale ne contient aucune disposition quant aux fonctions des tribunaux fiscaux, mais ce genre d'application et d'interprétation sont contraire aux principe de base du Droit. On ne peut pas accepter non plus une interprétation comme, le législateur a voulu dire ceci ou cela pour un sujet très important par rapport au droit de propriété. Il est évident que une amélioration adéquate n'a pas été portée.

Si on accepte que la disposition respective de la Loi des Infractions Administratives ne serai pas applicable entre un délit de contrebande fiscale et l'infraction d'évasion fiscale. Le protocole supplémentaire numéro 7 de la Convention Européenne des Droits de l'Homme trouvera un terrain d'application. La Turquie avait signé le protocole supplémentaire numéro 7 de la Convention Européenne des Droits de l'Homme le 14.03.1985 mais ne l'a approuvé que le 10.03.2016. L'Application du Protocole en question n'a intervenu qu'après sa publication dans le Journal Officiel numéro 29678 publié le 08.04.2016. Depuis la discussion concernant la validité du principe de Ne bis in idem dans le Droit Turc, n'a aucune raison d'être[34].

À notre avis, ce que nous devons mettre en application pour ce sujet, ce sera d›établir des sanction financière proportionnelle aux faits considérés comme délits, laisser le jugement aux tribunaux pénaux qui en sont compétents et annuler la sanction de multiplier 3 fois l'évasion fiscale frappant les infractions (administrative) d'évasion fiscale qui forment, en même temps, des délits de contrebande fiscale.

Il est aussi indéniable qu'une telle disposition comme celle de l'article 367 du Code de Procédure Fiscale qui dit « non seulement les jugements des tribunaux pénaux ne peuvent influencer les transactions et décisions des autorités et instances qui vont appliquer les sanctions fiscales comme définies dans la deuxième partie du quatrième livre de ce présent Code, les décisions qui seront délibérées par ces autorités et instances, ne lieront pas les juges pénaux » est totalement incompatible avec l'autorité de la chose jugée, le principe de confiance en Droit et la notion de l'unité judiciaire. Il va sans dire que l'application de la proposition détaillée dans le paragraphe précédent va également supprimer cet inconvénient.

34 **RENÇBER Altan**, Les Infractions Administrative Fiscale selon la Théorie Des Infractions Administrative,Université d'Istanbul Institut des Sciences Sociales, Istanbul 2017, Thèse de Doctorat non publiée, p.239

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 43–54

DOI: 10.26650/annales.2017, *49*(66).0003

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Witholding Tax Problems in Independent Personal Services Income of Persons Resident In Foreigin Countries – Example of United States of America – Turkey Double Taxation Agreement

Assist. Prof. Dr. Altan Rençber[1]

Abstract

"*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" sets out how and under what circumstances those persons who are resident in the United States but have Independent Personal Services Income in Turkey will be tax liable. In this article, these conditions will be examined and the illegality which may arise due to the present practice will be evaluated especially in cases where one should not be taxed in Turkey.

Keywords

Tax Law • Double Taxation Agreement • Witholding Tax

1 **Corresponding Author:** Altan Rençber (Asst. Prof. Dr.), Istanbul University, Faculty of Law, Department of Fiscal Law, Istanbul, Turkey. Email: altanrencber@istanbul.edu.tr

To cite this article: Rencber, Altan: "Witholding Tax Problems in Independent Personal Services Income of Persons Resident In Foreigin Countries – Example of United States of America – Turkey Double Taxation Agreement'', *Annales de la Faculté de Droit d'Istanbul,49*(66), 2017, p.43-54. https://dx.doi.org/10.26650/annales.2017.49.66.0003

Introduction

The basic regulation on how to tax people who are not resident in Turkey but who earn income in Turkey is in the Income Tax Law. According to paragraph 1 of Article 3 of the Income Tax Law No. 193, the real persons settled in Turkey are taxed on the whole of the profits and revenues they have gained both inside and outside of Turkey and also Article 6 of the Law specifies real persons who are not settled in Turkey are taxed only on the gains and revenues they have obtained in Turkey. However, with respect to the last paragraph of Article 90 of the Constitution of the Republic of Turkey; the provisions of international treaties shall prevail in disputes arising out of the international treaties on fundamental rights and freedoms in cases where the laws set forth different provisions on the same subject. For this reason, "*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" "*Agreement*" will be examined to determine how Independent Personal Services income will be taxed.

I. Assessment of the Applicability of the Agreement Provisions

There are basically two conditions for the agreement to be able to applied on the parties. One of them relates to the Residency, the other relates to the subject tax.

A. Concept and Condition of Residency

According to the Article 1 of the Agreement "*This Agreement shall apply to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Agreement.*" the first condition for entry into the scope of the Agreement is "Residency". Resident of the state is defined in the Article 4 as below: "*means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that in the case of income derived or paid by a partnership or similar pass-through entity, estate, or trust, this term applies only to the extent that the income derived by such partnership, similar entity, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners, beneficiaries, members, or grantors*"

However, since in some cases persons may be accepted as resident in two States due to their entry into both of the measures, a double-personality problem may arise. In this cases, real persons shall be deemed to be a resident of the State in which he has a permanent home available to him, if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer. If the residence can not be resolved in spite of these measures, then the nationality of the residence shall be regarded as the

measure for determining the residence of these persons and if the real person is in the nationality of both States, or in case none of them is in compliance, the problem is solved by mutual agreement between the parties.[2]

In order for this agreement to enter into force the person of the other country must obtain a certificate of residence from the competent authorities of the country in which they reside. Afterwards, they should submit a copy of Turkish translations of the documentary certified by notary public or the Turkish consulates in this country to the relevant tax office or tax payer.[3] Taxpayers will keep the relevant certificates of residence that they have received for to be presented to the competent authorities when necessary.[4]

B. Conditions Regarding Scopes of Tax

Article 2, paragraph 2 of the Agreement specifies the application area of the agreement in terms of taxation. Relevant article with the provision of *" The existing taxes to which the Agreement shall apply are, in particular: a) in the case of Turkey: i) the income tax (Gelir Vergisi); ii) the corporation tax (Kurumlar Vergisi); iii) the levy imposed on the income tax and the corporation tax (hereinafter referred to as "Turkish Tax*");" (Expect the taxes in the United States) Turkey's Corporate Tax and Income Tax is in the scope.

According to the last paragraph of the related article; "*The Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws*."

II. Implementation of the Agreement's Provisions

Once the Agreement is determined to be in terms of the parties, the second stage is to find out what kind of application area the agreement provisions will have.

In order to determine how the gains obtained in one of the Contracting States will be taxed, the nature of the income obtained under the contract must first be determined. Although the taxation of Personal Services Income is regulated in Article 14 of the Agreement, the definition of Personal Services Income is not negotiated. In such cases, according to the last paragraph of Article 3 of the Agreement, it should be

2 "If the real person is in the nationality of either State, or if none of them is in compliance, the problem is solved by mutual agreement between the parties." Revenue Administration Presidency, "Çifte Vergilendirmeyi Önleme Anlaşmaları Çerçevesinde Vergilendirme Esasları", http://www.gib.gov.tr/.

3 The Residence Document can also be arranged by the Taxpayers' Office of the High Taxpayer (Istanbul), limited only to its own taxpayer, as well as the Revenue Administration and Revenue Administration Presidency: Double Taxation Avoidance Circulars of Revenue Administration Presidency dated 13.02.2007 and No. 2008- 1/2007-1 /1

4 General Communiqué on the Avoidance of Double Taxation with Serial Number 4; Official newspaper date 26.09.2017.

examined what is the "Personal Services Income" in Turkey.

According to Article 65 of the Income Tax Law No. 193, Profits from any kind of personal services activities are personal services profits. According to the second paragraph of the article, personal services activity is based on personal or professional knowledge or specialization or profession and is not of a commercial nature shall be made on its own behalf and account under personal responsibility.

How taxation of self-employment income obtained by a resident in the contracting states is regulated under article 14 of the Agreement: "*Income derived by a resident of one of the Contracting States in respect of professional services or other activities of an independent character shall be taxable only in that State. However, such income may also be taxed in the other Contracting State if such services or activities are performed in that other State and if: a) the resident has a fixed base regularly available to him in that other State for the purpose of performing those services or activities; or b) the resident is present in that other State for the purpose of performing those services or activities for a period or periods exceeding in the aggregate 183 days in any continuous period of 12 months. In such circumstances, only so much of the income as is attributable to that fixed base or is derived from the services or activities performed during his presence in that other State, as the case may be, may be taxed in that other State.*"

In the second paragrapf of article 14, how taxation of Income derived by an enterprise of one of the Contracting States in respect of professional services or other activities of a similar character ise regulated. According to this article; "*Income derived by an enterprise of one of the Contracting States in respect of professional services or other activities of a similar character shall be taxable only in that State. However, such income may also be taxed in the other Contracting State if such services or activities are performed in that other State and if: a) the enterprise has a permanent establishment in that other State through which the services or activities are performed; or b) the period or periods during which the services or activities are performed exceed in the aggregate 183 days in any continuous period of 12 months. In such circumstances only so much of the income as is attributable to that permanent establishment or to the services or activities performed in that other State, as the case may be, may be taxed in that other State. In either case the Republic of Turkey may levy a withholding tax on such income. However, the recipient of such income, having been subjected to such a tax, may elect to be taxed on a net basis in respect of such income in accordance with the provisions of Article 7 (Business Profits) of this Agreement as if the income were attributable to a permanent establishment of the enterprise situated in that other State*."

As per this provision, in order to be taxed in Turkey, the establishment of the activity in Turkey should be taken into consideration by the resident of the other country, as well as the factors of *fixed base* or *a permanent establishment* or *duration*

of stay. If the activity is carried out in Turkey by means of a *fixed base* or *a permanent establishment*, taxation can be done in Turkey.

The provision of the agreement, which must be examined in order to determine whether the person has *a permanent establishment* in Turkey, is Article 5. According to this article "*permanent establishment*"[5] means a fixed place of business through which the business of an enterprise is wholly or partly carried on. "*permanent establishment* " is especially, a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and a building site, a construction, assembly or installation project if such site, project, or activities continue for a period of more than six months.

Although the term "*fixed base*" is not defined in the agreement, this term is similar to the notion of " *a permanent establishment* " as defined in Article 5 of the Agreements. There are no qualitatively significant differences between the terms "*permanent establishment* " and "*fixed base*" used in the agreement. The term "*permanent establishment*" is used mainly for commercial and industrial activities, while the term "*fixed base*" is used for the place where Independent Personal Services Activities are carried out. In determining whether a "Fixed Base" has been established, it is not necessary to allocate only the relevant activity in accordance with the nature of the activity. If it is shared with another real or legal person or belongs to another person, this place will not change its quality of being "*permanent establishment* ".[6]

Apart from these conditions, another condition of taxation in Turkey is to stay in Turkey for a certain period of time; 183 days in any continuous period of 12 months

The days on which the person is physically present in Turkey for the purpose of self-employment activity shall be taken into account on the basis of the period of stay. The person should stay in Turkey for a total of 183 days or more; in one or more time within a period of 12 months.[7]

The day in Turkey that lasts less than 24 hours will be counted as full day. Also days such as holidays, days of departures, day of arrivals, Saturdays and Sundays, national holidays, short brakes because delay of training or materials, days of sickness and days when one of the family member is dead or sick will be included as days passed in Turkey.[8]

---

5 In this context, the term " *permanent establishment* " is also distinguished in the concept of financial residence: the place of business is also a point of connection such as financial residence. But the distinction between the two docking points is that the financial residence is a personal tie-down point, while the workplace is a material tie-point: Billur Yaltı, **Elektronik Ticarette Vergilendirme**, Istanbul, Der, 2003, s. 142: Ege, Berber, **Vergi Hukukunda Mali İkametgah,** Unpublished Master Thesis, Istanbul Social Sciences Institute, 2012, s.6.

6 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

7 Some agreements are based on the "calendar year". Like Sweeden.

8 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

If it is "*enterprise*" and not the real person who is the resident, it will be possible to tax the revenue in Turkey if the duration or duration of the services or activities exceeds 183 days in any 12 month period. Previously this account was found with the number of staff sent and the number of days the service was performed together. For example, a USA resident in Turkey with 10 employees for 20 days was deemed to have performed 200 days in Turkey. However, now the number of days spent in Turkey is taken into account for the activity carried out without regard to the number of personnel.

Example: For a consultancy service to be provided by a real person with limited liability in Turkey:

3 people on 10.12.2018 for 30 days;

6 people on 12.04.2019 for 90 days;

4 people on 13.07.2019 for 45 days;

7 people on 25.12.2019 for 25 days; sent to Turkey.

Within 12 months from 10.12.2018; 183 day condition is not provided. In 12 months period (30 + 90 + 45 =) 165 days stayed in Turkey. Since people who have been sent to Turkey on 25.12.2019 are out of the 12-month period, they will not be taken into account in the calculation of the periods.

Another important point in the terms of calculation of days is that more than one self-employment activity in Turkey is carried out together in a time frame. In such a case, the overlapping days should be taken into consideration once.

Example:

The real person with limited liability come to Turkey on 01.08.2016 to perform two separate self-employment activities in Turkey and left Turkey on 31.12.2016. The periods of activity in Turkey are as follows:[9]

On the assumption that he stayed in Turkey;

1. 153 days between 01.08.2016 and 31.12.2016,

2. 91 days between 01.09.2016 and 30.11.2016, which is the operating period;

The number of days allocated by the self-employed taxpayer for two separate activities carried out in Turkey is (153 + 91 =) 244 days. (244-91 =) 153 days will be counted as the number of days because (91 days) will be considered only once. In this case, Turkey does not have the right to tax as a source state.

9 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

It should be noted that the Turkey's authority to tax does not let the taxation alone if the conditions of work or stay are met. In order to pay tax in Turkey, domestic law must have a ruling on this issue.

It should also be examined how Turkey uses this taxation authority. According to Article 30 of the Corporate Tax Code; 15 percent of taxes from the payments, pursuant to the principles in the Income Tax Law, entrepreneurs dealing with widespread construction and repair works in more than one calendar year are entitled to receive payments on progress payments made in connection with these works, self-employment profits, real estate capital gains, and payments under the seventh paragraph of Article 11 of the Tax Procedures Code; will be withheld.

In respect of real persons, the regulation is in Income Tax Law. In accordance with article 94 ITL, state agencies and public enterprises, public economic enterprises, other institutions, trading companies, joint ventures, associations, foundations, commercial enterprises of associations and foundations, cooperative, investment fund managers, tradesmen and self-employed individuals -who are obliged to state their real incomes-, farmers determining their incomes from agriculture based on the basis of balance sheet or on the basis of agricultural enterprise account are obliged to make withholding –to the account of income taxes of title holders- at the rate of 17% from the payments (excluding payments made to notary offices due to their independent business activities) made to the ones performing such works -due to the independent business affairs they perform which are within the scope of article 18- during the time of payment (including the ones paid in advance) in cash or by approximation, and the rate of 20% for the others.

Moreover, it is required to specify that, in accordance with article 86/2 of ITL, annual declaration is not submitted for fees, self-employment earnings, earnings from movable and immovable assets and for other earnings and incomes which are completely excised in Turkey through withholding under limited liability, and in case of submitting annual declaration for other incomes, such incomes are not included in the annual declaration. In accordance with article 30/9 of CTL, for the earnings and revenues whose taxes are being obtained through deduction as per article 30 –excluding the commercial earnings and incomes from agriculture submission of declaration is arbitrary as per articles 24 or 26 of CTL, or inclusion of the earnings and incomes in subject in the declarations to be submitted for the earnings and incomes which are not within the scope of article 30 is arbitrary.

III. Withholding Problem In Excising The Individuals And Enterprises Which Are Not Within The Scope Of Taxation Power Of Turkey

As it is mentioned above, if an individual is residing in USA, doesn't have a *a permanent establishment* in Turkey and is not providing element of staying, s/he will only be excised in USA, and will not have any taxational liability in Turkey.

Yet the tax administration, by specifying "*In case of performance of the activity in Turkey, the tax payers -who are obliged to make tax withholding over the self-employment payments they make- are required to make tax withholding over the payments in subject as at the time of arise of withholding liability they will not be able to know whether the title holder enterprise had stayed in Turkey for a period exceeding 183 days in total in a continuous period of 12 months for the performance of activity*." in a special notice[10] it had provided, is anticipating for relevant companies to make withholding as if they have a *a permanent establishment* in Turkey as the tax payers who are under the liability of making withholding will make payment in Turkey, and as it will not be possible for the company residing in USA to know where it will be excised in accordance with tax agreements. Therefore tax practice is progressing in this manner.

There is an arrangement in the General Communiqué of Double Taxation Prevention Agreement with serial no 4, which is very new, that this practice should be continued. According to this: "*Although the service is performed in Turkey, in accordance with the Double Taxation Treaty, the taxpayer will not make a tax withold in the case of clear determination that Turkey has no tax authority. In other words, according to the communiqué, it is stated that there will be no withholding only in cases where "the taxation authority is not clear*". However, there is no regulation of what "clear" situations are.

The individuals, who receive payments on which tax withholding had been made, will be able to apply to the relevant tax office in person or by proxy for the refund of taxes subjected to withholding in cases it is required for these payments not to be excised in Turkey within the frame of the provisions of the Agreement.

It is required to specify that this practice involves many problems. At this point, the first problem is relevant to the principle of lawfulness. As per paragraph 3 of article 73 of Constitution, "*Tax, dues, duties and similar financial liabilities are imposed, amended or annihilated by law.*" And a significant aspect of this, called as lawfulness of tax, is the principle of "*imposition of tax does not arise without law.*" As per this dimension of lawfulness of tax, tax will be able to be anticipated only by law in formal and material sense as a legal usage. [11]

And in cases being the subject of special notice, even beyond taxation of a case which is not anticipated by law, a case -which is being anticipated by an international agreement that it will not be excised- is being excised even if it is specified that it will be refunded later on. Such a practice is clearly against the lawfulness of tax principle. In tax law, as there is also the prohibition of comparison as a matter of lawfulness of tax principle, it will not be possible to allege that the relevant practice is being performed by comparison.[12]

10 Advance Ruling of Revenue Administration No: B.07.1.GİB.4.34.16.01-KVK 30-2285 and dated 22.12.2011.

11 Gülsen Güneş, **Verginin Yasallığı İlkesi,** On İki Levha, İstanbul, 2011, s.16.

12 Mualla Öncel, Ahmet Kumrulu, Nami Çağan, **Vergi Hukuku,** Turhan Kitapevi, Ankara, 2010, s. 29.

It is required to indicate that, in some agreements of prevention of double taxation, there are regulations regarding that Turkey may make withholding in similar cases and that the withheld amount will be refunded later on. Indeed, as published on the Official Gazette dated January 24, 2012, in "Agreement of Prevention of Double Taxation and Tax Evasion in Taxes Collected over Income in between Republic of Turkey and Federal Republic of Germany",[13] Article 27's provision of "*In case the taxes collected over the dividends, interests, intangible right amounts or other income elements -obtained in one of the contracting states by an individual being the resident of the other contracting state- are collected through deduction at source, the right of the state –where the income is obtained- to apply the deduction at source over the rate of its domestic legislation will not be affected from the provisions of this Agreement. In case the tax deducted at source is deducted or never collected in accordance with this Agreement, that tax will be refunded upon the application of the tax payer*." is permitting such a refund regulation. Still there is no such provision in the agreement in between Turkey and USA.

The sole problem in terms of lawfulness principle is not just regarding the imposition of supplementary tax burden. Besides the burden of supplementary tax, an additional procedure –which is not included in law- is also being imposed on the tax payer or tax responsible in order for her/him to be able to refund the tax. As also stated by the Constitutional Court in one of its decrees[14] it is said that "*Financial liabilities have various aspects such as basis and rates, imposition and accrual, methods of collection, sanctions, time limitation, upper and lower limits. Due to such aspects, if a financial liability is not sufficiently framed by law, it is possible for it to cause arbitrary practices which would affect the social and economic statuses, and even the fundamental rights of the individuals. In this respect, financial liabilities should be regulated by laws as defining their certain elements and as specifying their frames accurately.*" Indeed, due to tax duty, the relation in between the parties is not just a public borrowing and lending relationship. In other words, by the tax being determined and defined in law, the realization of the incident giving rise to tax will not be sufficient for the collection of tax, and other rules will also be required for it. Inclusion in the law some duties and methods that are realizing the tax and putting it into practice is being encountered as another requirement. Thus, the constitutive basic elements –determined in laws- will be able to find field of execution as being complemented with procedural provisions which will again be regulated in laws.[15] For instance, as in the method of deduction at source, formal liabilities –such as paying the taxes of third parties in their name, keeping books, providing notices, drawing up documents, maintaining books and documents- are also included within

13 For more information see: Tahir Erdem, "*Serbest Meslek Kazançları Üzerinden Kesilen Vergilerin Türkiye – Almanya Çifte Vergilendirmeyi Önleme Anlaşmasına İstinaden İadesinde Usul ve Esaslar*" **Vergi Sorunları,** October, 2015, S.325, s.28-33.

14 Decision of the Constitutional Court, E.1986 / 5, Dec.1987 / 7, dated 19.03.1987.

15 Güneş, **Verginin Yasallığı İlkesi,** s.144.

the scope of tax duty in a broad sense. For this reason, it is obligatory for these issues to also be regulated by the law-maker.[16], It is not possible to impose such a duty on the tax payer with the special notice.

Another problem in the relevant practice is regarding the right of property.[17] However, European Court of Human Rights is interpreting the concept of "Law" in a wide sense. According to the court, interference to right of property should definitely be performed by law which should be specific, clear. As per the related provision, interference to right of ownership should only be performed by law predictable and accessible.[18] In written or verbal law, and even in jurisdiction practices, it has been deemed that it is bearing the condition of "being accessible" if the method of interference to right of ownership is sufficiently determined. The basic reason of this is that "law" -in terms of contract- has been used in a wider sense as to also cover the Anglo-Saxon Law compared to the system of Continental Europe.[19]

When a practice is realized in the form specified in the special notice, how and when the withholding will be refunded is also uncertain. In tax laws, there is no provision relevant to the subject. But in the General Communiqué of Double Taxation Prevention Agreement with serial no 4, a regulation had been brought by the provision of "*The individuals, who receive payments on which tax withholding had been made, will be able to apply in person or by proxy within the correction time limitation –if there is no special regulation in the relevant agreement- to the relevant tax office / fiscal directorate for the refund of withheld taxes in cases when such payments shouldn't be excised in Turkey within the frame of the provisions of Double Taxation Prevention Agreement.*" But the relevant regulation is quite deficient due to not regulating the issues of whether interest will be applied or not to the refund to be provided, and if it is going to be applied, whether it will be over the rate of deferment interest or delay interest, the period of time in which it will be applied, and the period in which the refund is required to be provided.

In our opinion, if a refund will be provided, it should definitely be realized along with the interest calculated in the same period over the deferment interest rate

16 Bumin Doğrusöz, "Verginin Yasallığı İlkesi", http://www.referansgazetesi.com/haber.aspx?HBR_KOD=81815&ForArsiv=1. (Online): Last Access: 13.10.2017.

17 Protection of Property is governed by the Additional Protocol No. 1 of the European Convention on Human Rights. According to this provision: "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

18 Billur Yaltı, "Mülkiyet Hakkı versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı", **Vergi Dünyası**, July, 2010, S.227, s.103-114, s.109-110. Cristina Mauro, "The Concept of Criminal Charges in the European Court of Human Rights Case Law" **Human Rights and Taxation in Europe and the World**, Edt: Georg Kofler, Miguel Poiares Maduro, Pasquale Pistone, IBFD, 2011 s.459-477; s.466; .Melvin R.T Pauwels:"Retroactive Tax Legislation in view of Article 1 First Protocol ECHR", **EC Tax Review**, 2013-6, S.268-281, s.272.

19 Sunday Times v. United Kingdom (6538/74), 26.04.1979, p.47: http://hudoc.echr.coe.int, 36/5000 (Online): Last Access: 13.10.2017.

determined as per Law with no 6183 for the period as from the date of collection of tax until the serving of the correction voucher to the tax payer in accordance with article 112 of Tax Procedure Law.

Yet our opinion is in the direction of putting into effect a system which will not require the performance of refund. The taxpayers declaration should be taken as basis and otherwise, ex officio tax assessment is required to be done.

Conclusion

According to the "*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" in order to be taxed in Turkey, the establishment of the activity in Turkey should be taken into consideration by the resident of the other country, as well as the factors of *fixed base* or *a permanent establishment* or *duration of stay*. If the activity is carried out in Turkey by means of a *fixed base* or *a permanent establishment*, taxation can be done in Turkey.

Unfortunately the tax administration is anticipating for relevant companies to make withholding as if they have *a permanent establishment* in Turkey as the tax payers who are under the liability of making withholding will make payment in Turkey, and as it will not be possible for the company residing in USA to know where it will be excised in accordance with tax agreements. And the tax practice is progressing in this manner.

However, this practice is contrary to the principle of legality of the tax. Similarly, it is not possible to impose a duty on the taxpayer that is not written in law. Also, how and when the withholding will be refunded is also uncertain.

References

Ege Berber, "Vergi Hukukunda Mali İkametgah", Istanbul Social Sciences Institute, 2012, (Unpublished Master Thesis).

Yaltı, Billur, "Mülkiyet Hakkı versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı", Vergi Dünyası, July, 2010, S.227, s.103-114.

Bumin Doğrusöz, "Verginin Yasallığı İlkesi", http://www.referansgazetesi.com/haber.aspx?HBR_KOD=81815&ForArsiv=1.

Tahir Erdem, "Serbest Meslek Kazançları Üzerinden Kesilen Vergilerin Türkiye – Almanya Çifte Vergilendirmeyi Önleme Anlaşmasına İstinaden İadesinde Usul ve Esaslar", Vergi Sorunları, October, 2015, p.325.

Gülsen Güneş, "Verginin Yasallığı İlkesi", On İki Levha, İstanbul, 2011.

Cristina Mauro, "The Concept of Criminal Charges in the European Court of Human Rights Case Law", Human Rights and Taxation in Europe and the World, Edt: Georg Kofler, Miguel Poiares Maduro, Pasquale Pistone, IBFD, 2011, p.459-477.

Mualla Öncel/Ahmet Kumrulu/Nami Çağan, "Vergi Hukuku", Turhan Kitapevi, Ankara, 2010.

Melvin R.T Pauwels,"Retroactive Tax Legislation in view of Article 1 First Protocol ECHR", EC Tax Review, Iss. 6**,** 2013, p.268-281.

Billur Yaltı, Elektronik Ticarette Vergilendirme, İstanbul, Der, 2003.

http://hudoc.echr.coe.int

General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

Revenue Administration Presidency, "Çifte Vergilendirmeyi Önleme Anlaşmaları Çerçevesinde Vergilendirme Esasları".

Advance Ruling of Revenue Administration No: B.07.1.GİB.4.34.16.01-KVK 30-2285.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 55–90

DOI: 10.26650/annales.2017, *49*(66).0004

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

The Extension of Arbitration Agreements to Non-Signatories in International Commercial Arbitration

Att. Begüm Yiğit[1]

Abstract

Due to the growth and the sophistication of international business relations, it became clear that there are circumstances in which third parties that have not signed or similarly assented to an arbitration agreement may be both bound and benefitted from its terms. In this respect, the arbitration doctrine and practice use a wide range of theories to compel non-signatories to arbitrate.

The main aim of this study is to analyse conditions that allow an arbitration agreement to be extended to non-signatories; to reconcile the requirement of the consent to arbitrate with the necessities of modern developments in international trade; and to emphasize the importance of functional consent and equitable considerations with regard to non-signatory issues. In order to achieve these purposes, the present paper will focus on the most controversial four legal theories – the group of companies doctrine, piercing the corporate veil, third party beneficiary rule and guaranty agreements - under which arbitration agreement can be extended to non-signatories and will provide a commentary regarding the recent trends observed in this matter.

Keywords

Arbitration agreement • Non-signatories • Third parties • Extension • Third Party Beneficiary • Guaranty Agreements • Group of Companies • Piercing the Corporate Veil

Öz

Uluslararası ticari ilişkilerin yaygınlaşması ve karmaşık hale gelmesine bağlı olarak, tahkim anlaşmasını imzalamayan ve imzalanmasına rıza göstermeyen kişilerin bazı durumlarda tahkim anlaşması ile bağlı olabileceği veya tahkim anlaşmasından yararlanabileceği ortaya çıkmıştır. Bu kapsamda, tahkim doktrini ve uygulaması, tahkim anlaşmasını imzalamayan üçüncü kişilerin tahkime tabi olmasına ilişkin birçok hukuki teoriden yararlanmaktadır.

Bu çalışmanın temel amacı, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine yol açan şartları analiz etmek, tahkim anlaşmasına rıza gösterilmesi şartı ile uluslararası ticari ilişkilerdeki modern gelişmelerin getirdiği gereklilikleri uzlaştırmak, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine ilişkin işlevsel rıza ve hakkaniyet kavramlarının önemini vurgulamaktır. Bu amaçlara ulaşabilmek bakımından, işbu çalışma, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine yönelik en çok tartışılan dört teori – grup şirketleri doktrini, tüzelkişilik perdesinin kaldırılması teorisi, üçüncü kişi yararına sözleşme, garanti sözleşmeleri – üzerinde yoğunlaşmakta ve bu konulardaki güncel gelişmelere ilişkin kapsamlı bir analiz sunmaktadır.

Anahtar Kelimeler

Tahkim Anlaşması • İmzalamayanlar • Üçüncü Kişiler • Teşmil • Üçüncü Kişi Yararı • Garanti Sözleşmeleri • Grup Şirketleri •Tüzelkişilik Perdesinin Kaldırılması

1 **Correspondence to:** Begüm Yiğit (Att.), Istanbul Bar Association, Istanbul, Turkey: Email: baro@istanbulbarosu.org.tr

To cite this article: Yigit, Begum: "The Extension of Arbitration Agreements to Non-Signatories in International Commercial Arbitration'', *Annales de la Faculté de Droit d'Istanbul, 49*(66), 2017, p.55-90. https://dx.doi.org/10.26650/annales.2017.49.66.0004.

Introduction

Arbitration is a private dispute resolution mechanism and the parties involved have to agree on it owing to its contractual nature. The arbitration agreement is the keystone of international commercial arbitration and it involves the consent of the parties to have arbitration as a resolution mechanism.[2] This is actually an advantage compared to disputes resolved by national courts, since the parties to court proceedings are determined on the basis of interests[3] while in the context of arbitration, there is a will to reach a binding and definite decision through arbitration. As a consequence, entering into an arbitration agreement is indispensable for a person to participate in the arbitration proceedings and be bound by the arbitral award. This approach is also reflected in the definition of "arbitration agreements" in the Article 2/1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[4] (hereinafter referred to as "**New York Convention**"), European Convention on International Commercial Arbitration (hereinafter referred to as "**European Convention**") Art I (2)(a)[5] and in the Article 7 of UNCITRAL Model Law on International Commercial Arbitration[6] (hereinafter referred to as "**UNCITRAL Model Law**") Each of these legal instruments provides that it is the parties to an arbitration agreement and not other persons that are bound by the agreement.[7]

In line with the traditional role and bilateral nature of arbitration, the extension of the arbitration agreement to a party that had not consented was not considered as a possibility by arbitral tribunals for a long period of time. Accordingly, any legal or financial interest that a non-signatory could have in the dispute between the parties bound by an arbitration agreement was irrelevant.[8] However, due to the growth and the sophistication of international business relations, it became clear that there are circumstances in which third parties that have not signed or similarly assented to an arbitration agreement may be both bound and benefitted from its terms.[9] The arbitration doctrine and practice use a wide range of theories and legal constructs to compel non-signatories to arbitrate on the basis of agency and apparent authority, transfer and assignment, estoppel, alter ego and piercing the corporate veil, third party beneficiary rule, incorporation by reference, guarantees and the group of companies doctrine.

2 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration*, (6th edn, OUP 2015) 71.

3 Stavros Brekoulakis, *Third Parties in International Commercial Arbitration*, (1st edn, OUP 2010) 3.

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. 2/1 <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf > accessed 26 July 2016.

5 European Convention on International Commercial Arbitration 1961, Art. I(2)(a) <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/doc.html> accessed 26 July 2016.

6 UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 7 with amendments as adopted in 2006 <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 26 July 2016.

7 Gary Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 1408.

8 Brekoulakis (n 2) 3.

9 Born (n 6) 1411.

Before examining the main aim of this paper, it should be noted that the subject of the extension of the arbitration agreement to non-signatories is problematic for several reasons. First, consent is a fundamental element for creating a binding arbitration agreement since arbitration agreements bind only the parties that have signed it.[10] The surrounding idea behind all these legal theories mentioned above is that a non-signatory may be bound by an arbitration agreement on the assumption that it has implicitly consented to it by conduct. However, in reality, consent for arbitration is often absent in each one of these legal theories. Each of the existing non-signatory theories relies on equitable considerations or treat consent as a functional legal construct.[11] Second, non-signatory issues are not regulated under international treaties, institutional rules and the UNCITRAL Model Law and therefore there are no common statutory grounds to justify the extension of arbitration agreements to non-signatories. Furthermore, the law applicable to the substantive validity of the arbitration agreement governs the issue of non-signatories and the current arbitration practice is inconsistent between different national laws in regard to this issue.[12] Finally, this issue may be reviewed from the perspective of two different jurisdictions – a jurisdiction that is relied upon in proceedings for recognition and enforcement, and a jurisdiction that is connected to the proceedings for setting award aside.

Thus, the main aim of this study is to analyse conditions that allow an arbitration agreement to be extended to non-signatories; to reconcile the requirement of the consent to arbitrate with the necessities of modern developments in international trade; and to emphasize the importance of functional consent and equitable considerations with regard to non-signatory issues. In order to achieve these purposes, the present paper will focus on the most controversial four legal theories – the group of companies doctrine, piercing the corporate veil, third party beneficiary rule and guaranty agreements - under which arbitration agreement can be extended to non-signatories and will provide a commentary regarding the recent trends observed in this matter. These theories have drawn considerable attention in the academic area and in practice and the debate on these four legal theories remains largely unsettled today. In addition, the sophistication of modern business transactions and economic reality outgrow the idea of bilateral contractual arbitration which tends to exclude any non-signatory party from the arbitration process.

Therefore, this thesis adopts a liberal approach on this controversial issue and emphasizes that arbitration is becoming the ordinary way to solve commercial

10 Emmanuel Gaillard and John Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (1st edn, Kluwer Law International 1999) 280.

11 Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' Speech in the 30th Anniversary School of International Arbitration (Global Arbitration Review, 19-25 April 2015) <http://globalarbitrationreview.com/cdn/files/gar/articles/Stavros_Brekoulakis_speech_30_Anniversary_SIA.pdf> accessed 26 July 2016.

12 Christian Borris, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process' in Stefan N. Frommel and Barry A.K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, (1st edn, Kluwer Law International 1999) 61.

disputes and fairness or the good administration of justice, especially the necessity to avoid the multiplication and potential inconsistency of parallel proceedings justifies that extension be admitted freely by national courts and arbitral tribunals under certain conditions that will be explained in the main part for each of these four legal theories since applying a liberal standard of proof of consent and attaching importance to the functional concept of consent and equitable considerations will be more consistent with commercial reality and the pro-arbitration policies of the New York Convention.

In examining these four legal theories, the selected jurisdictions are mainly England, France, US and Swiss courts since they are leading authorities in establishing the conditions of these legal theories and they contributed to the development of the most important current trends regarding the subject. Taking a comparative look at these countries, it is seen that there are discernible differences with regard to the extension of arbitration agreements to non-signatories and this fact makes them suitable for comparison purposes.

Such differences may have a profound effect on the outcome of an arbitration and lawyers preparing an international arbitration agreement should carefully consider the advantages and disadvantages of the available choice of seats. In particular, the extension of the arbitration clause to other companies of the group started in France and still today, its courts and tribunals seated in France are among the most innovative in the development of this jurisprudence. Swiss courts appeared in the first place extremely reluctant to accept the extension of an arbitration clause to non-signatories but the Swiss Federal Court has considerably relaxed its jurisprudence.

The English approach still appears to be more restrictive where the group of companies doctrine is said to be inconsistent with the principle of privity of contract and the principle of corporate veil. In England, the issue of who is party to the arbitration clause is mainly viewed as an issue of consent, nevertheless extension may be achieved by recourse to some theories such as agency or piercing the corporate veil. The same theories are also applied in the United States and American case law is much more liberal than most European countries at least in some circuits due to the paramount concern of the courts being the federal policy favouring arbitration.

The thesis proceeds as follows. The first section considers the classification of four legal theories that will be examined as contractual and doctrine-based theories. In this classification, the common and distinct features of these two categories are highlighted. The second section addresses the issue of binding non-signatories under contractual theories. More specifically, conditions for the extension under third party beneficiary rule and guaranty agreements as well as different approaches taken by courts and tribunals are analysed, critically assessing the ideal conditions for these legal theories under which arbitration agreement should be extended to non-signatories. In the third section, the conditions for the application of piercing the

corporate veil and group of companies doctrines as well as different approaches taken by courts and tribunals are examined by proposing the ideal conditions for these legal theories under which arbitration agreement should be extended non-signatories. The final section summarises the conclusions reached as part of the analysis of each of these four legal theories and restates our solutions with respect to the conditions for the application of these legal theories.

CHAPTER 1: CLASSIFICATION OF THE LEGAL THEORIES AS CONTRACTUAL AND DOCTRINE-BASED THEORIES

As mentioned above, the arbitration doctrine and practice use a wide range of legal theories to compel non-signatories to arbitrate. However, the issues as to which common features can be found in all of them that allow their application towards non-signatory parties and how all these legal theories can be classified remain open for discussion in the academic area. Some attempts have been made in order to find common grounds among all legal theories which allow the extension of arbitration agreements to third parties and to classify all of them.

In this respect, with regard to the common features among all legal theories, some scholars assert that the majority of these theories undermine consent of the non-signatory to be bound by the arbitration agreement in the contract that it did not sign.[13] From the perspective of another scholar, non-signatory parties may be compelled to arbitrate on the basis of "contractual roots" or the principle of equity.[14] Therefore, considering the findings of the scholars, all the legal theories may have common features with regard to the consent of non-signatories and distinct features in respect of principles that allow their extension.

As regards the classification of all legal theories, Hosking tries to group them into four different categorizations: the first category is based on the question of whether rights are grounded on or explained by other rationales; the second is based on the status of non-signatory vis-à-vis a signatory, the third is based on the spectrum/importance of consent and the forth is based on the probability of non-signatory party to be known to a signatory. Criticising all of these categorizations, he correctly argued that none of these classifications is entirely satisfactory and an overall classification of theories is impossible.[15]

Another classification has been made by Brekoulakis who divides legal theories into two groups: In the first group, non-signatories are compelled or allowed to arbitrate

13 Bernard Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis' (2001) 18 Journal of International Arbitration 251.

14 S.I. Strong, 'Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' (1998) 31 Vand. J. Transnat'l L. 915.

15 James M. Hosking, 'The Third Party Non-Signatory's Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent' (2004) 4 Pepperdine Dispute Resolution Law Journal 471.

on the basis of equitable considerations while in the second group, they are allowed or compelled to arbitrate on the basis of a functional concept of consent that refers to the substantive contract which contains the arbitration agreement.[16] In this respect, according to the classification proposed by him, the piercing the corporate veil doctrine would be classified under the first group as it is based on clear equitable considerations while the other theories which will be examined in the next chapters- third party beneficiary, extension under guaranty agreements and group of companies doctrine would be classified under the second group which is based on a functional concept of consent that concerns the underlying main contract, not the arbitration agreement.

Taking into account the previous works of the scholars mentioned above, it should be noted that all legal theories that allow extension of arbitration agreements to non-signatories have both common and distinct features with each other and it is very difficult to classify them into categories since common and distinct features of legal theories are broader than that suggested in the scholarly writings. At this point, in order to facilitate the planning of this paper and to provide consistency in examining the common and distinct features of the four legal theories that will be analysed in the Chapter 2 and Chapter 3, the four legal theories are classified under two categories: contractual and doctrine-based ones.

According to this classification, some distinct features between two categories should be highlighted. First, the contractual theories are based on a contract which links the non-signatory to a signatory of the arbitration agreement while the ground of doctrine-based theories is a doctrine which is created by national courts or arbitral tribunals and requires certain preconditions to be fulfilled to make the non-signatory be bound by the arbitration agreement. Second, there are differences between contractual and doctrine-based theories about the primary consideration for the extension of arbitration agreements. Under the contractual theories, the extension of the arbitration agreement to a non-signatory depends primarily on determination of implied consent of the non-signatory through the application of contract principles. By contrast, as for doctrine-based theories, economic reality considerations which focus on the economic relationship between the non-signatory and one of the signatories of the arbitration agreement take primacy for the extension of arbitration agreements.

In this direction, extension under third party beneficiary rule and guaranty agreements are examined as contractual theories in Chapter 2 and piercing the corporate veil and group of companies doctrines are examined as doctrine-based theories in Chapter 3. The other features of each of these legal theories that are faced by national courts and arbitral tribunals will be considered below in detail.

16 Brekoulakis (n 10).

CHAPTER 2: BINDING NON-SIGNATORIES UNDER CONTRACTUAL THEORIES

In the present chapter, the extension of the arbitration agreement to non-signatories through the application of contractual theories of third party beneficiary rule and guaranty agreements will be scrutinised.

2.1. Extension Under Third Party Beneficiary Rule

According to the general principles of contract law, the original parties may agree to grant the benefits of their agreement to a party not otherwise bound by the agreement. In such circumstances, two important questions arise as to whether the third party beneficiary is entitled to bring an arbitration claim against one of the original parties and whether one of the original parties has a right to bring an arbitration claim against the third party beneficiary.[17] Under certain conditions that will be explained below, the third party beneficiary is entitled to demand performance of the benefits under the main contract through arbitration and at the same time, the party who has received the direct benefit from the contract which contains an arbitration clause is bound to arbitrate the dispute.

2.1.1. Law Governing Extension Under Third Party Beneficiary Rule

As for the applicable law to the extension under third party beneficiary rule, different approaches have been taken by the authorities. Some scholars have contended that issues of the extension under third party beneficiary rule should be governed by the law applicable to the arbitration agreement due to the fact that the status of the third party beneficiary is related to the formation and interpretation of the arbitration agreement.[18] Others have argued that this issue may also be governed by the law applicable to the main contract including the arbitration clause as the third party beneficiary will be bound by the arbitration agreement as a supplement right of the main substantive rights.[19] Moreover, there are reasonable arguments to apply transnational substantive rules to the third party beneficiary position since these issues are not related to public policy or international public law.[20]

Taking into consideration all these approaches in the academic area, if the law governing the main contract applies to the extension under third party beneficiary rule, it seems that this will not really offer certainty owing to the fact that it does not provide a uniform rule and also it is determined on a case-by-case assessment. It is also crucial to note that the internationalist approach in favour of application of

17 Brekoulakis (n 2) 59.

18 Born (n 6) 1459.

19 Mohamed S. Abdel Wahab, 'Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest through the Spatial-Temporal Continuum', in F Ferrari and S Kröll (eds), *Conflict of Laws in International Commercial Arbitration*, (Sellier International Publishers 2010) 162.

20 Brekoulakis (n 2) 66.

transnational substantive rules to the third party beneficiary position would lead to unpredictable decisions as the scope and conditions of application of the transnational substantive rules to the third party beneficiary position may be interpreted differently in diverse jurisdictions. Therefore, transnational substantive rules to the third party beneficiary position should only be applied as a component of the applicable national law or prevailing international usages.

Accordingly, the law applicable to the arbitration agreement should govern the extension under third party beneficiary rule since it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Nonetheless, the law governing the arbitration agreement may be more than one law, in particular since the arbitration agreement contains the issues of formal validity, substantive validity, objective and subjective arbitrability. If one considers the issue of extension as part of subjective arbitrability, it could be argued that 'extension' should be governed by the law governing capacity. However, applying the law governing capacity is problematic since it would lead to uncertainty and unpredictable results in different jurisdictions. In this respect, it seems plausible to suggest that extension under third party beneficiary rule should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of parties' agreement.

2.1.2. Application of the Third Party Beneficiary Rule in Diverse Jurisdictions

In some jurisdictions, issues related to the third party beneficiary status are governed by statutory provisions which generally contain provisions that apply to arbitration agreements.[21] These provisions allow for the direct enforcement of a contract by a third-party beneficiary in these jurisdictions.[22] For instance, in England, the Contracts (Rights of Third Parties) Act section 8 allows a third party beneficiary to receive the "pure benefit" of an arbitration agreement. In other words, if the beneficiary exercises the right under the contract, he may insist that arbitration shall be the main dispute resolution mechanism for any dispute between him and the promisor concerning their legal relations.[23]

In other jurisdictions, a number of national courts and arbitral tribunals confirmed that a non-signatory who claims third party beneficiary rights under a contract, is entitled to invoke the arbitration clause contained in the contract and also is bound by that clause.[24] Even in Swiss jurisdiction where neither statutory provisions nor court

21 Contracts (Rights of Third Parties) Act (England) 1999, s 8(1) and s 8(2); Singaporean Contracts (Rights of Third Parties) Act 2001, s 9(1) and s 9(2).

22 Bernard Hanotiau, *Complex Arbitrations: Multiparty,Multicontract, Multi-Issue and Class Actions*, (1st edn, Kluwer Law International 2005) 16.

23 Neil Andrews, 'Strangers to Justice No Longer: The Reversal of The Privity Rule Under The Contracts (Rights of Third Parties) Act 1999' (2001) 60 Cambridge Law Journal 353.

24 *Riek v Xplore-Tech Services Private Ltd et al*, 34 ICCA Yearbook 2009, 1056 (MDNC 2009).

decisions address the issue of whether the third party beneficiary is bound by the arbitration agreement, the prevailing view among scholars is that the beneficiary is not only entitled to invoke the arbitration clause but also under an obligation to do so.[25]

As already mentioned above, the first important question is whether the third party beneficiary may invoke an arbitration clause against one of the original parties. In most jurisdictions, this issue is determined based on the original parties' objectives and good faith intentions, especially depending on whether the parties aim to confer on the third party a real benefit under the main contract.[26] To illustrate, the English court first examined this issue in the *Nisshin Shipping* case[27], where it was held that the original parties had clearly purported to provide a real benefit of 1 per cent commission on the broker and therefore, he is entitled to invoke the arbitration clause against one of the original parties.[28] This approach has been followed consistently by several cases in England.[29] Similarly, French and US courts emphasized the crucial importance of granting real benefit to the third party beneficiary in order for the third party beneficiary to enforce the arbitration clause contained therein.[30]

Accordingly, once the condition of real benefit is proved, the third party beneficiary may directly invoke the arbitration agreement against the original parties. In this respect, the third party beneficiary must prove that the benefit conferred to it is closer to the degree of "substantial" rather than incidental.[31] Some authorities that adopt a high standard of proof have held that the third party beneficiary must prove the real benefit conferred on it with special clarity.[32] Evidence of this may be drawn from the writing itself and the surrounding circumstances.[33] However, it should be noted that this is a difficult burden for a third party beneficiary to satisfy due to the fact that the original parties rarely state their intention to confer a substantial benefit on a third party.[34] Given this difficulty, it seems logical to suggest that a reduced standard of proof should be maintained since it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements and also, the requirements of efficiency and single forum for resolving closely related disputes argue for a reduced standard of proof.[35]

25 Andrea Meier and Anna Lea Setz, 'Arbitration Clauses in Third Party Beneficiary Contracts- Who May and Who Must Arbitrate' (2016) 34 ASA Bulletin 62.

26 Brekoulakis (n 2) 61

27 *Nisshin Shipping Co Ltd v Cleaves Co Ltd* [2003] EWHC 2602 (Comm), [2003] 2 CLC 1097.

28 *Nisshin Shipping Co Ltd v Cleaves Co Ltd* [2003] EWHC 2602 (Comm), [2003] 2 CLC 1097.

29 *Christina Mulchrone v Swiss Life* [2005] EWHC 1808 (Comm), [2005] ArbLR 43.

30 C Cass Civ (1) 11 Jul 2006, 2006 Rev Arb 969; *Continental Cas Co v American National Insurance Co,* 417 F 3d 727, 735 (7th Cir 2005).

31 *Kyung Sup Ahn v Rooney Pace* 624 F Supp 368, 371 (SDNY 1985).

32 *McCarthy v. Azure* 22 F.3d 351, 362 (1st Cir 1994).

33 James M. Hosking, 'Non-Signatories and International Arbitration in the United States: The Quest for Consent' (2004) 20 Arbitration International 289.

34 Brekoulakis (n 2) 61; James J Sentner- 'Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories' (2005) 6 Business Law International 55, 68.

35 Born (n 6) 1458.

Taking a comparative look at the Swiss jurisdiction, it is seen that there is a considerably different approach with regard to the right of the third party beneficiary to invoke the arbitration clause contained in the main contract. Under Swiss law, there are two types of third party beneficiary contracts: In the case of a quasi-third party beneficiary contract, the promisee remains the sole party with the right to demand performance and the beneficiary has no right to demand performance from the promisor on its own.[36] By contrast, in the case of a genuine third party beneficiary contract, the third party has a right to demand performance on its own.[37] This differentiation is crucial for the issue of whether the third party beneficiary is entitled to invoke the arbitration clause contained in the main contract. Likewise, according to its two recent decisions, the Swiss Federal Supreme Court held that the arbitration clause is an accessory right to the claim for performance and examined in both decisions whether the contract entered into by the original parties was a genuine third party beneficiary contract.[38] If so, the third party would have a right to resort to an arbitral tribunal.[39] Therefore, comparing to other jurisdictions, under Swiss law, the right to demand performance is central to determine the issue of whether the third party beneficiary is entitled to invoke the arbitration clause rather than the condition of real benefit.

As already stated above, the second important question is whether one of the original parties may bring an arbitration claim against the third party beneficiary or whether the third party is bound by the arbitration clause contained in the main contract. The predominant view is that the status of third party beneficiary does not bring solely a duty to arbitrate.[40] In other words, only if the third party beneficiary exercises the real benefit conferred on it, will it be bound by the arbitration clause contained in the main contract.[41]

Likewise, this proposition is generally recognised in different jurisdictions, though on different grounds. In England, the Explanatory Notes to the Contracts (Rights of Third Parties) Act 1999 declare that section 8(1) is based on a "conditional benefit approach".[42] This effectively means that the subsection requires a third party beneficiary to have chosen to exercise the substantive right before it is bound by the arbitration clause. The Explanatory Notes further state that "to avoid imposing a "pure" burden on the third party, it does not cover, for example, a separate dispute

36 Swiss Code of Obligations 1912, Art 112 para 1.

37 Swiss Code (n 35) Art 112 para 2 .

38 Swiss Supreme Court decision 4A_44/2011 of 19 April 2011 [2.4.2] (2012) 30 ASA Bulletin 659,668-9; Swiss Supreme Court decision 4A_627/2011 of 8 March 2012 [3.5] (2012) 30 ASA Bulletin 647, 655-8.

39 ibid [2.4.1] (4A_44/2011); ibid [3.2] (4A_627/2011).

40 Hosking (n 32) 292.

41 Brekoulakis (n 2) 63.

42 Explanatory Notes to Contracts (Rights of Third Parties) Act 1999 (Explanatory Notes), s. 8 [34] < http://www.legislation.gov.uk/ukpga/1999/31/notes/division/4/8 > accessed 27 July 2016.

in relation to a tort claim by the promisor against the third party for damages."[43] In light of these explanations, it can reasonably be assumed that the English conditional benefit approach characterizes the arbitration agreement as a "burden"[44] and this is probably due to the traditional English reluctance to oust the jurisdiction of the courts in favour of arbitration agreements.[45]

In the United States, the same proposition is accepted on the basis of the principle of equitable estoppel. According to this principle, US authorities have held that where a third party that claims or exercises rights as a party under a contract, will be estopped from denying that it is bound by the arbitration clause contained in the contract.[46] Furthermore, in the *DuPont* case, US Court pointed out the difference between the third party beneficiary theory and the equitable estoppel and it was held that under the third party beneficiary theory, the intentions of the parties at the time the contract was executed are of crucial importance whereas under the equitable estoppel theory, a court must look at the parties' conduct after the contract was executed.[47] However, it should be emphasized that this is not exactly the case since in other jurisdictions where the third party beneficiary theory is applied, only if the third party chooses to exercise the substantive benefit conferred on it after the conclusion of the contract, will it be bound by the arbitration clause contained in the main contract. Thus, it seems that the conduct of the third party beneficiary after the conclusion of the contract is central in both theories to determine whether it is bound by the arbitration clause.

As regards the approach of the French courts, some commentators contend that the third party beneficiary is only bound by the arbitration clause contained in the main contract if he subsequently agrees to the specific dispute resolution mechanism.[48] Accordingly, one may assume that French case law is more concerned with giving effect to the intentions of the parties and it requires the specific consent of the third party beneficiary. Nonetheless, by virtue of the close reading of *V 2000* case of the Paris Court of Appeals, it seems plausible to suggest that French courts have a liberal and pragmatic approach with regard to the extension of the arbitration agreement under third party beneficiary rule.[49] Likewise, in the *V 2000* case, the ruling is that the arbitration clause extends to parties directly involved in the performance of the contract if their respective situations and activities raise the presumption that they

43 ibid.

44 ibid.

45 *Kulukundis Shipping Co v Amtorg Trading Corp*, 126 F2d 978, 982-985 (2d Cir 1942).

46 *Sourcing Unlimited Inc v Asimco Int'l Inc*, 526 F3d 38 (1st Cir 2008) in Jennifer Kirby, 'Sourcing Unlimited, Inc. v Asimco Int'l, Inc.: Appellate Jurisdiction and Equitable Estoppel' (2009) 26 Journal of International Arbitration 149; *JLM Indus, Inc v Stolt-Nielsen SA*, 387 F3d 163 (2d Cir 2004).

47 *E.I. DuPont de Nemours & Co* v *Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F3d 187 (3d Cir 2001).

48 Gaillard and Savage (n 9) 280.

49 CA Paris 7 Dec 1994, *V2000 (formerly Jaguar France) v. Renault* in (1996) Revue de L'Arbitrage 245.

were aware of the existence and scope of the arbitration clause.[50] Though some scholars suggest that this situation usually arises in circumstances involving group of companies and state owned entities[51], there is no reason as to why this ruling does not apply to the status of the third party beneficiary. Considering the pragmatic approach of the French case law, the third party beneficiary will be bound by the arbitration clause contained in the main contract provided that his activities raise the presumption that he knows the existence and scope of the arbitration clause and he is involved in the performance of the contract.

Under Swiss law, the position is less certain than other jurisdictions as the Swiss Supreme Court did not have a ruling on the question of whether a third party beneficiary may be bound by the arbitration clause contained in the main contract when it is the respondent in the arbitration.[52] The prevailing view among scholars is that the third party beneficiary is bound by the arbitration clause since they are directly connected with performance being rendered to the third party[53] and the consent does not need to be express.[54] Likewise, some commentators confirmed that the consent exists if the third party beneficiary accepts the substantive rights conferred on it and if it has sought performance of such rights.[55] Thus, even if the Swiss Supreme Court left the issue of whether the third party is bound by the arbitration clause contained in the main contract open, the predominant view among scholars is consistent with the proposition mentioned above.

2.1.3. Critique on the Third Party Beneficiary Rule

In light of the explanations stated above, it seems reasonable to suggest that extension under third party beneficiary rule should be governed by the law applicable to the existence and validity of the arbitration agreement as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. In addition, transnational substantive rules with regard to the third party beneficiary position may be applied as a component of the applicable national law or prevailing international usages.

Taking a comparative look at the selected jurisdictions, it is seen that in England, France and US, the issue of whether the third party beneficiary may invoke an arbitration clause against one of the original parties depends on whether the original parties aim to confer to the third party beneficiary a real benefit under the main contract

50 ibid 248-249.

51 Gaillard and Savage (n 9) 282.

52 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (3rd edn, OUP 2015) 140.

53 Meier and Setz (n 24) 72.

54 Kohler and Rigozzi (n 51) 141.

55 Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet&Maxwell 2007) 289.

and the said benefit should be substantial rather than incidental. Given the fact that proving the condition of real benefit is a difficult burden for a third party beneficiary to satisfy, I argue that a reduced standard of proof should be maintained as it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements. According to the recent decisions of the Swiss Supreme Court, an approach which is significantly different from other jurisdictions can be seen due to the fact that the right to demand performance is crucial for being entitled to invoke the arbitration clause rather than the condition of real benefit.

Despite the fact that the Swiss Supreme Court's approach leads to predictable results, it seems plausible to suggest that deeming an arbitration clause to be annexed to the claim for performance is not the right approach. This approach is not persuasive since an arbitration agreement is separable from the main contract and thus, cannot be merely an accessory right. Indeed, the aim of an arbitration clause set out in a contract is to give effect to the substantive rights and duties regulated under the contract. In this respect, the scope of the arbitration clause should not be more restricted than the scope of substantive rights. Therefore, determining the right to invoke the arbitration clause on the basis of the condition of real benefit is conceivable since only if the original parties aim to confer a substantial benefit to the third party beneficiary, will it be entitled to invoke the arbitration clause.

There is a general recognition among selected jurisdictions that only if the third party exercises the substantive rights conferred on it, will it be bound by the arbitration clause contained in the main contract. This proposition is generally accepted in England, US and France, though on different grounds. Even in Switzerland where the Swiss Supreme Court did not have a ruling on this issue, the prevailing view in the academic area is consistent with the approach of other jurisdictions. In my opinion, of course, the main contract between the original parties cannot create mere burdens for a third party. However, once the third party beneficiary chooses to exercise its substantive rights under the main contract, its consent to arbitrate does not need to be express. Likewise, the consent of the third party beneficiary is deemed to exist on the occasion of the fact that it accepts the substantive rights conferred on it and it has sought performance of such rights. Consequently, it seems logical to suggest that the third party beneficiary can only make use of its substantive benefits arising from the main contract if it also accepts the arbitration clause.

Finally, it is important to note that the parties should provide sufficient information in their contract to address the position of the third party beneficiary and its relationship to the dispute resolution clause.[56] This would provide a greater clarity with regard to the status of the third party beneficiary and facilitate to respond to the problematic issue of whether to extend the arbitration clause to the third party beneficiary.

56 Hosking (n 14) 529.

2.2. Extension Under Guaranty Agreements

"Guaranty" means a contract whereby the guarantor undertakes an obligation to be liable for the performance of the original debtor in case the original debtor does not perform its obligations.[57] After this definition, it should be emphasized that it is very common in international commercial transactions for a third party to agree in a separate guaranty agreement to provide a security for the obligations of the main debtor under a contract to which the guarantor is not party. In the event that the main contract between the creditor and the main debtor contains an arbitration clause but there is not any arbitration clause in the guaranty agreement, an important questions arises as to whether the guarantor is entitled to invoke the arbitration clause contained in the main contract and similarly whether the guarantor is bound by that arbitration clause.

There are serious arguments for and against the extension of the arbitration agreement contained in the main contract to the guarantor. On the one hand, the obligation of the guarantor has a secondary nature and closely dependent upon the main obligation.[58] Moreover, there is a general recognition in both common and civil law jurisdictions that the guarantor may invoke against the creditor all the defences of the main debtor arising out of the main contract, except for defences that are personal to the debtor.[59] Relying on these argument, it could be argued that the guarantor is bound by the arbitration clause contained in the main contract. On the other hand, the legal status of the guarantor and the main debtor are different as the guarantor is not a party to the main contract containing an arbitration clause and the liability of the guarantor will occur only when the original debtor fails to perform its obligations.[60] Thus, it may well be argued that the guarantor is not bound by the arbitration clause contained in a contract to which it is not a party. This section will provide an analysis of divergent approaches to the issue of extension under guaranty agreements in different jurisdictions.

2.2.1. Law Governing Extension under Guaranty Agreements

Regarding the applicable law to the extension under guaranty agreements, some authorities have argued that issues of the extension under guaranty agreements should be governed by the law applicable to the underlying guarantee relationship due to considerations of being the most relevant law to determine this issue.[61] Other authorities applied the choice of law clause in the main contract in order to give effect to the parties' intentions in the main contract.[62] Another line of thought has contended

57 Geraldine Andrews and Richard Millett, *Law of Guarantees* (7th edn, Sweet&Maxwell 2015) 2.

58 ibid 4.

59 Brekoulakis (n 2) 93.

60 Andrews and Millett (n 56) 309.

61 *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm).

62 *The A Company (Israel), The B Company (Israel) v. The Former Soviet Republic,* Jurisdictional Award in SCC cases 38/1997and 39/1997 (SCC Award), affirmed Judgment of the Stockholm District Court in case T 1510-99 (2001) and Judgment of the Svea Court of Appeal in case T 4496-01 (2002) <http://sccinstitute.com/media/56056/government_guarantee_case.pdf > accessed 27 July 2016.

that the law applicable to the arbitration agreement should apply to the issues of extension under guaranty agreements since it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement.[63] In addition, some scholars have suggested to apply a "validation principle", meaning that a guarantor is bound by an arbitration clause provided that either the law governing the arbitration agreement or the law applicable to the underlying guaranty agreement provides for this conclusion.[64]

The approach in favour of applying the law governing the main contract can be seen in a *SCC award case no. 38/1997* where it was held that the effect on the guarantor of an arbitration clause in the main contract shall be decided on the basis of the choice of law –Swedish law– made by the parties in the main contract.[65] From my point of view, a choice of law clause in the main contract cannot provide the basis for the law governing the extension under guaranty agreements due to the fact that the guarantor is a third party to the main contract and the guaranty agreement did not contain a choice of law clause. In this respect, it seems logical to suggest that the sole arbitrator should have determined the applicable law without recourse to the choice of law clause agreed by the original parties of the main contract.

Accordingly, the better view is that the law applicable to the arbitration agreement should govern the extension under guaranty agreements since it is the most closely connected law with the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. In this direction, in a recent Finnish award, the sole arbitrator held that it is appropriate to deal with the issue of extension pursuant to the Finland law as being the law of the seat of arbitration.[66] I am of the opinion that this finding leads to fairer and more predictable results than applying the choice of law clause agreed by the parties of the main contract owing to the fact that the guarantor is a third party to the main contract and the choice of law clause does not reflect its intention. At the same time, applying the law governing the arbitration agreement is more consistent with the principle of the separability of arbitration agreements than applying the law governing the underlying guarantee relationship. As a consequence, it seems plausible to suggest that the issue of extension under guaranty agreements should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of the parties' agreement.

63 A recent FAI Award reported by Mika Savola, chair of the FAI Board < http://arbitration.fi/2016/05/30/sole-arbitrators-jurisdictional-decision-finding-arbitration-clause-contained-loan-agreement-valid-binding-lendee-guarantor/ > accessed 27 July 2016 (FAI Award).

64 Born (n 6) 1463.

65 SCC Award (n 61).

66 FAI Award (n 62).

2.2.2. Divergent Approaches to the Issue of Extension under Guaranty Agreements

Different approaches have been taken by arbitral tribunals and national courts with regard to the issue of whether the guarantor is bound by the arbitration agreement of the main contract between the debtor and the creditor.

According to the first and prevailing approach in international arbitration, a guarantor is a third party to the main contract and to the arbitration clause therein. For this reason, a guarantor will not be bound by the arbitration agreement contained in the main contract.[67] Following this line, many arbitral tribunals and national courts have taken this approach. For instance, in the Interim Award of the *ICC Case No. 4367*, the arbitral tribunal pointed out that the guarantor Indian Bank is not a party to the main contract and the arbitration clause therein and thus, the suits before Indian courts in respect of a guaranty agreement are independent remedies separate from those before the tribunal.[68] The same position was upheld by the US Court in the *ITT Hartford* case where it was held that guarantors were not signatories to the main contract, the main contract does not illustrate an intent to benefit the guarantors and therefore, the guarantors were not bound by the arbitration clause contained in the main contract.[69]

Following this line of thought, French courts also did not accept the extension of arbitration agreements to the guarantors unless the parties' real intentions in drawing up the guaranty agreement were that the guarantor would be a party to the arbitration agreement.[70] This approach has been recognised for both first demand guarantees where the obligation of the guarantor is independent of the liability of the guarantor and general guarantees.[71] Likewise, some scholars have not supported the extension of arbitration agreements to the guarantors since the obligations of the guarantor are significantly different from the obligations of the main debtor and contended that the exceptions inherent in the debt that the guarantor may oppose to the creditor, do not cover the procedural objection based on the right to invoke the arbitration clause.[72] Other scholars have argued that whereas the guarantor may rely on the arbitration clause in the main contract against the creditor, the arbitration clause cannot be opposed against the guarantor.[73] The main argument behind the idea of impossibility of the invocation of arbitration clause against the guarantor is that it would be unjust to deprive the guarantor of its right of access to a state court due to considerations of fairness and good faith.[74]

67 Brekoulakis (n 2) 94.

68 *U.S. supplier v. Indian Buyer* Interim award in case No. 4367 (1984) *in* Yearbook Commercial Arbitration, Vol. 11 (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1986) 135-136.

69 *ITT Hartford Life & Annuity Ins Co v Amerishare Inv, Inc*, 133 F 3d 664, 670 (8th Cir 1998).

70 CA Paris 7 July 1994, *Uzinexportimport Romanian Co v Attock Cement Co* in (1995) Revue de L'Arbitrage 107.

71 C Cass Com 22 November 1977, *Buy Van Tuyen v Merrill Lynch Pierce Fenner* in (1978) Revue de L'Arbitrage 461; CA Paris 14 December 1987, *Cie de signaux et d'entreprises éelectriques v BNP et CPA* in (1989) Revue de L'Arbitrage 240.

72 Eric Loquin, 'Arbitrage et Cautionnement' (1994) Rev Arb 236, 240.

73 Rana Chaaban, 'Clause d'Arbitrage et Cautionnement' (2007) Revue de l'arbitrage 721, 728-743.

74 ibid 742-743.

As explained above, the prevailing view in most jurisdictions is that as the guarantor is not party to the main contract, it is also not party to the arbitration agreement contained in the main contract. In this sense, there is a general recognition that a separate legal theory must apply to the facts of the case in order to extend the arbitration clause to the guarantor. The most commonly used legal theory to this effect is incorporation by reference.[75] As regards the interpretation of issues related to the incorporation by reference, there are two divergent approaches taken by different jurisdictions to the extension of arbitration agreements. As such, three recent cases with comparable scenarios will be explained below in order to illustrate the difference between these approaches.

On the one hand, some national courts resorted to restrictive interpretation and have required a clearer language of reference for the extension of arbitration agreements to guarantors. Taking a close look at the facts of the *Decision no. 4A/128* of the Swiss Supreme Court, it is seen that the guaranty agreement explicitly referred to the main contract and the parties agreed that the guarantor which is the parent company of the guaranteed party, shall indemnify the creditor "as if the guarantor was the original debtor".[76] The Swiss Supreme Court held that the references in the guaranty contract to the various provisions of the main contract, while not specific to the arbitration clause, were intended to identify the secured obligations and were not sufficient to evidence a common intention of the parties to the guaranty agreement to incorporate the arbitration clause.[77] Thus, the Swiss Court emphasized that strict requirements of reference must be met for the extension of arbitration agreement to a guarantor.[78] Similarly, according to the facts of a recent Croatian Supreme Court's judgment, a Slovenian third party signed an annex to the main contract committing itself as a guarantor for the entire debt.[79] The annex did not restate the arbitration clause but contained a reference which states "All the other conditions remain unchanged".[80] The Croatian Supreme Court held that this clause only concerns the main contract and not the guaranty agreement despite the fact that it follows immediately after the guaranty agreement. Furthermore, it was held that even if the guarantor consented to the said clause, it would have meant that it did not oppose having the disputes between the parties of the main contract resolved by arbitration and thus, the guarantor is not bound by the arbitration clause contained in the main contract.[81] Therefore, it

75 Brekoulakis (n 2) 96.

76 Swiss Supreme Court decision 4A-128/2008 of 19 August 2008 Decision in (2008) 26 ASA Bulletin 721 (Swiss decision).

77 ibid.

78 Georg Naegeli and Chris Schmitz, 'Switzerland: Strict Test for the Extension of Arbitration Agreements to Non-Signatories' (2009) < http://www.homburger.ch/fileadmin/publications/EXTENSION.pdf > accessed 27 July 2016.

79 Croatian Supreme Court Judgment issued on 2 September 2014 (VSRH Revt-321/2013-2) (Croatian decision), in Tamara Manasijevic, 'Extension of Arbitration Agreements in Light of the Croatian Supreme Court Ruling- Caution with Pro-Arbitration Approach' published in Kluwer Arbitration Blog (2016) <http://kluwerarbitrationblog.com/2016/02/17/extension-of-arbitration-agreements-in-light-of-the-croatian-supreme-court-ruling-caution-with-pro-arbitration-approach/ > accessed 27 July 2016.

80 ibid.

81 ibid.

seems that the Croatian Supreme Court also took the stance in favour of restrictive interpretation of references contained in guaranty agreements.

On the other hand, other national courts have a tendency toward a broad interpretation of references by putting the commercial sensibility in the first place. In the *Stellar Shipping* case, the English High Court considered whether the guarantor's endorsement of the main contract in relation to its guarantee obligations included acceptance of the arbitration clause contained in the main contract.[82] Considering the close connection between the main contract and the guaranty agreement as well as the parties involved, it was held that it would be sensible to expect the parties to agree to a common method of dispute resolution and the guarantor is bound by the arbitration clause.[83]

According to the second and minority view, the guarantor may be bound by the arbitration clause under certain conditions. In a jurisdictional award of SCC *Case no. 38/1997*, the sole arbitrator established some preconditions for the extension of arbitration agreement contained in the main contract to the guarantor due to considerations of fairness. Firstly, the obligations undertaken by the debtor and the guarantor should be equivalent. According to the facts of the case, there was an explicit undertaking of the guarantor to repay a loan and as a consequence, the obligations of the debtor and the guarantor were identical.[84] Secondly, the guarantor should be aware of the arbitration clause. In this case, since organs of the guarantor state were involved in the negotiations of the main contract and there is a specific reference to that contract in the guaranty text, the guarantor was aware of the arbitration clause.[85] A similar position was upheld by a recent FAI award where the sole arbitrator decided that the guarantor is bound by the arbitration clause contained in the main contract as it was aware of the main contract and the arbitration clause therein.[86] As can be understood from these two arbitral awards, under the second and minority view, the nature of obligations and the awareness of the guarantor play an important role for adjudicators to decide whether to extend the arbitration clause to the guarantor.

2.2.3. Critique on the Extension under Guaranty Agreements

As explained above, the law applicable to the existence and validity of arbitration agreements should govern the extension under guaranty agreements as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. Additionally, this proposition would lead to fairer and more predictable results for both the guarantor and the parties of the main

82 Stellar Shipping (n 60).

83 ibid.

84 SCC Award (n 61).

85 SCC Award (n 61).

86 FAI Award (n 62).

contract and would be more consistent with the principle of separability of arbitration agreements than applying any other law.

In regard to the issue of whether the guarantor is bound by the arbitration agreement contained in the main contract, there are mainly two different stances taken by national courts and arbitral tribunals. According to the first and prevailing approach taken by many arbitral tribunals and national courts in selected jurisdictions, since the guarantor is not party to the main contract, it is also not bound by the arbitration clause contained therein. As such, it is generally accepted in these jurisdictions that a separate legal theory must exist in order to extend the arbitration clause to the guarantor. In particular, as the most frequently used theory to this effect is incorporation by reference, two divergent approaches to the interpretation of references were explained above on the basis of three recent decisions given by different jurisdictions.[87]

Considering these two divergent approaches to the interpretation of references, the Swiss Supreme Court and the Croatian Supreme Court tend to require that any incorporation by reference into a guarantee be explicit and the guarantor's intent to be personally bound by the arbitration clause must be express. From a critical perspective, it is questionable whether this restrictive interpretation of references is consistent with the necessity to avoid the multiplication of parallel proceedings, fairness and good administration of justice. In this respect, I argue that the restrictive interpretation of the said courts gave priority to the necessity of clear consent to the arbitration clause over commercial sensibility and procedural economy. Likewise, as pointed out by Brekoulakis, clear consent for arbitration is often absent in each one of legal theories for the extension of arbitration agreements to non-signatories.[88] In addition, commercial parties do not often consider the arbitration clause as a separate part of the main contract in the course of concluding the contract and they do not often carry about requesting clear consent for arbitration from a guarantor when incorporating the terms of the main contract into the guaranty agreement. Thus, this restrictive approach encourages parallel proceedings arising out of the obligations of the guarantor and ignores the fact that commercial parties are not specialists in the arbitration field. In this respect, the English High Court's broad interpretation of references by putting emphasis on the close connection between the main contract and the guaranty agreement is more consistent with the expectations of modern commercial transactions. Likewise, the English approach reconciles with the idea that arbitration is not a burden for commercial parties, but rather it is a normal way to resolve disputes between commercial parties.

Under the second and minority stance taken by awards of SCC and FAI mentioned above, the guarantor may be bound by the arbitration clause provided that its

87 Swiss decision (n 75), Croatian decision (n 78), Stellar Shipping (n 60).

88 Brekoulakis (n 10).

obligations are equivalent to that of the debtor and it is aware of the arbitration clause. These awards brought a new pro-arbitration perspective to the academic debate in relation to the extension of arbitration agreements to guarantors. Nonetheless, these awards can be criticised as the preconditions stated by arbitral tribunals for holding a guarantor subject to arbitration are not enough to determine the implied consent of the guarantor. Even if this thesis adopts a liberal approach to the non-signatory issues, this situation is quite different from holding that an arbitration clause extends with incorporation by reference. If the creditor or the guarantor intend to have the benefits of an arbitration clause, they can insist at least to refer to the provisions of the main contract. By holding a guarantor subject to arbitration when the guaranty agreement does not contain any references, the arbitrator grants the creditor a benefit for which it could have bargained with the guarantor and this may lead to unfair results.

Therefore, it seems plausible to suggest that in case there are references to the main contract in the guaranty agreement, the broad interpretation of these references is more persuasive and consistent with the expectations of modern commercial transactions. In case there are not any specific references in the guaranty agreement, the identical nature of obligations with the debtor and the awareness of the arbitration clause are not sufficient for a guarantor to be bound by the arbitration clause since these factors do not evidence even the functional and implied consent of the guarantor.

CHAPTER 3: BINDING NON-SIGNATORIES UNDER DOCTRINE-BASED THEORIES

In this chapter, the extension of the arbitration agreement to non-signatories through the application of doctrine-based theories will be evaluated.

3.1. Extension under Group of Companies Doctrine

In principle, an arbitration agreement concluded by one of the companies in the same group cannot be binding on other members of the same group due to considerations of limited liability and separate legal personality. As an exception to this general rule, arbitral tribunals may extend an arbitration clause to a non-signatory member of the same group under certain conditions that will be scrutinised below. Accepting the fact that this doctrine might even have experienced more criticism than sympathy in the arbitration community, this section will analyse different approaches taken by national courts and arbitral tribunals in relation to the law governing extension under group of companies doctrine and the applicability of the doctrine.

3.1.1. Law Governing Extension under Group of Companies Doctrine

In the context of the group of companies doctrine, there is a noticeable trend among tribunals not to base their decision on the issue of extension on a prior

determination of the applicable law.[89] Given the separability of the arbitration clause, they generally decide on this issue according to the common intention of the parties and the usages of international trade by applying international rules of substantive law.[90] The main reason is that the majority of national laws supports the principles of separate legal personality and limited liability that does not allow for the application of the group of companies doctrine.[91] In this respect, in the Dow Chemical case, Paris Court of Appeal decided whether to extend the arbitration clause under the group of companies doctrine having regard to the common intention of the parties and the usages of international trade.[92] By contrast, the majority of other jurisdictions did not allow international rules to determine the issue of extension.[93] Likewise, it should be noted that some scholars have argued that issues related to the group of companies doctrine ought to be governed by the law applicable to the arbitration agreement.[94]

In my opinion, in case the implied consent of the non-signatory can be deduced from the facts of the case, national courts and arbitral tribunals should take equity and efficiency considerations into account when determining their competence. As such, the law applicable to the arbitration agreement should govern this issue as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. In addition, since the main purpose of the group of companies doctrine is to demonstrate the implied consent according to the facts of the case, this doctrine should be considered as a rule of international law and be applied as part of the law applicable to the arbitration agreement. Likewise, arbitral tribunals seated in France have treated this doctrine as "a usage conforming to the needs of international commerce".[95] Otherwise, due to the principle of separate legal personality which is generally recognised in most jurisdictions, this doctrine will rarely be applicable if the tribunal relies only on the national law.[96] Furthermore, given the fact that equitable considerations are taken into account by courts and tribunals when deciding on substantive issues, considerations of equity and good administration of justice should also play an important role in jurisdictional issues.

89 Hanotiau (n 21) 97.

90 Brekoulakis (n 2) 165-166.

91 Brekoulakis (n 2) 165.

92 CA Paris 21 October 1983, *Société St. Gobain v Société Dow Chemical* (1984) Revue de L'Arbitrage 98 with observations by A. Chapelle (CA *Dow Chemical* case).

93 *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] WL 229138 [62] (Peterson Farms).

94 Born (n 6) 1498.

95 *Dow Chemical France, The Dow Chemical Company and others v ISOVER Saint Gobain*, Interim award of ICC Case No. 4131, 23 September 1982, in Pieter Sanders (ed), (1984) 9 Yearbook Commercial Arbitration 131 (*Dow Chemical* Award).

96 Brekoulakis (n 2) 168.

3.1.2. Divergent Approaches to the Extension under Group of Companies Doctrine

French arbitration practice is the leading authority adopting the group of companies doctrine.[97] Although it is not the first award in relation to group of companies, the conditions for the application of the group of companies doctrine was first introduced by the famous *Dow Chemical award*[98], issued in Paris in 1982. These conditions were: (i) the existence of a 'single economic unit'[99], (ii) the active role of the non-signatory company in the negotiations, performance or termination of the contract[100]; and (iii) the requirement of common intention of the parties to arbitrate.[101] The combination of these conditions were main criteria for determining the implied consent of the non-signatory and led to the concept of group of companies doctrine. Likewise, Paris Court of Appeal upheld this award but its reasoning was focused on the intention of the parties as revealed by their conduct rather than the concept of group of companies doctrine.[102]

In the *Orri* decision, Paris Court of Appeal went too far from the requirement of combination of the aforementioned three conditions.[103] In this case, the Paris Court of Appeal refused to set aside the award in which the arbitration agreement is extended to a non-signatory on the basis of the active role of the non-signatory in the performance of the contract and its awareness of the existence of the arbitration clause.[104] Therefore, the Court did not require the combination of three elements mentioned above in order to determine implied consent of the non-signatory. However, more recent decisions made by the ICC tribunals adopted a more moderate approach and it seems that arbitrators now recognize the significant problems arising from this doctrine.[105] For instance, in *ICC Case no. 9517*, the tribunal pointed out that even if the condition of close corporate ties is established, this will not be enough to justify an extension of the arbitration clause.[106]

The approach of the Swiss jurisdiction has been inconsistent. On the one hand, the Swiss Federal Supreme Court in 1996 did not allow for the extension of an arbitration clause signed by a project company to its foreign parent.[107] Similarly, some Swiss

97 Born (n 6) 1445.

98 *Dow Chemical* Award (n 94), Collection of ICC Awards 1974-1985, 146-153 and 464-473 with observations by Yves Derains.

99 *Dow Chemical* Award (n 94) (1984) Revue de L'Arbitrage 137 (1984) 9 YBCA 131.

100 ibid.

101 ibid.

102 CA *Dow Chemical* case (n 91); Yves Derains, 'Is There a Group of Companies Doctrine?' in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 131.

103 CA Paris 11 January 1990, *Orri v Lubrifiants Elf Aquitaine* (1992) Revue de L'Arbitrage 95 (CA *Orri* decision).

104 ibid 106.

105 Stephan Wilske, Laurence Shore and Jan-Michael Ahrens, 'The "Group of Companies Doctrine" – Where is it Heading?' (2006) 17 American Review of International Arbitration 73, 88.

106 ICC Case No. 9517 (2000), 16(2) ICC BULL 80 (2005).

107 Swiss Supreme Court decision of 29 January 1996, *Saudi Butec Ltd v Al Vouzan Trading, Contracting Co Ltd v Saudi Arabian Saipem Ltd, Saipem SpA* (1996) 14 ASA Bulletin 496.

scholars have contended that the group of companies doctrine is not recognised under Swiss law.[108] On the other hand, in a recent case, the Swiss Federal Supreme Court upheld an award in which the tribunal applied Lebanese law and international trade usages to extend the arbitration agreement to the controlling shareholder.[109] Although the Court did not expressly recognise the group of companies doctrine, this decision surprised many practitioners and was criticised by arbitration practitioners.[110] Consequently, although the Swiss jurisdiction did not endorse the group of companies doctrine as a part of Swiss law, it appears to be flexible and close to the present position of French courts.[111] Nonetheless, it may well be argued that the Supreme Court would not allow the extension of arbitration agreement to the controlling shareholder if the tribunal applied Swiss law.

Though the US Jurisdiction has a generous case law applying the other non-signatory theories, US Court of Appeals, in the *Sarhank* case, clearly stated that US courts will not follow the group of companies doctrine.[112] Nonetheless, in the *Ryan* case, US Court of Appeals held that a non-signatory parent company may be bound by an arbitration clause due to procedural efficiency considerations.[113] Even if the Court did not refer explicitly to the group of companies doctrine, the discrepancy between US courts was criticised by some scholars as it affects adversely the business certainty required in modern transactions relating to several companies.[114]

The most conservative approach between selected jurisdictions can be seen in England. The English Commercial Court, in *Peterson Farms* case, established that the group of companies doctrine "forms no part of English law" and annulled the relevant part of the award.[115] English scholars have also been generally suspicious in relation to the doctrine.[116] In this direction, in the *Dallah* case, the English Court refused enforcement of an ICC award issued in Paris, reasoning that French law had wrongly been applied by the arbitral tribunal with regard to the issue of extension.[117] In this case, there was no group of companies situation but the issue was related to the

108 Jean-François Poudret, 'L'Extension de la Clause d'Arbitrage: Approches Française et Suisse' (1995) 122 Journal de Droit International (Clunet) 893, 913.

109 Swiss Supreme Court decision of 16 October 2003, *X. S.AL., Y.S.AL, et A contre Z Sarl* ATF/BGE (Collection of Supreme Court cases) 129 III 727, 730.

110 Philipp Habegger, 'Extension of Arbitration Agreements to Non-Signatories and Requirements of Form' (2004) 22 ASA Bulletin 398.

111 Derains (n 101) 137.

112 *Sarhank Group v Oracle Corporation*, 404 F 3d 657 (2nd Cir. 2005) (SDNY).

113 *J.J. Ryan & Sons* v *Rhone Poulenc Textile SA et al*, 863 F 2d 315, 320–21 (4th Cir. 1988), 15 Yearbook Commercial Arbitration 543 (1990).

114 Hosking (n 32) 295.

115 *Peterson Farms* (n 92), (2004) 1 Lloyd's Law Rep. 612 (QB).

116 John Leadley and Liz Williams, 'Peterson Farms: *There Is No Group of Companies Doctrine in English Law'* 2004 International Arbitration Law Review 111; Wilske, Shore and Ahrens (n 104) 81-82.

117 Dallah Real Estate and Tourism Holding Co.v. The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755, [2010] 1 All ER 592.

determination of implied consent of a state.[118] Since the decision was based on a strict interpretation of the implied consent that was incompatible with French approach, it is also a good example for showing the reluctance of English courts to recognise the group of companies doctrine.

3.1.3. Critique on the Extension under Group of Companies Doctrine

In light of the explanations stated above, the law applicable to the arbitration agreement should govern the extension under the group of companies doctrine as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Additionally, the group of companies doctrine should be considered as a rule of international law and be applied as part of the national law governing the arbitration agreement. Otherwise, if the tribunal relies only on the legal rules of a national law, the doctrine will not have a chance to be applicable.

Taking a comparative look at the selected jurisdictions, it is seen that French arbitration practice generally supports the doctrine whereas England adopted the most conservative approach between selected jurisdictions. The stance taken by United States and Switzerland seems to be more flexible than England but it should be noted that there are several discrepancies between court decisions in the US and Switzerland. As emphasized by Hosking, this discrepancy affects negatively the business certainty required in modern transactions.[119] Therefore, it seems plausible to suggest that the clear and consistent case law with regard to the doctrine would be more desirable for commercial parties due to considerations of predictability and prudence. Furthermore, given the divergent approaches between major selected jurisdictions, the initial choice of seat has a great importance for determining the willingness of the tribunal to extend the arbitration agreement.[120]

From a general perspective, the group of companies doctrine emphasizes the importance of economic reality on the basis of determining the implied consent of the non-signatory. Even implicit consent needs to be clearly evidenced with a degree closer to certainty, rather than possibility.[121] Of course, the strict approach of English courts can be criticised as parties with an important role in the commercial transaction might be left outside the arbitration proceedings. However, this should not mean that implied consent may be construed with a degree of probability. In this respect, the Paris Court of Appeal's *Orri* decision can be criticised since the extension of the arbitration agreement to the non-signatory was only based on its active role in

118 ibid.

119 Hosking (n 32) 295.

120 Vladamir Pavic, '"Non-Signatories" and the Long Arm of Arbitral Jurisdiction' in Peter Hay and others(ed), Resolving International Conflicts – Liber Amicorum Tibor Varady (1st edn, Central European University Press 2009) 213, 229.

121 Gaillard and Savage (n 9) 254 .

the performance of the contract and its awareness of the arbitration clause.[122] It seems reasonable to suggest that these grounds are ambiguous factors and insufficient to determine the implicit consent with a degree closer to certainty in the context of the group of companies doctrine.

Accordingly, I argue that the combination of three conditions introduced by *Dow Chemical*[123] award should exist in every situation for the extension of the arbitration clause under the group of companies doctrine and the tribunal should focus on the common intention of the parties. In addition, the implied consent of the non-signatory should be determined according to the facts of the case with a degree of certainty rather than probability.

3.2. Extension under Piercing the Corporate Veil Doctrine

According to the piercing the corporate veil doctrine, a party who has not consented to a contract containing an arbitration clause may nevertheless be bound by the clause if that party strongly dominates the affairs of an entity that did execute the agreement and has abused such control.[124] The doctrine constitutes an exception to the principle of limited liability and separate legal identity of companies and is justified by elements of fairness.[125]

Some scholars have drawn attention to three variants of the theory which are instrumentality, alter ego and identity doctrines.[126] Given this difference, although the words "alter ego" and "piercing the corporate veil" are often used interchangeably, it is preferred to use the word "piercing the corporate veil" in a general sense including all variants of the doctrine in the context of extension of arbitration agreements to non-signatories. This section will analyse different approaches taken by national courts and arbitral tribunals in relation to the law governing extension under piercing the corporate veil doctrine. In addition, accepting the fact that the doctrine is generally recognised in all selected jurisdictions, this section will draw attention to some differences with regard to the application of the doctrine in diverse jurisdictions.

3.2.1. Law Governing Extension under Piercing the Corporate Veil Doctrine

Regarding the applicable law to the extension of arbitration agreements under the piercing the corporate veil doctrine, distinct authorities have applied the law of the

122 CA *Orri* decision (n 102).

123 Dow Chemical Award (n 94).

124 Born (n 6) 1433.

125 Sebastien Besson, 'Piercing the Corporate Veil: Back on the Right Track' in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 147.

126 Pietro Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for This Doctrine to Exist?' (2009) 26 Journal of International Arbitration 647, 649.

state of incorporation[127], or the law governing the main contract[128] or the law governing the arbitration agreement[129]. Furthermore, some scholars have argued that uniform international principles should govern the extension since the doctrine arises from the application of internationally recognized equitable principles to avoid unfairness.[130] Other scholars have suggested that the law of place of residence of the contracting party who asserts the misuse of the control could govern this issue as the theory is an exception that aims to correct the effect of the law on the basis of good faith considerations.[131]

Taking into consideration all these approaches with regard to the applicable law, even if some courts have contended that the state of incorporation of an entity has a greater interest in determining when to isolate shareholders from legal liability[132], this law may be uncertain in case the signatory and the non-signatory corporations are incorporated in different countries. Similarly, applying the law governing the main contract to the issue of extension is not appropriate since non-signatory party is not a party to the main contract and the choice of law clause does not reflect its intention. It is also important to note that the law of the place of residence of the contracting party which invokes the abuse may be unfamiliar and unpredictable to other contracting party in the context of multinational transactions. Likewise, the application of uniform international rules may lead to unpredictable decisions as the scope and conditions of internationally recognized equitable principles may be interpreted differently in diverse jurisdictions.

In this respect, it seems plausible to suggest that the law applicable to the arbitration agreement should govern the extension under the piercing the corporate veil doctrine as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. Likewise, as noted by Brekoulakis[133], tribunals often rely on national laws and especially on the law of the seat of arbitration when they refer to this theory.[134] I argue that this finding leads to fairer and more predictable results in respect of non-signatories than any other law mentioned above. Additionally, this approach is more consistent with the principle of autonomy of arbitration agreements than applying any other laws. Consequently, this issue should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of the parties' agreement.

127 *Fletcher v Atex Inc*, 68 F 3d 1451, 1456 (2d Cir 1995).

128 *FR8 Singapore Pte Ltd v Albacore Maritime Inc*., 754 F Supp 2d 628 (SDNY 2010).

129 ICC Case No. 8385 of 1995 (1997) 124 Journal du Droit International 1061, 1072-1073 with observations by Yves Derains.

130 Born (n 6) 1444.

131 Besson (n 124) 155.

132 *Soviet Pan Am Travel Effort v Travel Committee Inc*, 756 F Supp 126 (SDNY 1991).

133 Brekoulakis (n 2) 172.

134 ICC Case no. 7626 of 1995, in Jean-Jacques Arnaldez and Yves Derains and Dominique Hascher (eds), *Collection of ICC Arbitral Awards 1996-2000* (1st edn, Kluwer Law International 2003) 119; ICC Case no. 10758 of 2000, (2000) Journal du Droit International 1171.

3.2.2. Application of Piercing the Corporate Veil Doctrine in Diverse Jurisdictions

The piercing the corporate veil doctrine is recognised in all selected jurisdictions but there are some differences between jurisdictions with regard to the application of the doctrine.

Under English law, the principle of separate legal personality has a crucial importance and the corporate veil can only be pierced in very limited circumstances. Especially, in both recent *VTB Capital*[135] and *Prest*[136] cases, the UK Supreme Court established that piercing the corporate veil is possible only where a corporate structure has been implemented or used to avoid or frustrate an existing legal obligation. As such, the English jurisdiction has a significantly high standard that generally requires fraud or other misconduct to avoid liability through the use of corporate structure.[137] Therefore, since any published case law specific to the extension of arbitration agreements could not be reached at the time of writing this paper, it can be assumed that this elevated standard for piercing the corporate veil would also be valid in the context of arbitration.

Swiss case law has also been reluctant to disregard the legal personality of a corporation. As pointed out by Poudret, under Swiss law, the legal personality of a corporation will only be disregarded in exceptional circumstances consisting of fraud or an abuse of right.[138] In a recent decision, the Swiss Supreme Court held that the doctrine of piercing the corporate veil can be used to extend the arbitration agreement.[139] In addition, the Court emphasized its well-established practice according to which the corporate veil may be pierced in exceptional circumstances where a corporation and another entity or its majority shareholder are operating as a single economic entity and it would be unfair to uphold the legal distinction between them.[140] Thus, Swiss case law also brought an elevated standard for piercing the corporate veil.

Many US Courts have similarly been prudent in applying piercing the corporate veil doctrine and they adopted a three-pronged test for disregarding the separate legal personality of a corporation.[141] For instance, in the *Fisser* case, the US Court held that the requirements for the application of the doctrine are: (i) control or complete domination of an entity, (ii) fraud or wrong committed by the use of this control or domination and (iii) injury or loss suffered by the counterparty caused by the

135 *VTB Capital plc v Nutritek International Corp and Others* [2013] UKSC 5, [2013] 2 AC 337.

136 *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34, [2013] 3 WLR 1.

137 Born (n 6) 1434.

138 Poudret (n 107) 913.

139 Swiss Supreme Court Decision 4A_160/2009 of 25 August 2009, in Georg Van Segesser and Petra Rihar, 'Piercing the Corporate Veil – Effect on the Arbitration Clause and Jurisdiction' published in Kluwer Arbitration Blog (2009) < http://kluwerarbitrationblog.com/2009/11/24/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction-2/?print=print > accessed 27 July 2016.

140 ibid.

141 Philip I. Blumberg and others, *Blumberg on Corporate Groups* (2nd edn, Harcourt Professional Publishing 2006) s 70.22.

aforementioned act.[142] This three-pronged test has been referred to in the *Freeman* case and in that case, the US Court applied the piercing the corporate veil doctrine in relation to the extension of an arbitration agreement.[143] However, according to the minority view, in case of complete control of a company's regular activities by another company, this may merely be sufficient to disregard the separate legal personality. To illustrate, in the *Servaas Inc* case, the US Court held that a corporate veil may be pierced "where one entity exercises complete domination and control over the day-to-day operations of another entity".[144] In this respect, US Courts that adopt this minority view would be more willing to pierce the corporate veil and extend the arbitration agreement to a non-signatory.

Furthermore, it seems that French case law does not clearly distinguish the group of companies and piercing the corporate veil doctrines.[145] This can be explained by the practice that the group of companies doctrine was recognized in France and was generally satisfactory to address the issue of extension.[146] Nonetheless, it should be noted that French courts appear to be prone to pierce the corporate veil in case of fraud. Likewise, in the *Orri* case, as mentioned in the previous section, Paris Court of Appeal had applied the group of companies doctrine for the extension.[147] However, in that case, French Supreme Court relied only on the ground of fraud for the extension of arbitration agreements.[148] As already explained, the grounds relied on by the Paris Court of Appeal were ambiguous factors and insufficient to determine the implicit consent with a degree closer to certainty in the context of the group of companies doctrine. By contrast, in that case, it seems reasonable to suggest that the notion of fraud constituted an appropriate justification for the extension in the context of piercing the corporate veil doctrine. In addition, since the French Supreme Court allowed the extension of arbitration agreement on the sole ground of fraud in the *Orri*[149] case, the French approach is familiar with piercing the corporate veil doctrine.

3.2.3. Critique on the Piercing the Corporate Veil Doctrine

As regards the applicable law, it seems logical to suggest that extension under piercing the corporate veil doctrine should be governed by the law applicable to the existence and validity of the arbitration agreement as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Furthermore, this proposition would lead to fairer and more predictable results for all

142 *Fisser v International Bank*, 282 F 2d 231, 237 (2d Cir1960).

143 *Freeman v Complex Computing Company Inc*, 979 F Supp 257 (SDNY 1997).

144 *Servaas Inc v Republic of Iraq,* 686 F Supp 2d 346, 354-355 (SDNY 2010).

145 Poudret and Besson (n 54) 255-56.

146 Besson (n 124) 152.

147 CA *Orri* decision (n 102).

148 C Cass Civ (1) 11 June 1991, *Orri v Société des Lubrifiants Elf Aquitaine* (1992) Revue de L'Arbitrage 73.

149 ibid.

parties and would be more consistent with the principle of autonomy of arbitration agreements than applying any other suggested law.

Taking a comparative look at the selected jurisdictions, it is seen that authorities generally recognise the piercing the corporate veil doctrine. On the one hand, under English and Swiss law, the corporate veil may be pierced in exceptional circumstances where a non-signatory significantly controls a contracting party and there is a fraud or abuse of right. Similarly, many US Courts adopted a three-pronged test and they also have an elevated standard for piercing the corporate veil. On the other hand, some US Courts held that complete control of a company's day-to-day activities can solely be sufficient to disregard the separate legal personality. As such, US Courts that adopt this minority view has a lower standard to pierce the corporate veil. Moreover, although French case law does not distinguish the group of companies and piercing the corporate veil doctrines, given the recognition of group of companies doctrine in France and acceptance of the notion of fraud in the *Orri*[150] decision, French courts seem to be prone to piercing the corporate veil in case of fraud. Since there is not any published decision apart from the French Supreme Court's *Orri*[151] decision, the standard of French jurisdiction is not clear. Nevertheless, it seems reasonable to suggest that French case law would not have such a high standard for piercing the corporate veil as English, Swiss and many US Courts have due to the fact that the group of companies doctrine is generally satisfactory to address these situations.

In the context of piercing the corporate veil doctrine, an important question arises as to whether the control or domination of an entity over another justifies treating it as a party to the arbitration agreement. I argue that this element is not merely sufficient and a second element, at least an abuse of right must exist for piercing the corporate veil. The reason behind this argument is that piercing the corporate veil doctrine implies an extension without consent of the parties and the analysis is much more fact-oriented than other non-signatory theories.[152] In this respect, only the control criterion should not be sufficient to disregard limited liability and separate legal personality of companies which are core principles of company law. Likewise, the core of the doctrine is based on the abuse of right of the corporate form.[153] Nonetheless, it should be noted that such abuses may be divergent.[154] From a liberal perspective, it seems reasonable to suggest that courts and tribunals should not limit such abuses to the case of fraud and they should also pay attention to other scenarios of abuses.

Lastly, an important question arises in relation to the arbitration procedure as to whether the non-signatory company will be bound by the arbitration agreement instead

150 ibid.

151 ibid.

152 Pavic (n 119) 223-224.

153 ICC Case No 11209 (2005) 16(2) ICC Bulletin 102, 106-107.

154 Besson (n 124) 154.

of or in addition to the signatory company. The answer to this question is not consistent in practice. Some scholars suggest that the claim should be invoked against the non-signatory controlling company which is the real party in interest.[155] It is also contended that the arbitration agreement would not be extended to the non-signatory and in fact, non-signatory would replace the signatory.[156] These propositions in the academic area appear to be well-grounded and justifiable but as there is no uniform practice with regard to this procedural issue, it is questionable whether it would be possible to invoke the claim against the non-signatory company until the tribunal determines the issue of extension. In this respect, it seems logical to invoke claims against both signatory and non-signatory companies in order to be on the safe side in the arbitration proceedings.

CONCLUSION

The classification of the most controversial four legal theories –third party beneficiary rule, guaranty agreements, group of companies doctrine and piercing the corporate veil doctrine- as contractual and doctrine-based theories brings to light the distinct features of these two categories. The main differences between them are the legal basis which links the non-signatory to the arbitration agreement and primary considerations for the extension of arbitration agreements. This thesis focuses on the applicable law issues and comparison of divergent approaches in selected jurisdictions under each of these legal theories. As such, this thesis emphasizes the importance of functional concept of consent and equitable considerations with regard to these controversial non-signatory theories and allows for making the following conclusions.

As regards the applicable law, the law applicable to the existence and validity of the arbitration agreement should govern the extension under the theories examined in this paper. This proposition would lead to fairer and more predictable results for all parties and would be more consistent with the principle of autonomy of arbitration agreements than applying any other suggested law. In particular, the group of companies doctrine should be considered as a rule of international law and be applied as part of the national law governing the arbitration agreement.

Regarding the application of the selected theories, the primary concern of contractual theories is to determine the implied consent of the non-signatory. Under the third party beneficiary rule, in most selected jurisdictions, the right of the third party to invoke the arbitration clause depends on whether the original parties aim to confer the third party a real benefit under the main contract. In this respect, the benefit conferred on third party beneficiary must be substantial rather than incidental. This prevailing approach taken by England, France and United States is persuasive.

155 Brekoulakis (n 2) 173.

156 Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties' in Albert Jan van den Berg (ed), ICCA: 50 Years of the New York Convention (Kluwer Law International, 2009) 343, 378.

Nevertheless, given the difficulty of proving the condition of real benefit, a reduced standard of proof should be maintained as it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements. Likewise, it seems logical to suggest that only if the third party exercise its substantive rights under the main contract, will it be bound by the arbitration clause contained therein. In regard to the extension under guaranty agreements, a separate legal theory must exist in order to determine the implied consent of the guarantor and the most frequently used theory to this effect is incorporation by reference. In case there are references to the main contract in the guaranty agreement, the broad interpretation of these references is advisable as it is more consistent with the expectations of modern commercial transactions. Likewise, the approach in favour of broad interpretation of references reconciles with the idea that arbitration is not a burden for commercial parties, but rather it is a normal way to resolve disputes between commercial parties.

As for doctrine-based theories, economic reality considerations take primacy as they mainly focus on the economic relationship between the non-signatory and one of the signatories of the arbitration agreement. In this respect, the group of companies doctrine is beneficial as it facilitates including a third party who has an active role in the transactions in the arbitration proceedings. Nonetheless, the combination of three conditions introduced by the leading *Dow Chemical*[157] award should exist in every situation for the extension of the arbitration clause under the group of companies doctrine and the tribunal should focus on the common intention of the parties. In addition, adjudicators should determine the implied consent of the non-signatory according to the facts of the case with a degree of certainty rather than probability in order to achieve a fair and equitable solution. In the context of piercing the corporate veil doctrine, since this theory is much more fact-oriented rather than implied consent in comparison with other theories, the control criterion is not merely sufficient to treat a non-signatory as a party to the arbitration agreement and a second element, at least an abuse of right must exist for the application of the doctrine. Furthermore, it seems plausible to suggest that adjudicators should not limit such abuses to the case of fraud and they should also take into consideration other scenarios of abuses.

The debate on the extension of arbitration agreements remains largely unsettled today. This thesis, adopting a liberal approach, highlights the fact that becoming a party to the arbitration agreement is not a sanction for the non-signatory. Instead, arbitration is currently the ordinary way to solve commercial disputes and the good administration of justice necessitates the extension of arbitration agreements to non-signatories under certain conditions that are examined for each of these four legal theories. As such, arbitral tribunals and national courts should grant more importance to the functional concept of implied consent and equitable considerations in deciding whether to extend

157 *Dow Chemical* Award (n 94).

an arbitration agreement to a non-signatory. In addition, there are strong arguments to conclude that commercial parties would desire that all related disputes be resolved efficiently in a single forum instead of multiple and potentially inconsistent proceedings in different forums and applying a liberal standard of proof of consent is compatible with commercial reality and the pro-arbitration policies of the New York Convention.

Finally, given the divergent approaches of leading authorities with regard to the application of non-signatory theories, lawyers drafting an arbitration agreement should carefully choose the seat of arbitration and they should be aware of the recent trends with regard to the extension of arbitration agreements in the available choice of seats.

BIBLIOGRAPHY

Table of Cases

United Kingdom

Christina Mulchrone v Swiss Life [2005] EWHC 1808 (Comm), [2005] ArbLR 43

Dallah Real Estate and Tourism Holding Co.v. The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755, [2010] 1 All ER 592

Nisshin Shipping Co Ltd v Cleaves Co Ltd [2003] EWHC 2602 (Comm), (2003) 2 CLC 1097

Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm), [2004] WL 229138 [62] (Peterson Farms case)

Prest v Petrodel Resources Limited and Others [2013] UKSC 34, [2013] 3 WLR 1

Stellar Shipping Co LLC v Hudson Shipping Lines [2010] EWHC 2985 (Comm)

VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5, [2013] 2 AC 337

France

CA Paris 7 Dec 1994, V2000 (formerly Jaguar France) v. Renault in (1996) Revue de L'Arbitrage 245

CA Paris 14 December 1987, Cie de signaux et d'entreprises éelectriques v BNP et CPA in (1989) Revue de L'Arbitrage 240

CA Paris 7 July 1994, Uzinexportimport Romanian Co v Attock Cement Co in (1995) Revue de L'Arbitrage 107

CA Paris 11 January 1990, Orri v Lubrifiants Elf Aquitaine (1992) Revue de L'Arbitrage 95

CA Paris 21 October 1983, Société St. Gobain v Société Dow Chemical (1984) Revue de L'Arbitrage 98 with observations by A. Chapelle

C Cass Civ (1) 11 Jul 2006, 2006 Rev Arb 969

C Cass Com 22 November 1977, Buy Van Tuyen v Merrill Lynch Pierce Fenner in (1978) Revue de L'Arbitrage 461

C Cass Civ (1) 11 June 1991, Orri v Société des Lubrifiants Elf Aquitaine (1992) Revue de L'Arbitrage 73

Switzerland

Swiss Supreme Court decision 4A_44/2011 of 19 April 2011 [2.4.2] (2012) 30 ASA Bulletin 659

Swiss Supreme Court Decision 4A_160/2009 of 25 August 2009, in Georg Van Segesser and Petra Rihar, 'Piercing the Corporate Veil – Effect on the Arbitration Clause and Jurisdiction' published in Kluwer Arbitration Blog (2009) < http://kluwerarbitrationblog.com/2009/11/24/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction-2/?print=print >

Swiss Supreme Court decision 4A-128/2008 of 19 August 2008 in (2008) 26 ASA Bulletin 721

Swiss Supreme Court decision of 29 January 1996, Saudi Butec Ltd v Al Vouzan Trading, Contracting Co Ltd v Saudi Arabian Saipem Ltd, Saipem SpA (1996) 14 ASA Bulletin 496

Swiss Supreme Court decision 4A_627/2011 of 8 March 2012 [3.5] (2012) 30 ASA Bulletin 647

Swiss Supreme Court decision of 16 October 2003, X. S.AL., Y.S.AL, et A contre Z Sarl ATF/BGE (Collection of Supreme Court cases) 129 III 727

United States

Collins v International Dairy Queen Inc, 2 F. Supp. 2d 1465 (MDGa 1998)

Continental Cas Co v American National Insurance Co, 417 F 3d 727 (7th Cir 2005)

E.I. DuPont de Nemours & Co v Rhone Poulenc Fiber and Resin Intermediates, SAS, 269 F3d 187 (3d Cir 2001)

Fisser v International Bank, 282 F 2d 231, 237 (2d Cir1960)

Fletcher v Atex Inc, 68 F 3d 1451, 1456 (2d Cir 1995)

Freeman v. Complex Computing Company Inc, 979 F Supp 257 (SDNY 1997)

ITT Hartford Life & Annuity Ins Co v Amerishare Inv, Inc, 133 F 3d 664 (8th Cir 1998)

JLM Indus, Inc v Stolt-Nielsen SA, 387 F3d 163 (2d Cir 2004)

Kulukundis Shipping Co v Amtorg Trading Corp, 126 F2d 978 (2d Cir 1942)

Kyung Sup Ahn v Rooney Pace 624 F Supp 368 (SDNY 1985)

McCarthy v. Azure 22 F.3d 351 (1st Cir. 1994)

Riek v Xplore-Tech Services Private Ltd et al, 34 ICCA Yearbook 2009, 1056 (MDNC 2009)

Ryan, J..J. & Sons v Rhone Poulenc Textile SA et al, 863 F 2d 315 (4th Cir. 1988), 15 Yearbook Commercial Arbitration 543 (1990)

Sarhank Group v Oracle Corporation, 404 F 3d 657 (2nd Cir. 2005) (SDNY)

Servaas Inc. v. Repub. of Iraq, 686 F Supp 2d 346, 354-355 (SDNY 2010)

Singapore, FR8 Pte Ltd v Albacore Maritime Inc., 754 F Supp 2d 628 (SDNY 2010)

Sourcing Unlimited Inc v Asimco Int'l Inc, 526 F3d 38 (1st Cir 2008) in Jennifer Kirby, 'Sourcing Unlimited, Inc. v Asimco Int'l, Inc.: Appellate Jurisdiction and Equitable Estoppel' (2009) 26 Journal of International Arbitration 149

Soviet Pan Am Travel Effort v Travel Committee Inc, 756 F Supp 126 (SDNY 1991)

Other Jurisdictions

Croatian Supreme Court Judgment issued on 2 September 2014 (VSRH Revt-321/2013-2) (Croatian decision), in Tamara Manasijevic, 'Extension of Arbitration Agreements in Light of the Croatian Supreme Court Ruling- Caution with Pro-Arbitration Approach' published in Kluwer Arbitration Blog (2016) <http://kluwerarbitrationblog.com/2016/02/17/extension-of-arbitration-agreements-in-light-of-the-croatian-supreme-court-ruling-caution-with-pro-arbitration-approach/ > accessed 27 July 2016

Judgment of the Stockholm District Court in case T 1510-99 (2001) and Judgment of the Svea Court of Appeal in case T 4496-01 (2002) <http://sccinstitute.com/media/56056/government_guarantee_case.pdf > accessed 27 July 2016

Arbitral Awards

A recent FAI Award reported by Mika Savola, chair of the FAI Board < http://arbitration.fi/2016/05/30/sole-arbitrators-jurisdictional-decision-finding-arbitration-clause-contained-loan-agreement-valid-binding-lendee-guarantor/ > accessed 27 July 2016

Dow Chemical France, The Dow Chemical Company and others v ISOVER Saint Gobain, Interim award of ICC Case No. 4131, 23 September 1982, in Pieter Sanders (ed), (1984) 9 Yearbook Commercial Arbitration 131

ICC Case No. 9517 (2000), 16(2) ICC BULL 80 (2005)

ICC Case No. 8385 of 1995 (1997) 124 Journal du Droit International 1061, 1072-1073 with observations by Yves Derains

ICC Case no. 7626 of 1995, in Jean-Jacques Arnaldez and Yves Derains and Dominique Hascher (eds), Collection of ICC Arbitral Awards 1996-2000 (1st edn, Kluwer Law International 2003) 119

ICC Case no. 10758 of 2000, in (2000) Journal du Droit International 1171

The A Company (Israel), The B Company (Israel) v. The Former Soviet Republic, Jurisdictional Award in SCC cases 38/1997and 39/1997

U.S. supplier v. Indian Buyer Interim award in case No. 4367 (1984) in Yearbook Commercial Arbitration, Vol. 11 (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/ Netherlands 1986) 135

Table of Legislation

United Kingdom

Contracts (Rights of Third Parties) Act (England) 1999, s 8(1) and s 8(2)

Switzerland

Swiss Code of Obligations 1912 (Swiss Code), Art 112 para 1 and para 2

Other Jurisdictions

Singaporean Contracts (Rights of Third Parties) Act 2001, s 9(1) and s 9(2)

Tables of International Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. 2/1

European Convention on International Commercial Arbitration 1961, Art. I(2)(a)

UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 7 with amendments as adopted in 2006

Books

Andrews G and Millett R, *Law of Guarantees* (7th edn, Sweet&Maxwell 2015)

Blackaby N and others, *Redfern and Hunter on International Arbitration*, (6th edn, OUP 2015)

Blumberg P and others, *Blumberg on Corporate Groups* (2nd edn, Harcourt Professional Publishing 2006)

Brekoulakis S, *Third Parties in International Commercial Arbitration*, (1st edn, OUP 2010)

Born G, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014)

Gaillard E and Savage J (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (1st edn, Kluwer Law International 1999)

Hanotiau B, *Complex Arbitrations: Multiparty,Multicontract, Multi-Issue and Class Actions*, (1st edn, Kluwer Law International 2005)

Kaufmann-Kohler G and Rigozzi A, *International Arbitration: Law and Practice in Switzerland* (3rd edn, OUP 2015)

Poudret J and Besson S, *Comparative Law of International Arbitration* (2nd edn, Sweet&Maxwell 2007)

Articles

Abdel Wahab M, 'Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest through the Spatial-Temporal Continuum', in F Ferrari and S Kröll (eds), *Conflict of Laws in International Commercial Arbitration*, (Sellier International Publishers 2010) 162

Andrews N, 'Strangers to Justice No Longer: The Reversal of The Privity Rule Under The Contracts (Rights of Third Parties) Act 1999' (2001) 60 Cambridge Law Journal 353

Besson S, 'Piercing the Corporate Veil: Back on the Right Track' in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 147

Borris C, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process' in Frommel S and Rider B (eds), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, (1st edn, Kluwer Law International 1999)

Brekoulakis S, 'Parties in International Arbitration: Consent v. Commercial Reality' Speech in the 30th Anniversary School of International Arbitration (Global Arbitration Review, 19-25 April 2015) <http://globalarbitrationreview.com/cdn/files/gar/articles/Stavros_Brekoulakis_speech_30_Anniversary_SIA.pdf > accessed 26 July 2016

Chaaban R, 'Clause d'Arbitrage et Cautionnement' (2007) Revue de l'arbitrage 721

Derains Y, 'Is There a Group of Companies Doctrine?' in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 131

Ferrario P, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for This Doctrine to Exist?' (2009) 26 Journal of International Arbitration 647

Habegger P, 'Extension of Arbitration Agreements to Non-Signatories and Requirements of Form' (2004) 22 ASA Bulletin 398

Hanotiau B, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis' (2001) 18 Journal of International Arbitration 251

Strong S, 'Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' (1998) 31 Vand. J. Transnat'l L. 915

Hosking J, 'The Third Party Non-Signatory's Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent' (2004) 4 Pepperdine Dispute Resolution Law Journal 471

——, 'Non-Signatories and International Arbitration in the United States: The Quest for Consent' (2004) 20 Arbitration International 289

Leadley J and Williams L, 'Peterson Farms: *There Is No Group of Companies Doctrine in English Law'* 2004 International Arbitration Law Review 111

Loquin E, 'Arbitrage et Cautionnement' (1994) Rev Arb 236

Meier A and Setz A, 'Arbitration Clauses in Third Party Beneficiary Contracts- Who May and Who Must Arbitrate' (2016) 34 ASA Bulletin 62

Naegeli G and Schmitz C, "Switzerland: Strict Test for the Extension of Arbitration Agreements to Non-Signatories" (2009) < http://www.homburger.ch/fileadmin/publications/EXTENSION.pdf > accessed 27 July 2016

Pavic V, '"Non-Signatories" and the Long Arm of Arbitral Jurisdiction' in Peter Hay and others(ed), Resolving International Conflicts – Liber Amicorum Tibor Varady (1st edn, Central European University Press 2009) 213

Poudret J, 'L'Extension de la Clause d'Arbitrage: Approches Française et Suisse' (1995) 122 Journal de Droit International (Clunet) 893

Sentner J- 'Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories' (2005) 6 Business Law International 55

Voser N, 'Multi-Party Disputes and Joinder of Third Parties' in Albert Jan van den Berg (ed), ICCA: 50 Years of the New York Convention (Kluwer Law International, 2009) 343

Wilske S, Shore L Ahrens M, 'The "Group of Companies Doctrine" – Where is it Heading?' (2006) 17 American Review of International Arbitration 73

Other Legal Sources

Explanatory Notes to Contracts (Rights of Third Parties) Act 1999 (Explanatory Notes), s. 8 [34] < http://www.legislation.gov.uk/ukpga/1999/31/notes/division/4/8 > accessed 27 July 2016

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 91–151

DOI: 10.26650/annales.2017, *49*(66).0005

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

The Eu-Turkey "Refugee Deal": A New Way of Responsibility-Sharing or the Collapse of the International System for the Protection of Refugees?

Ceren Elitez[1]

Abstract

The Syrian displacement crisis is the most compelling humanitarian crisis of our times. The mass displacement of Syrians did not only cause challenges for Syria's neighboring countries -including Turkey as the largest host of displaced Syrians- but also the European Union Member States. It has also call into question the principle of "responsibility-sharing" in the context of the international protection of refugees, Human Rights Law and Refugee Law. As a result of a long negotiation process between Turkey and EU over the protection, and care of displaced Syrians, the parties agreed upon a text that is called the EU-Turkey "Refugee Deal". The deal was met with a chorus of objection by scholars, legal experts and international NGOs who criticized it for contradicting the general principles of the international Human Rights Law, Refugee Law and the EU Asylum Law. This paper studies the pathway that lead EU and Turkey to sign the "Refugee Deal", its content and clauses, implications and potential risks that are likely to occur in practice, with an emphasis on the contribution and/or detriment that the deal would bring to the notion of responsibility-sharing in international humanitarian system.

Keywords

Syrian refugee crisis • EU-Turkey Refugee Deal • International asylum system • Burden-sharing • Readmission agreement

AB-Türkiye "Mülteci Anlaşması": Yeni Bir Sorumluluk Paylaşımı Yöntemi Mi Yoksa Uluslararası Mülteci Koruma Sisteminin Çöküşü Mü?

Öz

Suriye krizi, çağımızın en zorlu insani krizidir. Suriyelilerin toplu halde yerinden edilmesi, yalnızca -Suriyeli sayısının en çok olduğu ülke olan Türkiye dahil olmak üzere- Suriye'nin komşularında değil, Avrupa Birliği'nin üye ülkelerinde de zorluklar yaratmıştır. Kriz aynı zamanda uluslararası iltica sistemi, İnsan Hakları Hukuku ve Mülteci Hukuku çerçevesinde karşımıza çıkan "sorumluluk paylaşımı" prensibini de gündeme getirmiştir. Yerinden edilen Suriyelilerin korunması ve bakımı üzerine Türkiye ile AB arasında yürütülen uzun müzakereler sonucunda, taraflar AB-Türkiye "Mülteci Anlaşması" olarak adlandırılan bir metin üzerinde mutabık olmuştur. Anlaşma, bunun uluslararası İnsan Hakları Hukuku'nun, Mülteci Hukuku'nun ve AB İltica Hukuku'nun genel ilkelerini ihlal etmesini eleştiren akademisyenler, yasal uzmanlar ve uluslararası STK'lar tarafından bir dizi itirazla karşılanmıştır. Bu çalışma, AB ve Türkiye'yi "Mülteci Anlaşması"nı imzalamaya götüren yolu, anlaşmanın içeriğini, maddelerini, sonuçlarını ve uygulamada ortaya çıkabilecek olası riskleri incelemektedir. Aynı zamanda anlaşmanın uluslararası insani mekanizmalar çerçevesinde ele alınan sorumluluk paylaşımı kavramına yapacağı katkıları ya da vereceği zararları vurgulamaktadır.

Anahtar Kelimeler

Suriyeli mülteci krizi • AB-Türkiye Mülteci Anlaşması • Uluslararası iltica sistemi • Sorumluluk paylaşımı • Geri kabul anlaşması

* Bu makale, İstanbul Bilgi Üniversitesi Sosyal Bilimler Enstitüsü Hukuk Yüksek Lisans Programı (İnsan Hakları Hukuku) çerçevesinde Yrd. Doç. Dr. Lami Bertan TOKUZLU danışmanlığında hazırlanan ve Prof. Dr. Nuray EKŞİ, Yrd. Doç. Dr. Lami Bertan TOKUZLU ve Yrd. Doç. Dr. Ulaş Karan'dan oluşan jüri tarafından oybirliğiyle başarılı bulunan tez çalışmasıdır. Tezde yer alan tablolar metinden çıkarılmış ve tabloların içeriği hakkında özet bilgi verilmiştir.

1 **Corresponding Author:** Ceren Elitez, NGO worker in the field of asylum, refugees and resettlement, Istanbul, Turkey.

To cite this article: Elitez, Ceren: "The Eu-Turkey "Refugee Deal": A New Way of Responsibility-Sharing or the Collapse of the International System for the Protection of Refugees?", Annales de la Faculté de Droit d'Istanbul,49(66), 2017, p.91-151. https://dx.doi.org/10.26650/annales.2017.49.66.0005

Contents

Abbreviations

AFAD	: Disaster and Emergency Management Presidency
APD	: Asylum Procedures Directive
CoE	: Council of Europe
DGMM	: Directorate General for Migration Management
EC	: European Commission
ECHO	: European Commission Humanitarian Aid & Civil Protection
ECHR	: European Convention on Human Rights
ECOSOC	: UN Economic and Social Council
ECRE	: European Council on Refugees and Exiles
ECtHR	: European Court of Human Rights
EU	: European Union
EU Charter	: Charter of Fundamental Rights of the European Union
GoT	: Government of Turkey
HRP	: Humanitarian Response Plan
HRW	: Human Rights Watch
HUGO	: Hacettepe University Migration and Politics Research Center
ICCPR	: International Covenant on Civil and Political Rights
ILO	: International Labor Organization
IOM	: International Organization for Migration
LFIP	: Law on Foreigners and International Protection
MFA	: Ministry of Foreign Affairs of the Republic of Turkey
MSF	: Médecins Sans Frontières
NGO	: Non-governmental organization
PKK	: Kurdish Workers' Party

RRP	: Regional Response Plan
RRP6	: Syria Regional Response Plan 2014
SHARP	: Humanitarian Assistance Response Plan for Syria 2014
SRP	: Syria Response Plan 2015
TECs	: Temporary education centers
TİSK	: Turkish Confederation of Employer Associations
TPR	: Temporary Protection Regulation
UN	: United Nations
UNHCR	: United Nations High Commissioner for Refugees
UNOCHA	: United Nations Office for the Coordination of Humanitarian Affairs
1951 Convention	: 1951 Convention Relating to the Status of Refugees
1967 Protocol	: 1967 Protocol Relating to the Status of Refugees
1984 Convention	: UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984
3RP	: Syria Regional Refugee and Resilience Plan

I. Introduction[2]

The ongoing armed conflict in Syria has triggered widespread displacement and a humanitarian crisis in and across the region. Today, the Syrian displacement crisis is called to be the world's largest humanitarian crisis since World War II.[3] Since the onset of the conflict in the spring of 2011, over 250,000 people have been killed and over one million injured.[4] As of March 2016, the estimated number of persons in need of humanitarian assistance inside Syria has reached approximately 13.5 million, including millions of children.[5] Over 6,600,000 people have been internally displaced by violence, and human rights violations and abuses forced 4,815,868 people to flee Syria.[6]

The tremendous impact of the Syrian displacement crisis on host countries is conspicuous and it is being globally discussed today. Especially the situation in the Republic of Turkey, the largest recipient of displaced Syrians in the world, is the subject of a heated debate. Other neighboring countries that are hosting large number of Syrians are the Lebanese Republic, the Hashemite Kingdom of Jordan, the Republic of Iraq, and the Arab Republic of Egypt. The United Nations (UN) estimates that some 4.7 million Syrian "refugees" will be registered in the region by the end of 2016.[7] It is important to note that, in this paper, the term "refugee" will not be used as a term referring to the legal status that is described under the 1951 Convention Relating to the Status of Refugees (1951 Convention)[8], unless indicated otherwise. It will be used to broadly define displaced Syrians and members of other nationalities as well as stateless persons who fled their country of origin and sought refuge elsewhere. This usage of the term "refugee" is also accepted by the world's leading international refugee organizations such as UNHCR. Although the bulk of the refugees remain in Turkey, Jordan and Lebanon, a growing number of refugees are seeking safety outside the immediate neighborhood of Syria. Thus the Syrian displacement crisis is increasingly affecting the European countries too. Poor conditions in host countries and despair over a chance to return to their country of origin drive Syrians to seek safety in Europe. Growing numbers of Syrian refugees risk their lives in unsafe boats, endeavoring to reach Europe by sea. The world is witnessing a continuous and heartrending tragedy where desperate families are swallowed as a whole by Mediterranean Sea. Only in the first three months of

2 This thesis covers the incidents and developments that took place until 1 May 2016. It may not contain updates and developments that may have occurred later than 30 April 2016.

3 European Commission Humanitarian Aid and Civil Protection (ECHO), "Turkey: Refugee Crisis Factsheet", Brussels-Belgium, March 2016, p.1.

4 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Syria: Key Figures, available at: http://www.unocha.org/syria (accessed on 30 April 2016).

5 *Ibid*.

6 *Ibid.*

7 UN, Regional Refugee & Resilience Plan (3RP) 2016-2017: Regional Strategic Overview, n.p., November 2015, p.6.

8 UN, 1951 Convention Relating to the Status of Refugees, UN General Assembly, 28 July 1951, "Mültecilerin Hukuki Durumuna İlişkin Sözleşme", Official Gazette no. 10898, 5 September 1961.

2016, 627 migrants died in the Mediterranean.[9] The number of migrant fatalities is expected to increase heavily towards the end of this year, given the fact that the death toll has reached 3,771 in 2015.[10] Same year, over 440,000 Syrians have arrived in Europe by sea.[11]

It can be argued that, between 2011 and 2016, the international community's response to the displacement crisis has not been as adequate as it should have been, given the magnitude of the crisis' destructive effects on the lives of millions of Syrian people, and its enormous social and economic impact on host countries. The international community has been unsuccessful in showing solidarity with host countries and failed to commit itself to two traditional ways of responsibility-sharing in the context of displacement crises, namely financial support to host countries and resettlement as a durable solution.[12] In spite of appeals made to the international community, UN's budget for funding its various strategic plans aiming to send humanitarian aid inside Syria and to support host countries for the protection of Syrian refugees remained more than 50 percent uncovered each year.[13] Furthermore, as of 18 March 2016, only 179,147 places have been made available for resettlement, an amount corresponding to 6.5 percent of the number of Syrian refugees registered in Turkey.[14]

Such a weak level of international solidarity has caused considerable resentment in hosting countries. In this international setting heated by discussions over the principle of responsibility-sharing, and following a long period of negotiations between the European Union (EU) and Turkey over a cooperation plan for tackling the so-called "Syrian refugee crisis", a deal has been agreed between two parties on 18 March 2016. This controversial EU-Turkey "Refugee Deal" (hereinafter the "Refugee Deal") proposes that all new irregular migrants entering Greece from Turkey be returned to Turkey; that in exchange, EU resettle one Syrian refugee who is already in Turkey; that Turkey receive €6 billion as financial aid to support refugees on Turkish soil; and that Turkey's accession process to the EU be re-energized, and the process of visa liberalization to the Schengen area for Turkish nationals be accelerated.

The deal was met with a chorus of protests from international non-governmental organizations (NGOs), legal experts and human rights activists who consider it to be a breach of international and European laws, particularly Human Rights Law, and argue

9 UNHCR, Refugees/Migrants Emergency Response – Mediterranean, available at: http://data.unhcr.org/mediterranean/regional.php (accessed on 30 April 2016).

10 *Ibid.*

11 UN, 3RP - Regional Refugee & Resilience Plan 2016-2017 in Response to the Syria Crisis, available at: http://www.3rpsyriacrisis.org/crisis/ (accessed on 30 April 2016).

12 In this paper, the term "responsibility-sharing" is preferred to the term "burden-sharing" since the latter suggests that refugees are a burden on the state where they reside.

13 Please see below for more details on this subject.

14 UNHCR, "Resettlement and Other Forms of Legal Admission for Syrian Refugees", 18 March 2016, available at: https://data.unhcr.org/syrianrefugees/download.php?id=10772 (accessed on 30 April 2016).

that is "doomed to failure".[15] Amnesty International called both parties of the deal to stop "trading away refugees" by emphasizing that Turkey should not be recognized as a "safe third country" where refugees could be returned to: "The breach of the right to seek asylum is not mitigated by the fiction that Turkey is a 'safe' country for refugees. […] We recognize that those who fail after a fair process to demonstrate a legitimate case to stay can be returned. Our objection is to fast-track collective expulsions that fail to take individual circumstances into account".[16] Mike Noyes, ActionAid's head of humanitarian response, fears that the deal "will effectively turn the Greek islands, where thousands of refugees arrive every day, into prison camps where terrified people are held against their will before being deported back to Turkey".[17] Kenneth Roth, executive director of Human Rights Watch (HRW), stated in his letter to European leaders that they "caution against any suggestion of conditionality between refugee resettlement and the forced return of asylum seekers. Resettlement can be a very helpful supplement to asylum but can never be a substitute for the right to seek asylum".[18] Similarly, United Nations High Commissioner for Refugees (UNHCR) assumes that the deal complies with legal standards on paper however it is suspicious that asylum safeguards mentioned in the deal would prevail in implementation.[19]

This paper aims to study the pathway that lead EU and Turkey to sign the "Refugee Deal", its content and clauses, implications and potential risks that are likely to occur in practice, with an emphasis on the contribution and/or detriment that the deal would bring to the notion of responsibility-sharing in international humanitarian system. Thus, the following questions need to be answered: Did the international community take necessary action on time for finding a durable solution to the Syrian displacement crisis by sharing the responsibility of protecting and caring for the Syrian refugees? Is the "Refugee Deal" the proper international response that would bring a durable solution to the Syrian displacement crisis? Or is it a band-aid approach that may lead to worrying repercussions in near future? Do the policies described within the Deal meet the requirements of Human Rights Law, international asylum system, refugee law and the principle of responsibility-sharing between international actors for tackling a humanitarian crisis that evokes major global challenges? Does the "Refugee Deal" contribute to the shared understanding of responsibility-sharing or is it likely to have a detrimental effect on this notion? Is the deal vulnerable to legal challenges with regards to principles governing the international

15 **Camino Mortera-Martinez**, "Doomed: Five Reasons Why the EU-Turkish Refugee Deal Will Not Work", Centre for European Reform, 24 March 2016, available at: http://www.cer.org.uk/insights/doomed-five-reasons-why-eu-turkish-refugee-deal-will-not-work (accessed on 30 April 2016).

16 **Salil Shetty / Ken Roth / Catherine Woollard**, "Say No to a Bad Deal with Turkey", Amnesty, International, 17 March 2016, available at: https://www.amnesty.org/en/latest/news/2016/03/say-no-to-a-bad-deal-with-turkey/ (accessed on 30 April 2016).

17 "EU-Turkey deal 'sends clear message to migrants'", Belfast Telegraph, 18 March 2016, available at: http://www.belfasttelegraph.co.uk/news/world-news/euturkey-deal-sends-clear-message-to-migrants-34551303.html (accessed on 30 April 2016).

18 **Ken Roth**, "Human Rights Watch Letter to EU Leaders on Refugees", HRW, 15 March 2016, available at: https://www.hrw.org/news/2016/03/15/human-rights-watch-letter-eu-leaders-refugees (accessed on 30 April 2016).

19 UNHCR, Press release "UNHCR on EU-Turkey Deal: Asylum Safeguards Must Prevail in Implementation", 18 March 2016, available at: http://www.unhcr.org/56ec533e9.html (accessed on 30 April 2016).

and European Human Rights Law, such as *non-refoulement* and prohibition of collective expulsions? Does Turkey meet the requirements for being recognized as a "safe third country"? Are there any visible signs that the asylum safeguards mentioned in the deal will not materialize in implementation?

In pursuit of these questions, this paper is divided into two main sections: background and content of the "Refugee Deal", and its legality and implications.

The first section will be presented in two sub-sections: the situation in Turkey and the international community's response to the Syrian displacement crisis so far, with an emphasis on the EU. The first sub-section consists of an in-depth research of the economic impacts, and social and political consequences of the Syrian displacement crisis on Turkey and its society, and on the lives of Syrian refugees. The question of integration of Syrians in Turkey will be discussed throughout the sub-section. In the second sub-section, the repercussions of the Syrian displacement crisis in EU countries will be reviewed, and the level attained in international responsibility-sharing for protection of refugees in the fifth year of the protracted Syrian displacement crisis will be examined, with an emphasis on the cooperation between the EU and Turkey.

The second section consists of a review of the negotiation process and the content of the "Refugee Deal", as well as a legal analysis of the "Refugee Deal" and a reflection upon its potential material outcomes, and is also divided into two sub-sections. Under the first sub-section, the period of negotiations between the EU and Turkey will be reviewed in detail and the ultimate content of the "Refugee Deal" will be presented. Under the second sub-section, the legal implications of the "Refugee Deal" will be analyzed with respect to the fundamental principles of the international Human Rights Law, Refugee Law and Humanitarian Law, such as *non-refoulement*, and the prohibition of collective expulsions. In this context, Turkey's adequacy for its recognition as a "safe third country" will also be assessed. This sub-section will also aim to identify any potential shortcomings of the "Refugee Deal" that may arouse in practice, and to highlight the vulnerable areas that may cause any breach of international norms by disabling the safeguards mentioned in the "Refugee Deal", during its implementation. To that end, the current problematic practices related to the admission, registration and deportation of refugees in Greece will be reviewed.

The research method that will be used in this paper consists mainly of a thorough review of existing legal and political analyses, socioeconomic statistics and case-law.

II. The Road to the Eu-Turkey "Refugee Deal": the Question of Responsibility-Sharing for a Durable Solution to Syrian Displacement Crisis

The ongoing Syrian humanitarian crisis has been deepened and worsened since the spring of 2011 by the death of over 250,000 people and the injury of more than one

million people.[20] It has become globally the largest displacement crisis that forced more than the half of all Syrians to flee their homes. In this rapid and massive displacement, over 6.6 million Syrians have been internally displaced and 4.8 million Syrians have crossed international borders in an attempt to save their lives.[21] This is considered to be the largest political, humanitarian and development challenge of our time.

A- Turkey: Lack of a Comprehensive Integration Policy for the Bulk of Syrian Refugees

Turkey currently hosts the largest portion of Syrian refugees. As of March 2016, 2,715,789 Syrian refugees have been registered in Turkey.[22] Apart from Turkey, other neighboring countries that have been affected by the Syrian displacement crisis are Lebanon, Jordan, Iraq, and Egypt. It is projected that by the end of 2016 the total number of Syrian refugees registered in the region will be as high as 4.7 million.[23] The UN anticipates a total of 2.75 million Syrians registered in Turkey by the end of 2016.[24] Currently, in addition to over 2.7 million Syrian refugees, Turkey is also hosting 256,700 refugees from other nationalities (i.e. Iraqis, Iranians, Afghans, and Somalis) as of February 2016.[25]

Turkey declared in October 2011 an open door policy towards refugees fleeing Syria.[26] Currently 272,439 Syrian refugees[27] are hosted in 25 official refugee camps (the so-called "temporary protection centers") distributed in 10 provinces[28] and managed by the Disaster and Emergency Management Presidency (AFAD), the leading governmental agency for assistance to camp refugees and for coordination of services to off-camp refugees. UN estimates that 300,000 Syrians will be hosted in the official refugee camps and 2.45 million will live within urban areas, by the end of 2016.[29] The Government of Turkey (GoT) holds that the cost of caring for and protecting Syrian refugees has already exceeded $8 billion while the amount of assistance provided

20 UNOCHA, Syria: Key Figures, *op.cit.*

21 *Ibid.*

22 UNHCR, Syria Situation Map as of 9 March 2016, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/SyriaSituationMapasof09March2016.pdf (accessed on 30 April 2016).

23 UN, Regional Refugee & Resilience Plan (3RP) 2016-2017, *op. cit.*, p.6.

24 UN, Regional Refugee & Resilience Plan (3RP) 2016-2017:Turkey, n.p., November 2015.

25 ECHO, "Turkey: Refugee Crisis Factsheet", *op. cit.*, p.1.

26 In October 2015, Human Rights Watch reported that Turkey has closed its borders to Syrian refugees and started to push backs at the border (HRW, "Turkey: Syrians Pushed Back at the Border Closures Force Dangerous Crossings with Smugglers", 23 November 2015, available at: https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border, accessed on 30 April 2016). Turkish authorities denied the report and called it "misleading" while acknowledging that they "have had to temporarily restrict the free movement of refugees due to security concerns in the past" (**Birce Bora**, "Analysis: Is Turkey's 'open door policy' an illusion?", AlJazeera, 24 November 2015, available at: http://www.aljazeera.com/news/2015/11/analysis-turkey-open-door-policy-illusion-151124084706365.html, accessed on 30 April 2016).

27 AFAD, Current Status in AFAD Temporary Protection Centres, available at: https://www.afad.gov.tr/EN/IcerikDetay1.aspx?ID=16&IcerikID=848 (accessed on 30 April 2016).

28 The "temporary protection centers" are located in the provinces of Hatay, Gaziantep, Şanlıurfa, Kilis, Mardin, Kahramanmaraş, Osmaniye, Adıyaman, Adana and Malatya.

29 UN, Regional Refugee & Resilience Plan (3RP) 2016-2017: Turkey, *op. cit.*, p.4.

by the international community still remains at $455 million.[30] This sum has been mostly spent for offering basic health, education, food security and social and other services to Syrian refugees residing inside the camps. However, off-camp Syrian refugees (that constitute 90 percent of total number of Syrians in Turkey) are spread out through the country, and their access to information, registration and to public services, including education and healthcare, is gravely limited. Off-camp refugees are surviving under very challenging circumstances, as they lack much-needed support for housing, food, education and health services. While the number of off-camp refugees grows, the situation is worsening and vulnerabilities are increasing.[31] As Kemal Kirişçi and Elizabeth Ferris put it in their report, "the economic, social and political impact of the refugees is growing. Although Turkey has much more capacity to manage the situation than Jordan and Lebanon, it is difficult to see how Turkey will be able to cope without greater burden-sharing with the international community".[32]

In the last few years, Turkey received wide-ranging praise not only for its monumental direct assistance to Syrian refugees (particularly to those inside the camps), but also for re-structuring its legislative tools for the management of humanitarian migration and asylum:[33] First of all, Law 6458 on Foreigners and International Protection (LFIP) was approved on 10 April 2013, and entered into force on 11 April 2013.[34] LFIP is the first law that Turkey adopted to address asylum, and as Rebecca Kilberg commentates, it reflects the fact that "Turkey's migration identity has shifted from being principally a country of emigration and transit to becoming a destination for immigrants and people fleeing conflict".[35] LFIP describes procedures relating to the entrance, stay and exit of foreigners, as well as the management of asylum, and legal, unauthorized and humanitarian migration. Furthermore, in compliance with the Article 103 of LFIP, the Directorate General for Migration Management (DGMM) has been established under the Ministry of Interior and organized in 81 provinces and 148 districts.[36] DGMM has a wide range of responsibilities, i.e. development

30 MFA, "Speech by H.E. Mevlüt Çavuşoğlu, Minister of Foreign Affairs of the Republic of Turkey at the Opening Session of the Eighth Annual Ambassadors Conference", Ankara, 11 January 2016, available at: http://www.mfa.gov.tr/speech-by-h_e_-mevl%C3%BCt-%C3%A7avu%C5%9Fo%C4%9Flu_-minister-of-foreign-affairs-of-the-republic-of-turkey-at-the-opening-session-of-the-eighth-annual-ambassadors-conference_-11-january-2016_-ankara.en.mfa (accessed on 30 April 2016). However, this number is not certain since the budget spent by the GoT for protecting and caring for displaced Syrians is not officially published.

31 **Kılıç Buğra Kanat** / **Kadir Üstün**, *Turkey's Syrian Refugees Toward Integration*, SETA, Ankara, 2015, pp. 21-27.

32 **Kemal Kirişçi / Elizabeth Ferris**, *Not Likely to Go Home: Syrian Refugees and the Challenges to Turkey – and the International Community*, Turkey Project Policy Paper no. 7, Brookings Institute, Washington DC, September 2015, pp. 2-3.

33 UNHCR, UN High Commissioner for Refugees Antonio Guterres, "Written text of speech to the UN Security Council", 26 February 2015, available at: http://www.unhcr.org/54ef66796.html (accessed on 30 April 2016). "High Commissioner welcomes Turkish work permits for Syrian refugees", 18 January 2016, available at: http://www.unhcr.org/569ca19c6.html, (accessed on 30 April 2016).

34 LFIP: Law on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanunu"), Official Gazette no. 28615, 11 April 2013. While the section of LFIP formally establishing the DGMM came into force in April 2013 immediately on the publication of the LFIP, all the remaining sections of the Law came into force after a year, in April 2014.

35 **Rebecca Kilberg**, "Turkey's Evolving migration Identity", Migration Information Source, 14 July 2014, available at: http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity (accessed on 30 April 2016).

36 Although DGMM was established by the LFIP on 11 April 2013, the new agency did not fully take over the foreigners' caseload from National Police, the agency previously in charge of foreigners, until May 2015. For further reading, please

and practice of new legislation and strategies for managing migration; facilitation of the coordination between agencies and institutes working in the field of migration; administration of visas, entrance, exit and deportation of foreigners; management of international protection and temporary protection; registration and documentation of temporary protection beneficiaries; refugee status determination procedures of asylum seekers; protection of the victims of human trafficking. With the adoption of LFIP, the legal concept of "temporary protection" was also introduced in Turkish law for the first time, although Turkey has been providing *de facto* protection to the victims of the Syrian conflict since 2011.[37] However the temporary protection regime has not been formalized until the adoption of the Temporary Protection Regulation (TPR) on 22 October 2014, in the framework of Article 91 of LFIP.[38] Turkey's "temporary protection" regime represents a *prima facie*, group-based approach: "The citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed our borders coming from Syrian Arab Republic as part of a mass influx or individually for temporary protection purposes due to the events that have taken place in Syrian Arab Republic since 28 April 2011 shall be covered under temporary protection",[39] and extends to "temporary protection" beneficiaries the right to legal stay, protection from *refoulement* and access to a set of basic rights and services, including free healthcare.[40] Lastly, the long-awaited Regulation on Work Permit of Foreigners Under Temporary Protection was adopted on 15 January 2016.[41] Under this brand-new regulation, Syrian refugees who have been registered in Turkey for at least six months will be allowed to apply for a working permit in the city where they first registered. The work permit will ensure that its holder be paid at least the minimum wage. A number of other rules have also been set out by the regulation, such as the procedure for self-employed workers to apply for work permits, and the 10 percent Syrian workforce quota in Turkish companies. On 26 April 2016, a similar regulation on working permits for persons under "international protection" (non-Syrian asylum seekers) and "secondary protection" statuses has been adopted.[42]

Nonetheless, Turkey continues to be rebuked by human rights activists, scholars and NGOs due to its failure to adopt a comprehensive integration policy for Syrian refugees.

see Turkey: 2011-2014: Temporary Protection Based on Political Discretion and Improvisation,available at: http://www.asylumineurope.org/reports/country/turkey/2011-2014-temporary-protection-based-political-discretion-and-improvisation (accessed on 30 April 2016).

37 **Oktay Durukan / Veysel Eşsiz / Öykü Tümer**, *Country Report: Turkey*, Asylum Information Database (AIDA), December 2015, available at: http://mhd.org.tr/assets/aida_tr_update.i.pdf (accessed on 30 April 2016).

38 TPR: Temporary Protection Regulation ("Geçici Koruma Yönetmeliği"), Official Gazette no. 29153, 22 October 2014.

39 *Ibid.* Provisional Article 1 (1).

40 However, TPR does not prescribe a long-term legal integration for "temporary protection" beneficiaries. This matter will be discussed below.

41 Regulation on Work Permit of Foreigners Under Temporary Protection (Geçici Koruma Sağlanan Yabancıların Çalışma İzinlerine Dair Yönetmelik"), Official Gazette no. 29594, 15 January 2016.

42 Regulation on Work Permit of Foreigners Under International Protection ("Uluslararası Koruma Başvuru Sahibi ve Uluslararası Koruma Statüsü Sahibi Kişilerin Çalışmasına Dair Yönetmelik"), Official Gazette no. 29695, 26 April 2016.

Although some reports note that integration started in an informal manner,[43] and that there is a broad consensus in Turkey (particularly in cities hosting large populations of Syrian refugees) "among academics, officials and civil society activists that the refugees are here to stay and that measures are urgently needed to help with their integration",[44] there are legal, social and cultural barriers that hinder a successful integration of Syrians in Turkey. Many recently published articles, based on interviews with Syrian refugees, reveal that the lack of integration is the main reason why Syrian refugees clearly express their disquiet about their potential future in Turkey and are willing to leave for Europe.[45] The problematic areas surrounding integration may be analyzed under four main sections: "temporary protection" status, education, employment (economic hardship), and fear from political instability and social resentment.

1- Lack of Long-Term Legal Integration: Temporary Protection Regime

Since 2011, a real integration process has been prevented due to the "guest" policy that the GoT assumed towards displaced Syrians. As Ahmet İçduygu remarks "Turkish reception policies were at the outset predicated on the assumption that the conflict would come to a swift conclusion".[46] Turkey "has not carried out a policy towards Syrians based on a discourse of rights, but rather one based on 'generosity.'"[47] For this reason, the integration of Syrian refugees was not an item on the task list approximately until the fourth year of the crisis, either in government policies or public opinion.[48]

The lack of an official policy for the integration of foreigners in general may be observed through the legal framework set out in the LFIP: According to Article 96 of the Law, the responsibility of planning "for harmonization activities in order to facilitate mutual harmonization between foreigners, applicants and international protection beneficiaries and the society as well as to equip them with the knowledge

43 A report from January 2015 points out to the fact that 35,000 Syrians were born in Turkey, and that numerous marriages have been recorded between Turkish and Syrian nationals (ORSAM, Effects of the Syrian Refugees on Turkey, Report no: 195, Ankara, January 2015, p. 8). According to a report prepared by Theirworld organization in September 2015, more than 100 Syrian babies are born in Turkey everyday (**Maysa Jalbout**, Partnering for a Better Future: Ensuring Educational Opportunity for All Syrian Refugee Children and Youth in Turkey, Theirworld, 10 September 2015, available at: http://www.aworldatschool.org/page/-/uploads/Reports/Theirworld%20-%20Educational%20Opportunity%20for%20Syrian%20Children%20and%20Youth%20in%20Turkey%202015_09_10%20Release.pdf?nocdn=1, p. 18 (accessed on 30 April 2016).

44 **Kirişçi / Ferris**, *op. cit.*, p. 11.

45 **Peter Kenyon**, "For Syrian Migrants, Many Reasons To Leave Turkey For Europe", NPR, 17 September 2015, available at: http://www.npr.org/sections/parallels/2015/09/17/441168633/for-syrian-migrants-many-reasons-to-leave-turkey-for-europe (accessed on 30 April 2016). **Pınar Sevinçlidir**, "Why do Syrians want to leave Turkey?", BBC, 22 September 2015, available at: http://www.bbc.co.uk/monitoring/why-do-syrians-want-to-leave-turkey (accessed on 30 April 2016). **Ghabra Omar**, "Why Syrian Refugees in Turkey Are Leaving for Europe", the Nation, 29 September 2015, available at: http://www.thenation.com/article/why-syrian-refugees-in-turkey-are-leaving-for-europe/ (accessed on 30 April 2016). **Peter Kenyon**, "Turkey's Migrant Policy: They Can Come, But They Can't Settle", NPR, 22 October 2015, available at: http://www.npr.org/sections/parallels/2015/10/22/450855100/turkeys-migrant-policy-they-can-come-but-they-cant-settle (accessed on 30 April 2016). **İhsan Çetin**, "Why do Syrian refugees leave Turkey?", Middle East Monitor, 18 January 2016, available at: https://www.middleeastmonitor.com/articles/europe/23384-why-do-syrian-refugees-leave-turkey (accessed on 30 April 2016).

46 **Ahmet İçduygu**, *Syrian Refugees in Turkey: the Long Road Ahead*, Migration Policy Institute, Washington DC, April 2015, p.1.

47 **Şenay Özden**, *Syrian Refugees in Turkey*, Migration Policy Centre, Italy, May 2013, p. 5.

48 **Kirişçi / Ferris**, *op. cit.*, pp. 11-16.

and skills to be independently active in all areas of social life without the assistance of third persons in Turkey" is delegated to DGMM.[49] Although many scholars such as Kilberg interpret the concept of "harmonization" to be a substitute for "integration",[50] this concept is ambiguously described and "limited to the extent that Turkey's economic and financial capacity deems possible" under the law.[51]

Turkey's official reluctance to legally integrate Syrians in long-term is further observed in the "temporary protection" regime constituted by TPR. First of all, Article 16 of the TPR prohibits "temporary protection" beneficiaries from filing a separate individual "international protection" request in Turkey "during the period of the implementation of temporary protection".[52] Provisional Article 1 of the TPR corroborates with this principle: Individual applications of "temporary protection" beneficiaries "for international protection shall not be processed during the implementation of temporary protection".[53] TPR also avoids strictly guaranteeing access to the individual "international protection" procedure to former "temporary protection" beneficiaries in the event of a future termination of the "temporary protection" regime.[54] On the other hand, TPR does not preset the duration of the "temporary protection" regime. Articles 11 and 15 of TPR clearly states that the "temporary protection" regime can be "limited", "suspended"[55] or "terminated"[56] any time based on the discretion of Turkey's Board of Ministers. Furthermore, according to Article 25 of TPR, the "temporary protection" identification document grants solely the right to stay in Turkey and is not "equivalent to a residence permit", and consequently "shall not grant the right for transition to long term residence permit",[57] in accordance with Articles 42 and 43 LFIP.[58] Accordingly, time spent in Turkey as a beneficiary of "temporary protection" will not be taken into consideration when calculating the total term of uninterrupted legal residence as a precondition to apply for Turkish citizenship. Indeed, "temporary protection" regime

49 LFIP, *op. cit.*, Article 96.

50 **Kilberg**, *op.cit.*

51 LFIP, *op. cit.*, Article 96.

52 TPR, *op. cit.*, Article 16.

53 TPR, *op. cit.*, Provisional Article 1 (1).

54 Durukan, Eşsiz, Tümer, *op. cit.*, pp. 126-127.

55 TPR, *op. cit.*, Article 15.

56 TPR, *op. cit.*, Article 11.

57 TPR, *op. cit.*, Article 25.

58 LFIP, *op. cit.*, Article 42 – (1) A long-term residence permit shall be issued by the governorates, upon approval of the Ministry, to foreigners that have continuously resided in Turkey for at least eight years on a permit or, foreigners that meet the conditions set out by the Migration Policies Board.
(2) Refugees, conditional refugees and subsidiary protection beneficiaries as well as persons under temporary protection or humanitarian residence permit holders are not entitled to the right of transfer to a long-term residence permit.
ARTICLE 43 – (1) With regard to the issuing long-term residence permit the following conditions shall apply: a) having continues residence in Turkey for at least eight years; b) not having received social assistance in the past three years; c) having sufficient and stable income to maintain themselves or, if any, support their family; ç) to be covered with a valid medical insurance; d) not to be posing a public order or public security threat. (2) Subject to subparagraph (d), the conditions stipulated in the first paragraph shall not apply to foreigners who are considered appropriate for a long- term residence permit due to meeting the conditions determined by the Migration Policies Board.

in its current form is far from creating the legal framework for a long-term integration of Syrians in Turkey who understandably feel unsecure under the unpredictable legal status of "temporary protection".

Furthermore, even if "temporary protection" beneficiaries were to be granted access to "international protection" procedure as defined under LIFP in the event of a termination of the "temporary protection" regime, the geographical limitation that Turkey applies to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol)[59], would still deprive "international protection" beneficiaries from legal integration in long-term. The geographical limitation policy that Turkey applies to 1951 Convention precludes nationals of non-European countries from being granted "refugee" status in Turkey. In other terms, individuals from outside of Europe, such as Syrians, are expected to be resettled elsewhere or to return to their country of origin, deprived of any chance to settle in Turkey a foreseeable future. Moreover, beneficiaries of "temporary protection" do not enjoy the much broader rights that they would have under "refugee" status: According to 1951 Convention, persons under "refugee" status should receive at least the same rights and basic help as any other foreigner who is a legal resident, including economic and social rights. Refugees should have access to medical care, schooling and the right to work.[60] Thus the shortcomings of the "temporary protection" status compared to "refugee" status are amongst the fundamental reasons that have been preventing the integration of Syrian nationals in Turkey. As reported by many Syrians, the fact that they are not being granted "refugee" status implies unpredictability about their presence in Turkey.[61] This situation is spurring Syrians, who are unable to return home and unlikely to gain third-country resettlement, to travel to Europe by sea at the risk of losing their lives. Like many other scholars and human rights defenders, İçduygu recommends Turkey to lift its limitation to the 1951 Convention.[62]

2- Education: Key to integration

In the fifth year of the protracted displacement crisis, the right to education for Syrian children in Turkey is still problematic due to the lack of a comprehensive integration policy, and accordingly, this lack hinders a sustainable integration of Syrians in Turkey. According to a HRW report, prior to the conflict "the primary school enrollment rate in Syria was 99 percent and lower secondary school enrollment was 82 percent, with high gender parity. In Turkey's 25 government-run refugee camps, approximately 90 percent of school-aged Syrian children regularly

59 UN, 1967 Protocol Relating to the Status of Refugees, UN General Assembly, 31 January 1967, "Mültecilerin Hukuki Durumuna İlişkin Protokol", Official Gazette no. 12968, 5 August 1968.

60 UN, 1951 Convention, *op. cit.*

61 **Özden**, *op. cit.*, p. 5.

62 **İçduygu**, *op. cit.*, pp. 1-2.

attend school. However, these children represent just 13 percent of the Syrian refugee school-aged population in Turkey. The vast majority of Syrian children in Turkey live outside refugee camps in towns and cities, where their school enrollment rate is much lower—in 2014-2015, only 25 percent of them attended school".[63] HRW observed that 415,000 out of 620,000 Syrian school aged children who have entered Turkey in the last four years are unable to access education.[64]

Turkey has taken significant steps for realizing Syrian refugee children's right to education: On 23 September 2014, Turkey's Ministry of National Education issued Circular No: 2014/21 on Education Services for Foreign Nationals, in line with LFIP.[65] The Circular did not only create provincial commissions in charge of issues related to education, but also introduced, for the first time, the concept of "temporary education centers" (TECs), in an attempt to regulate and accredit existing private schools run by Syrian charities. TECS are primary and secondary schools offering a modified Syrian curriculum in Arabic,[66] operating both inside and outside refugee camps.[67] Also, as per Article 4 of the Circular, a "foreigner identification document" is sufficient for registration in the Turkish public school system.[68] Consequently, there are two parallel systems of formal education for Syrian primary and secondary school-age children in Turkey: Turkish public schools and TECs.

According to Article 28 of the UN Convention on the Rights of the Child (that was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force on 2 September 1990), it is a duty of all State parties to provide compulsory free education to all children.[69] As a party to the Convention, Turkey has the obligation to provide free primary education to all Syrian refugee children in its territories. The main standards set under the Convention regarding the party States' duties for the children's right to education include (a) providing compulsory and free primary education; (b) making secondary and vocational education available to all children; (c) on the basis of the State's capacity, making higher education accessible to all; (d) making "educational and vocational information and guidance available and accessible to all children"; and (e) taking "measures to encourage regular attendance at schools and the reduction of drop-out rates".[70]

63 HRW, *When I Picture My Future, I See Nothing: Barriers to Education for Syrian Refugee Children in Turkey*, USA, November 2015, pp. 5-6.

64 *Ibid.*, pp. 5-11.

65 Circular No: 2014/21 on Education Services for Foreign Nationals ("Yabancılara Yönelik Eğitim-Öğretim Hizmetleri"), No. 10230228/235/4145933, 23 September 2014.

66 **Jalbout**, *op. cit.*, p. 5.

67 HRW, When I Picture My Future, *op. cit.*, p. 19.

68 Circular No: 2014/21, *op. cit.*

69 UN, Convention on the Rights of the Child ("Çocuk Haklarına Dair Sözleşme"), UN General Assembly, 20 November 1989, Official Gazette no. 22184, 27 January 1995.

70 *Ibid.*, Article 28.

However, the GoT could not put in place an efficient educational system for Syrian refugee children as shown by recent research, and therefore it fails to comply with its obligations under the UN Convention on the Rights of the Child: Data from November 2015 shows that only 6 percent of the school-aged population among Syrian refugees attends Turkish public schools.[71] In other terms, the bulk of Syrian children who have right to access Turkish public schools without paying an enrollment fee, are not enjoying this right in practice. Such a low figure seems to be caused by the fact that public educational services in cities hosting the largest populations of Syrian refugees are "extremely strained" and the Syrian families living there typically do not have sufficient financial resources.[72] Similarly, attendance to school through TECs remains significantly low: During the 2014-2015 school year, there were 34 TECS in camps and 232 outside of camps with a total primary and secondary enrollment numbers of 74,097 in camps and 101,257 outside camps.[73] This figure is reported to be a result of most of TECs' inaccessible locations that cause high transportation expenses for their students.[74] It is also observed that TECs are generally overcrowded and the tuition fees asked for enrollment in TECs are unaffordable for most of the Syrian refugee families.[75] The HRW identifies the main reasons preventing Syrian children from attending school in Turkey to be the lack of information on school admission procedures, language barriers, economic hardship, and difficulties with social integration.[76]

Among others, the assessment report on "Migration Trends & Patterns of Syrian Asylum Seekers Travelling to the European Union" published in September 2015 emphasizes the fact that one of the reasons driving Syrians to take the fatal sea route to Europe is the "inadequate access to services such as […] education".[77] Bill Frelick from HRW reports that according to testimonies of young Syrian refugees, the most common reason for their travel to Europe is "seeking education".[78]Lack of education may have various dangerous consequences as acknowledged by a Turkish education official quoted in the report prepared by Kirişçi and Ferris: Syrian children and youth deprived of education in Turkey "risk falling victim to radical and terrorist groups. […] Whether the refugees stay or return to Syria, we simply cannot afford to allow for a lost generation".[79] A quote from a Syrian refugee mentioned in the HRW report lays bare the criticality of education as a tool of protection for the most vulnerable

71 HRW, When I Picture My Future, *op. cit.*, p. 19.

72 **Jalbout**, *op. cit.*, p. 11.

73 HRW, When I Picture My Future, *op. cit.*, p. 20.

74 **Jalbout**, *op. cit.*, p. 8.

75 HRW, When I Picture My Future, *op. cit.*, p. 20.

76 *Ibid.*, pp. 22-42.

77 REACH, Migration Trends & Patterns of Syrian Asylum Seekers Travelling to the European Union, 28 September 2015, available at: data.unhcr.org/mediterranean/download.php?id=125, p. 7 (accessed on 30 April 2016).

78 **Bill Frelick**, "Why Don't Syrians Stay in Turkey", HRW, 29 September 2015, available at: https://www.hrw.org/news/2015/09/29/why-dont-syrians-stay-turkey (accessed on 30 April 2016).

79 **Kirişçi / Ferris**, *op. cit.*, p. 11.

group of Syrian refugees, namely the children and youth: "If a person is sick, they can get treatment and get better. If a child doesn't go to school, it will create big problems in the future—they will end up on the streets, or go back to Syria to die fighting, or be radicalized into extremists, or die in the ocean trying to reach Europe.[80]

3- Employment and Economic Hardship

The problems related to employment and economic hardship constitute both a reason and a consequence of the lack of a comprehensive integration policy for Syrians in Turkey. As previously mentioned, Turkey extended work permits to Syrian refugees by the brand-new Regulation on Work Permit of Foreigners Under Temporary Protection on 15 January 2016, in line with Article 29 of TPR. However, the regulation itself is not presumed to immediately relieve the economic difficulties that have been forcing Syrian refugees to travel to Europe. Although the new regulation is welcomed as a tool to eliminate exploitation of unprotected Syrian workforce in Turkish labor market, and it is expected to create opportunities for Syrians in the formal labor economy, as the President of AFAD Fuat Oktay expressed, "work permits on their own will not create jobs".[81]

In its report updated in February 2016, International Labor Organization (ILO) reveals the economic hardship endured by most of Syrian refugees: "over half of the refugees who live and work in Turkish communities earn less than $250 a month, far less than the minimum wage in Turkey. Syrian workers tend to work in poor working conditions where core labor and social rights are not observed, in seasonal agricultural and low-skilled jobs. Local level consultations show that wages and fees have dropped to one-fifth of their previous levels, causing the working conditions of the most vulnerable groups from both communities to deteriorate, including children not in school".[82] The lack of employment is threatening to push some refugees to extremes as noted by a Syrian activist: "Refugees who are left jobless and without means of survival can become the devil: They can turn into [pro-Assad militants] or join the likes of Jabhat al-Nusra and IS. Providing them with employment allows them to reintegrate into society and gives them hope for a better life".[83] In addition to its security dimension, lack of employment also fuels the Syrian refugee crisis in Europe. According to German Minister for Economic Development Gerd Müller, "if people feel that they have a future and some opportunities in the region, they will not embark on the journey to Europe".[84]

80 HRW, When I Picture My Future, *op. cit.*, p. 50.

81 **Kemal Kirişçi**, "Europe's refugee/migrant crisis: Can "illiberal Turkey" save "liberal Europe" while helping Syrian refugees?", Brookings Institute, 19 February 2016, available at: http://www.brookings.edu/research/articles/2016/02/19-turkey-eu-syria-kirisci (accessed on 30 April 2016).

82 ILO, The ILO Response to the Syrian Refugee Crisis, February 2016, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_357159.pdf, p. 18 (accessed on 30 April 2016).

83 **Mona Alami**, "NGO finds work for Syrian refugees in Turkey", AlMonitor, 7 August 2015, available at: http://www.al-monitor.com/pulse/originals/2015/08/syrian-refugees-turkey-ngo-employment.html (accessed on 30 April 2016).

84 BMZ (German Federal Ministry for Economic Cooperation and Development), Newsletter "Special Edition: The BMZ's response to the refugee crisis", February 2016, available at: https://www.bmz.de/en/service/nl/Newsletter_Februar_2016/index.html (accessed on 30 April 2016).

As stressed out by analysts, new policies to create job opportunities for refugees need to be developed and implemented for coping with the detrimental effects of the Syrian displacement crisis on Turkish economy and on the lives of millions of Syrian refugees. Kirişçi argues that ensuring the integration of Syrian labor in the formal economy would be a "win-win" both for Syrian refugees and business sectors in Turkey: Refugees will become less dependent on financial aid from the GoT and international aid programs, and Turkish economy will be boosted.[85] Turkish Confederation of Employer Associations (TİSK) similarly reports that Turkish business sectors perceive Syrian refugees to be permanent in Turkey, and thus look forward to new policies to be developed for integration of Syrians in Turkish economy.[86] On the other hand, as a World Bank report recommends, the first step for achieving this goal is the collection and evaluation of data regarding the demographical characteristics and skill set of the Syrian refugee population.[87]

Lastly on this question, some recent developments may be interpreted as a signal of the industrialized countries' intention to assume responsibility in helping host countries for reducing the economic hardship endured by Syrian refugees. During the "Supporting Syria and the Region 2016" Conference hosted by Germany, Kuwait, Norway, the United Kingdom (UK) and the UN in London on 4 February 2016, over 60 countries, international organizations, and business and civil society representatives came together to agree on a new approach on how to respond to the protracted Syrian displacement crisis. One of the main topics of the conference being "transforming opportunities for refugees from Syria and the region", the participants recognized that the "lack of economic opportunity is damaging for refugees and their host communities", and agreed to "increase their external support for public and private sector job creation", and to "support employment creation programs" in host countries.[88] Co-hosts of the conference also declared that "leading private sector partners added their commitment to these efforts, and their willingness to help bring new investment that will create jobs and decent work" in countries hosting Syrian refugees.[89] According to the declaration, the ultimate goal is to create up to 1.1 million jobs for Syrian refugees and host country citizens in the region by 2018.[90]

85 **Kirişçi**, "Europe's refugee/migrant crisis", *op. cit.*

86 TİSK (Turkish Confederation of Employer Associations), *Perspectives, Expectations and Suggestions of the Turkish Business Sector on Syrians in Turkey*, Publication no: 354, Ankara, 30 December 2015, p. 76.

87 **Ximena V. Del Carpio / Mathis Wagner**, *The Impact of Syrians Refugees on the Turkish Labor Market*, Policy Research Working Paper 7402, World Bank – Boston College, August 2015, pp. 19-20.

88 "Co-Hosts Declaration of the Supporting Syria and the Region Conference", London, 4 February 2016, available at: https://2c8kkt1ykog81j8k9p47oglb-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/FINAL-Supporting-Syria-the-Region-London-2016-4-Feb.pdf (accessed on 30 April 2016).

89 *Ibid.*

90 *Ibid.*

4- Fear from Political Instability in Turkey

The question of political stability in Turkey is another avenue that prevents Syrian refugees from trusting in their likelihood to build a secure and predictable future for themselves and their families if they are to stay in Turkey.

To start with the ongoing civil conflict between the national army and Kurdish guerilla forces of Kurdish Workers' Party (PKK) in southeast Turkey, that escalated since the breakdown of the peace process in late 2015, it has caused insecurities within the Syrian Kurdish population in Turkey.[91] The armed conflict is violent and it transformed numerous Kurdish towns of Turkey into ruins that is reminiscent of the destruction in Syria, and killed many civilians.[92] Frelick argues that, "any Kurd living in the region is aware of the violence that has erupted [in 2015] in Turkey between government forces and Kurdish militants. […] Beyond these tensions within the country is the Turkish government's well known antipathy to the armed Syrian Kurdish forces on its border. The Turkish authorities have become much stricter in limiting movement in and out of predominantly Kurdish refugee camps after a suicide bombing in southern Turkey".[93] Due to these developments, some scholars assert that Turkey is no longer safe for ethnic Kurds.[94] Furthermore, in January 2016, a resident of Diyarbakır province said to The Independent that, "even the Syrian refugees have packed up and left" due to intense clashes and civilian deaths taking place at the city center.[95] This testimony may be interpreted as an indicator of the fact that not only ethnic Kurds, but the Syrian refugee population as a whole is intended to flee provinces hit by armed conflict, and feels at risk due to current political instability in Turkey.

The GoT's eagerness and repetitive efforts to convince the international community for creating a "safe zone" on the Syrian side of the Turkish border, and returning millions of Syrian refugees to this area, is also causing anxiety within the Syrian population in Turkey. Kirişçi indicates that the idea of enforcing a "safe zone" (also called "no-fly zone", "buffer zone", or "safe haven") "appears to have been first raised in July 2012" after the GoT announced that a buffer zone would be planned if the number of Syrian

91 Due to absence of detailed statistics and publications related to the demographical characteristics of the Syrian refugee population in Turkey, this paper will not speculate on the total number of Syrian Kurds who sought refuge in Turkey. According to Güneş and Lowe, "a significant number of Kurds have […] crossed the border, especially since the attack by ISIS on Kobane and its surrounding areas began in September 2014." (**Cengiz Güneş / Robert Lowe**, *The Impact of the Syrian War on Kurdish Politics Across the Middle East*, Chatham House, London, August 2015). Özden Zeynep Oktav reports that the number of Syrian Kurds who entered Turkey following the ISIS attack on Kobane was over 200,000 (**Özden Zeynep Oktav**, "Turkey's growing unease about the consequences of the Syrian crisis", Middle East Monitor, 30 June 2015, available at: https://www.middleeastmonitor.com/articles/guest-writers/19564-turkeys-growing-unease-about-the-consequences-of-the-syrian-crisis, accessed on 30 April 2016).

92 **Kemal Kirişçi**, "Turkey's Syria Challenge", Brookings Institute, 19 February 2016, available at: http://www.brookings.edu/research/opinions/2016/02/19-turkey-syria-challenges-kirisci (accessed on 30 April 2016).

93 **Frelick**, *op. cit.*

94 **Mortera-Martinez**, *op. cit.*

95 **Laura Pitel**, "Turkey in crisis: 'Ripple effect' from Syria and Iraq sees worst flare-up in Kurdish conflict in 20 years", Independent, 17 January 2016, available at: http://www.independent.co.uk/news/world/middle-east/turkey-in-crisis-ripple-effect-from-syria-and-iraq-sees-worst-flare-up-in-kurdish-conflict-in-20-a6818331.html (accessed on 30 April 2016).

refugees in Turkey exceeds 100,000 people.[96] Recently, in July 2015, various media agencies covered the allegations of a possible agreement between the Unites States (U.S.) and Turkey for creating a "safe zone" ("no-fly zone") that would be "about 40 miles deep into Syria along the 68-mile stretch of border" with an ultimate goal to host around "2 million Syrian civilians who have fled to Turkey".[97] However in August 2015 it became clear that the U.S. and Turkey did not reach such agreement since U.S. solely envisaged an "ISIS free zone" rather than a "safe zone" in Syria.[98] Later on, in September 2015, in his letter to EU leaders, Turkish Prime Minister Ahmet Davutoğlu resumed the discussion on "safe zones" and requested support from EU and U.S. "for a buffer and no-fly zone in northern Syria by the Turkish border, measuring 80km by 40km.[99] Finally on 23 April 2016, the German Chancellor Angela Merkel, the president of the European Council, Donald Tusk and the first vice-president of the European Commission, Frans Timmermans visited the city of Gaziantep in Turkey together with Davutoğlu. During the conference that was held in Gaziantep, Merkel called for the creation of "zones [in Syria] where the ceasefire is particularly enforced and where a significant level of security can be guaranteed".[100]

Scholars and human rights activists strictly object to such plans and argue that "safe zones" would rather be "unsafe" as evidenced by the genocidal killings of 8,000 Bosniacs in the UN-protected "safe area" of Srebrenica in July 1995.[101] Ferris argues that returning Syrian refugees in Turkey to a "safe zone" in Syria would be "a violation of the spirit—if not the letter—of international refugee law".[102] Turkey is a signatory of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[103] which prohibits any state from returning individuals to a place where they "would be in danger of being subjected to torture".[104] Given the

96 **Kirişçi / Ferris**, *op. cit.*, p.5.

97 **Karen DeYoung / Liz Sly**, "U.S.-Turkey deal aims to create de facto 'safe zone' in northwest Syria", Washington Post, 26 July 2015, available at: https://www.washingtonpost.com/world/new-us-turkey-plan-amounts-to-a-safe-zone-in-northwest-syria/2015/07/26/0a533345-ff2e-4b40-858a-c1b36541e156_story.html (accessed on 30 April 2016).

98 **Barnard, Anne / Michael R. Gordon / Eric Schmitt**, "Turkey and U.S. Plan to Create Syria 'Safe Zone' Free of ISIS", The New York Times, 27 July 2015, available at: http://www.nytimes.com/2015/07/28/world/middleeast/turkey-and-us-agree-on-plan-to-clear-isis-from-strip-of-northern-syria.html (accessed on 30 April 2016).

99 **Ian Traynor**, "EU refugee summit in disarray as Tusk warns 'greatest tide yet to come'", The Guardian, 24 September 2015, available at: http://www.theguardian.com/world/2015/sep/24/eu-refugee-summit-in-disarray-as-donald-tusk-warns-greatest-tide-yet-to-come (accessed on 30 April 2016).

100 **Ercan Gürses** / **Andreas Rinke**, "Germany seeking 'safe zones' in Syria to shelter refugees", Reuters, 23 April 2016, available at: http://www.reuters.com/article/us-europe-migrants-turkey-germany-idUSKCN0XK0BS (accessed on 30 April 2016).

101 Please see UN Secretary-General's report on Srebrenica dated 15 November 1999 for further reading on this subject. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_549_1999.pdf (accessed on 30 April 2016).

102 **A. Matthew Hall / Elizabeth Ferris**, "What Would the Turkish Buffer Zone Mean for Syria's Displaced?", Atlantic Council, 3 November 2014, available at: http://www.atlanticcouncil.org/blogs/menasource/what-would-the-turkish-buffer-zone-mean-for-syria-s-displaced (accessed on 30 April 2016).

103 UN, A/RES/39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 10 December 1984, "İşkenceye ve Diğer Zalimane, Gayriinsani veya Küçültücü Muamele veya Cezaya Karşı Birleşmiş Milletler Sözleşmesi", Official Gazette no. 19895, 10 August 1988.

104 *Ibid.*, Article 3.

reports of ISIS atrocities, GoT would be violating its international obligations by returning "Syrians to a situation where they are at risk of torture".[105]

Kirişçi similarly reminds the principle of *non-refoulement* in the context of the international Human Rights Law, and also warns about a possible intention of the GoT to take advantage of a "safe zone" for attacking its opponents in Syria (such as ISIS and Syrian regime), and contemplates that such attack "would risk using refugees as some form of a shield or tool for a larger and riskier political objective".[106] Thus, the spreading anxiety within the Syrian refugee population in Turkey over the likelihood of the creation of a "safe zone" inside Syria should be taken into serious consideration.

5- Social Resentment and Violence towards Syrian Refugees in Turkey

The perceived social discontent within the Turkish society regarding the presence of Syrian refugees, is another source of insecurity for the refugee population. As emphasized by Frelick, "when Turkey first opened its doors to Syrian refugees, it expected that Assad would fall quickly and the refugees would return home. The persistence of the Assad regime was unexpected in Ankara, and popular tolerance for the refugees appears to be waning".[107] Some argue that at the origins of the growing discontent within the Turkish society is the fear of country's "Arabization" due to the increasing number of Syrian refugees.[108] Similarly, according to a detailed survey conducted by M. Murat Erdoğan from Hacettepe University Migration and Politics Research Center (HUGO) in November 2015 (hereinafter "HUGO Survey"), 70.8% of the participants believe that there are deep cultural differences between Turkish and Syrian societies.[109]

Several incidents of violence towards Syrian refugees have been reported from around the country since the beginning of the mass influx.[110] Many reports show that the resentment towards Syrians is on the rise due to the economic burdens of hosting such a large number of refugees. TİSK research finds that, in general, unemployed Turkish citizens blame Syrian refugees for stealing their jobs by providing low-cost

105 **Hall / Ferris**, *op. cit.*

106 **Kirişçi / Ferris**, *op. cit*,, p. 16.

107 **Frelick**, *op. cit.*

108 **Omar**, *op. cit.*

109 **M. Murat Erdoğan**, *Syrians in Turkey: Social Acceptance and Integration Research Executive and Summary Report*, HUGO, Ankara, November 2014, pp. 35-36.

110 Among many other examples, an unprecedented incident of violence towards Syrian refugees was reported in December 2015. A gang of thieves that has killed several Syrian refugees by using sadistic methods such as emboweling and scalping, was arrested by Turkish authorities in Istanbul (Cumhuriyet, "Karın deşip kafa derisi yüzen gasp çetesi yakalandı", 6 December 2005, available at http://www.cumhuriyet.com.tr/haber/turkiye/443766/Karin_desip_kafa_derisi_yuzen_gasp_cetesi_yakalandi.html, accessed on 30 April 2016). In a recent incident that took place in March 2016, the employer of a 12-year-old Syrian child, refused to pay his weekly salary of 50 Turkish Liras (around 17 U.S. Dollars) and cut off his head as they boy insisted to be paid (Zete, "Suriyeli çocuk 50 lira haftalığını vermediği için öldürülmüş", 27 March 2016, available at: https://zete.com/suriyeli-cocuk-50-lira-haftaligini-vermedigi-icin-oldurulmus/, accessed on 30 April 2016).

labor.[111] The increase in rent, housing and food prices, especially in provinces hosting large numbers of Syrian refugees, fuels these tensions.[112]

In fact, both TİSK and HUGO reports prove that the impact of Syrian refugees on Turkish economy is not exactly detrimental: There is a revival in the economy and exports,[113] and "in some cities with large Syrian population, unemployment decreased synchronously with increasing capacity. These surprising numbers indicate new economic development brought by Syrian refugees. Additionally, it is claimed that many Syrian businessmen transferred their capital to Turkey due to the crisis, which ensured a significant amount of foreign capital inflows".[114]

Furthermore, the Syrian workforce is meeting the deficit for unskilled labor demanded by sectors such as agriculture and manufacture,[115] thus enabling locals to switch to high skill and high wage sectors.[116] However, 56.1% of HUGO Survey respondents remain inclined to believe that the Syrian refugees cause economic problems.[117] In addition, the 62.2% rate of HUGO Survey respondents who perceive Syrian refugees as "criminals" is worrying. HUGO Survey warns that, "many incidents took place, such as demonstrations demanding 'Syrians Out' and direct assaults on Syrian people. […] An important reason behind the protests in some places is the issue of unjust competition in enterprise or employment. Unless the process is well-managed, xenophobia and enmity may rapidly spread among some groups within Turkish society".[118] More concerning is the percentage (47.5%) of HUGO Survey respondents who support these violent reactions.[119] On account of statistics mentioned above, it is not surprising that almost half of the participants expressed their fear from Syrian refugees.

According to HUGO Survey, hate speech in the media is a triggering factor for such resentment and distrust towards Syrians. In Turkish media, "the refugees are depicted on the one hand as vulnerable, weak and poor people, and on the other hand as fugitives, criminals, thieves, murderers, rapists, susceptible to crime and a burden on the country".[120] In the media, Syrian refugees are depicted as "a cause for high public expenditure", "beggars", "second-wives", and individuals inclined to commit crime, and a "cause of epidemics".[121]

111 TİSK, *op. cit.*, p. 54.
112 *Ibid.*
113 *Ibid.*
114 **Erdoğan**, *op. cit.*, p. 18.
115 TİSK, *op. cit.*, p. 54.
116 ORSAM, *op. cit.*, p. 34.
117 **Erdoğan**, *op. cit.*, pp. 29-30.
118 *Ibid.*, p. 24.
119 *Ibid.*, p. 33.
120 *Ibid.*, pp. 41-42.
121 *Ibid.*, pp. 41-42.

Furthermore, according to a survey conducted in Turkey by the German Marshall Fund in July 2015, 81% of the participants think that the "immigrants" are not integrated well enough into Turkish society[122] and "73% said that the existing immigrants should be asked to go back home".[123] Lastly, according to the HUGO Survey, 57.4% of the respondents are against the admission of more Syrian refugees in Turkey.[124] In a previous survey from November 2013, conducted by Centre for Economic and Foreign Policy Studies, 86% percent of the participants had expressed that "no further Syrian refugees should be allowed in the country".[125]

B- Responsibility-Sharing So Far and the "Refugee Deal": Protecting Refugees or Protecting Europe?

The international community was not successful at stopping the armed conflict in Syria, and the regional actors' political agendas have further aggravated the situation.[126] The widespread displacement did not only cause a humanitarian crisis in the region (and beyond the region) but has also reached an unprecedented level, exposing the failure of international humanitarian governance. The overlong debate on EU's failure to demonstrate solidarity in responsibility-sharing with Turkey, the major host country for Syrian refugees, is now further heated by the "Refugee Deal".

1- The Question of Responsibility-Sharing for a Durable Solution to the Syrian Displacement Crisis

Introduced for the first time in the UN Economic and Social Council (ECOSOC)[127] and UN General Assembly resolutions[128] on the establishment of the UNHCR, the term "international protection of refugees" puts forward the aim of ensuring "refugees the widest possible exercise of […] fundamental rights and freedoms" which all "human beings shall enjoy […] without discrimination".[129] Refugees do not enjoy the effective protection of their country of origin, therefore the international community as a whole has the responsibility to provide the international protection that the refugees need for being able to enjoy their fundamental rights.[130] There are two core legal elements at the center of the international system for the protection of refugees: the 1951 Convention and the 1967 Protocol. And other legal instruments such as

122 GMF, *Turkish Perceptions Survey 2015*, Washington DC, 2015, p. 13.

123 *Ibid.*, p. 13.

124 **Erdoğan**, *op. cit.*, p. 34.

125 EDAM, *Public Opinion Surveys of Turkish Foreign Policy 2014/1*, "Reaction mounting against Syrian refugees in Turkey", n.p., 2014, p. 1.

126 **Kirişçi / Ferris**, *op. cit.*, p. 2.

127 UN ECOSOC E/RES/248(IX) A, 6 August 1949.

128 UN General Assembly, A/RES/ 319(IV) A, 3 December 1949.

129 UN, 1951 Convention, *op. cit.*, Preamble .

130 UN General Assembly, Note on International Protection, A/AC.96/830, 7 September 1994, p. 8.

regional refugee conventions, national law relating to the admission, recognition and protection of refugees, as well as the international and regional human rights instruments, and the international humanitarian law complement the system.[131] If governments lack the means to protect refugees in their territories, "they need to receive the assistance of the international community to enable them to do so".[132] In sum, the protection of refugees is an international responsibility and not merely the responsibility of the countries surrounding the conflict zone causing a refugee crisis. In this context, as parties to the 1951 Convention, EU Member States share the responsibility of providing international protection to Syrian refugees regardless of the fact that these persons are hosted by neighboring countries such as Turkey, Lebanon, Jordan, Iraq and Egypt.

The term "responsibility-sharing" was first introduced in relation to the need for sharing responsibility for protection of refugees in situations of mass influx.[133] The preamble to 1951 Convention declares that in mass influxes, "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution […] cannot therefore be achieved without international co-operation".[134] Although there are no clear mechanisms of responsibility-sharing defined in the 1951 Convention, two traditional methods of responsibility-sharing have come into being: resettlement, and financial assistance for countries hosting large numbers of refugees to help them with their care and protection. During a series of expert roundtable meetings held in the context of UNHCR's Global Consultations on International Protection initiative in 2001, UN Executive Committee has officially encouraged the international community to share the host States' responsibility in case of mass influxes.[135] Later on, in its Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations in 2004, the UN Executive Committee reiterated its recognition of the duty of the international community to share the responsibility of caring for refugees in cooperation with host countries in case of mass influxes, and especially if there is a protracted refugee situation in the host country, until a durable solution is found.[136] The Conclusion recommends that the resettlement be used more effectively as "a tool of burden and responsibility sharing", and that the international community mobilize its resources for supporting the host countries.[137] Another valuable recommendation mentioned in the Conclusion is for the States,

131 *Ibid.*, p. 10.

132 *Ibid.*

133 **Christina Boswell**, "Burden-sharing in the New Age of Immigration", Migration Policy Institute, 1 November 2003, available at: http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration (accessed on 30 April 2016).

134 UN, 1951 Convention, *op. cit.*, Preamble.

135 For further information on UNHCR's Global Consultations on International Protection, please see: http://www.unhcr.org/3b95cbce4.html (accessed on 30 April 2016).

136 UN ExCom No. 100 (LV) - 2004, General Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, contained in United Nations General Assembly document A/AC.96/1003.

137 *Ibid.*

UNHCR and other relevant actors to develop and implement "as early on in a crisis as possible, a comprehensive plan of action".[138]

2- Resettlement

Considered as "a vital instrument of international solidarity, and burden and responsibility sharing, particularly for large-scale and protracted refugee situations", resettlement is the transfer of refugees from an asylum country to another State that has agreed to admit them as refugees with permanent residence status.[139] Through the UNHCR's Agenda for Protection in 2002 and Convention Plus initiative in 2004, resettlement has reemerged as a core component of international responsibility-sharing,[140] and the Position Paper on the Strategic Use of Resettlement in 2010 made a global call to all States for developing effective "multi-year resettlement strategies".[141]

Since the onset of the Syrian displacement crisis in 2011, resettlement reappeared as a major topic of discussion over the need for a durable solution and responsibility-sharing. In addition to UNHCR, various scholars and NGOs have been pointing out the need to enhance the level of protection of Syrian refugees. To this end, UNHCR has recommended that States increase refugee resettlement, and facilitate "humanitarian admission, and family reunification or other forms of admission for Syrian refugees".[142] Other forms of admission may consist of "private sponsorship, medical evacuation, humanitarian visas, academic scholarships, and labor mobility schemes".[143]

In 2014, UNHCR submitted 103,890 refugees to States for resettlement consideration and 21,154 of these individuals were refugees from Syria.[144] In 2014 Syrian refugees became the largest nationality group worldwide submitted by UNHCR for resettlement. Due to large-scale submission of Syrian refugees for resettlement by UNHCR, "submissions from MENA increased from 10,500 in 2012 to 23,200 in 2014, and submissions from Europe rose from 8,500 in 2012 to 16,400 in 2014".[145] "UNHCR Turkey submitted the highest number of refugees globally, with 15,700

138 *Ibid.*

139 UNHCR, Multilateral Framework of Understandings on Resettlement, FORUM/2004/6, 16 September 2004, available at: http://www.refworld.org/docid/41597d0a4.html, p. 1 (accessed on 30 April 2016).

140 UNHCR, Resettlement Handbook, July 2011, available at: http://www.refworld.org/docid/4ecb973c2.html, pp. 53-54 (accessed on 30 April 2016).

141 UNHCR, Position Paper on the Strategic Use of Resettlement, 4 June 2010, available at: http://www.refworld.org/docid/4c0d10ac2.html (accessed on 30 April 2016).

142 UNHCR, Finding Solutions for Syrian Refugees: Resettlement, Humanitarian Admission, and Family Reunification , 18 October 2013, available at: http://www.refworld.org/docid/53ad36614.html (accessed on 30 April 2016).

143 **Nicole Ostrand**, "The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States", Journal on Migration and Human Security, vol. 3 no. 3, 2015.

144 UNHCR, Projected Global Resettlement Needs for 2016, July 2015, available at: http://www.unhcr.org/protection/resettlement/558019729/unhcr-projected-global-resettlement-needs-2016.html, p. 11 (accessed on 30 April 2016).

145 UNHCR, Refugee Resettlement Trends 2015, June 2015, available at: http://www.refworld.org/docid/55aca1864.html, p. 16 (accessed on 30 April 2016). Lebanon, Jordan, Egypt and Iraq fall in Middle East and North Africa (MENA), whereas Turkey is considered to be in Europe in accordance with UNHCR's regional boundaries.

submissions in 2014".[146] In spite of the UN's struggle in urging the international community to resettle larger numbers of Syrian refugees for a sustainable solution to the displacement crisis in solidarity with the host countries, these calls did not receive a sufficient response. "In order to reach the milestone of 130,000 places for Syrian refugees by the end of 2016, approximately 27,000 places are still required".[147]

Furthermore, UNHCR estimates that 369,334 refugees need resettlement from MENA and 214,972 individuals need resettlement from Europe in 2016. Considering the fact that the majority of the individuals in need of resettlement in MENA and Europe are Syrian nationals, and in light of the numbers shown in Figure 8 above, it can be assessed that the gap between the resettlement needs of Syrian refugees and UNHCR's capacity to meet them is enormous: At best, only 47,785 individuals out of 584,306 individuals would be referred to States for resettlement from MENA and Europe in 2016.

These figures show that the resettlement system in place is considerably slow and the huge resettlement backlog is alerting the international community to create and implement new resettlement solutions. Unless new mechanisms are established, the concept of resettlement may cease to be an efficient tool of responsibility-sharing and consequently it cannot provide a durable solution to the protracted Syrian displacement crisis. UNHCR's actual capacity and strategic mission imply that this office should not undertake the role of the only entity responsible for resettlement: the States -and especially the industrialized States of the EU- should raise their quotas for Syrian resettlement. However, even higher pledges may not meet the Syrians' needs for resettlement. As a solution, the international community may discuss the possibility of sending State-governed resettlement missions to Turkey where the resettlement needs of Syrian refugees may be processed by each State in coordination with the UNHCR.

Despite UN's acknowledgement of resettlement as a indispensable tool of international responsibility-sharing and its encouragement to all States, and particularly to industrialized States of Europe, for establishing sustained, multi-year resettlement commitments, in the 1990s and onward, "western European countries became increasingly concerned about the political and socio-economic costs of asylum and temporary protection systems".[148] The so-called notion of "reception in the region", based on the argument that Europe should reduce refugee flows to its territories by "ensuring a higher standard of protection and assistance in refugee camps nearer to places of origin", has gained weight in European migration policies.[149] The most frequent criticism to this notion asserts that making it more difficult for refugees to reach Europe would result with "shifting" Europe's

146 *Ibid.*, p. 16.

147 UNHCR Projected Global Resettlement Needs for 2016, *op. cit.*, p. 9.

148 **Boswell**, *op. cit.*

149 *Ibid.*

responsibilities towards host countries, rather than "sharing" these responsibilities for the international protection of refugees.[150]

Regarding 28 EU Member States' contribution to the resettlement of Syrian refugees, UNHCR reports that as of 18 March 2016 only a total of 75,326 places have been made available by Austria (1,900), Belgium (475), Czech Republic (70), Denmark (390), Finland (1,900), France (1,000), Germany (41,899), Hungary (30), Ireland (610), Italy (1,400), Luxembourg (60), Netherlands (850), Poland (900), Portugal (118), Romania (40), Spain (984), Sweden (2,700) and UK (20,000).[151] This figure consists of confirmed pledges for resettlement and other forms of legal admission (including humanitarian admission, private sponsorship, emergency scholarship for higher education, and vulnerable persons relocation scheme) for Syrian refugees since 2013, and the due date for these places to be allocated has not been determined. For instance, the United Kingdom pledged to accept up to 20,000 Syrian refugees by 2020. In conclusion, compared to 2,715,789 Syrian refugees currently registered in Turkey, the number of places pledged by EU countries for the resettlement of Syrian refugees shows that EU has been significantly reluctant to share the responsibility of finding a durable solution for Syrian refugees.[152] EU's reluctance to accept Syrian refugees through resettlement is pushing Syrian refugees to search for ways to "self-resettle" themselves into the EU, as it will be discussed below.

3- Financial Assistance

Another traditional tool of international responsibility-sharing is financial assistance to countries hosting large numbers of refugees. Since the beginning of the Syrian displacement crisis in 2011, the UN made numerous calls to the international community and requested their financial contribution for funding its response plans such as Humanitarian Response Plan (HRP) to provide humanitarian assistance into Syria, and Regional Response Plan (RRP) to assist countries hosting refugees.

HRPs are annual plans that aim to ensure the timely delivery of much-needed humanitarian aid inside Syria, in cooperation with the Government of Syria, humanitarian actors (i.e. UN agencies, International Organization for Migration (IOM), and international NGOs registered in Syria) by responding to urgent humanitarian needs in a wide range of sectors (i.e. protection, shelter, food, nutrition, health, education, livelihood, and water, sanitation, hygiene).[153] However, in 2014, only 51 percent ($1,144,764,7351 out of $2,256,199,013) of the budget for Humanitarian

150 *Ibid.*

151 UNHCR, "Resettlement and Other Forms of Legal Admission for Syrian Refugees", *op. cit.*

152 See the first sub-section.

153 UN, Syrian Arab Republic Humanitarian Assistance Response Plan (SHARP) 2014, n.p., 15 December 2013. UN, Overview: 2015 Syria Response Plan (SRP) and 2015-2016 Regional Refugee and Resilience Plan (3RP), Berlin, 18 December 2015. UN, Syrian Arab Republic Humanitarian Response Plan (HRP) 2016, n.p., December 2015.

Assistance Response Plan for Syria (SHARP) has been met.[154] The Syria Response Plan 2015 (SRP) also remained 57 percent ($1,636,166,119) unfunded.[155] As of March 2016, only 6 percent ($176,990,492 out of $3,182,409,473) of the funding requested for HRP for Syria in 2016 has been received.[156]

On the other hand, UN's annual regional response plans aim to funnel financial resources into the countries hosting the refugees from Syria, and to respond to the immediate humanitarian needs of refugees in these countries, including protection and essential services (i.e. food, health, education, and material assistance in support of the most vulnerable).[157] The host countries covered by UN's regional response plans in 2014, 2015 and 2016 are Turkey, Lebanon, Jordan, Egypt and Iraq.[158] It is observed that the international community's financial contribution to UN plans for sharing the cost of caring and protecting refugees in host countries has been disappointingly limited. The Syria Regional Response Plan 2014 (RRP6) remained only 63 percent covered (with the collection of $2,352,833,419 out of $3,740,654,701 required).[159] The Syria Regional Refugee and Resilience Plan 2015 (3RP) has received only 65 percent ($2,811,274,851 out of $4,319,944,557) of its required funding.[160] Lastly, as of 31 March 2016, only 9 percent ($408,817,705 out of $4,552,032,036) of the required funding has been collected for 3RP 2016.[161]

The figures above show the international community's failure to financially support the international agencies and host countries in responding to the urgent humanitarian needs of Syrians who have been internally displaced and those who fled to neighboring countries. And particularly EU Member States' contribution to the funding of HRPs and RRPs for Syria has been very limited in 2014 and 2015.

In 2014, 27 out of 65 donors were EU Member States (Latvia did not pledge to make any financial contributions). However these states' total contribution remained at around one billion USD within the grand total of $5.2 billion that has been collected. Similarly, 26 EU Member States (except for Greece and Croatia) participated in the funding of HRP and 3RP for Syria in 2015. The total financial contribution made by these 26 countries remained at around $1.7 billion within the total amount of approximately $5.9 million that has been collected from 58 donors.[162]

154 UNOCHA, FTS, *op. cit.*

155 *Ibid.*

156 *Ibid.*

157 UN, 2014 Syria Regional Response Plan (RRP6) Strategic Overview, n.p., December 2013, p. 10.

158 *Ibid.* UN, Regional Refugee & Resilience Plan (3RP) 2015-2016: Regional Strategic Overview, n.p., December 2014. UN, Regional Refugee & Resilience Plan (3RP) 2016-2017, *op. cit*.

159 UNOCHA, FTS, *op. cit.*

160 *Ibid.*

161 *Ibid.*

162 UNOCHA, FTS, *op. cit.*

As of April 2016, EU Member States' participation in UN's efforts for funding its HRP and 3RP plans for 2016 seems to be more limited in comparison to previous years (see Figure 11 below). The list of donors includes 22 countries, the half of which consists of 11 EU Member States. However, as of 07 April 2016, only around $44 million of the total funding so far ($181,946,192) has been donated by EU Member States.

4- The Consequences of the EU's Reluctance to Share Responsibility

Due to dire conditions in Turkey, lack of integration policies, and despair over prospects for a return to their country of origin as discussed in the first sub-section of this paper, "this depressing picture is compelling Syrian refugees to take the ultimate risk of trusting their self-resettlement to the hands of human smugglers, rather than the EU, the United States, and international agencies".[163] Increasing numbers of Syrian refugees are "self-resettling themselves to EU" by risking their lives for reaching Europe through Mediterranean Sea via unsafe boats. Thus, the victims of the Syrian displacement crisis who were forced to flee violence, human rights abuses and civil war, has become the subjects of another humanitarian crisis.

The death toll in the Mediterranean Sea is tragic. According to UNHCR, the number of migrant fatalities recorded in the Mediterranean Sea increased from 3,500 in 2014 to 3,771 in 2015.[164] IOM reports that 805 of the fatalities in 2015 occurred in the "Eastern Mediterranean", which stands for the Aegean Sea.[165] Located between Greece and Turkey, the Aegean is the main sea route used by Syrian refugees to reach Europe. According to figures shared by UNHCR Greece, 272 migrants died and 152 people went missing in the Aegean Sea in 2015.[166] The number of fatalities that occurred in the first three months of 2016 is alerting, and is indicative of the fact that the death toll in the Mediterranean is going to increase this year. Only in the first three months of 2016, 627 migrants died in the Mediterranean Sea.[167] As of 20 March 2016, the number of casualties has reached 127 and 20 persons have gone missing in the Aegean Sea.[168]

Despite the lack of safe and legal pathways to Europe for refugees, the number of arrivals in Europe through Mediterranean has also been increasing since 2014: it escalated from 216,054 in 2014 to 1,015,078 in 2015.[169] UNHCR data shows that 856,723 people departed from Turkey and arrived in Greece by Aegean Sea in 2015,[170]

163 **Kemal Kirişçi**, "Why 100,000s of Syrian refugees are fleeing to Europe", Brookings Institute, 3 September 2015, available at: http://www.brookings.edu/blogs/order-from-chaos/posts/2015/09/03-eu-refugee-crisis-kirisci (accessed on 30 April 2016).

164 UNHCR, Refugees/Migrants Emergency Response – Mediterranean, *op. cit.*

165 IOM, Migration Flows – Europe, available at: http://migration.iom.int/europe/ (accessed on 30 April 2016).

166 UNHCR, "Greece Data Snapshot", 27 April 2016, available at: https://data.unhcr.org/mediterranean/download.php?id=1106 (accessed on 30 April 2016).

167 UNHCR, Refugees/Migrants Emergency Response – Mediterranean, *op. cit.*

168 UNHCR, "Greece Data Snapshot", *op. cit.*

169 UNHCR, Refugees/Migrants Emergency Response – Mediterranean, *op. cit.*

170 *Ibid.*

and according to the European Commission Humanitarian Aid & Civil Protection (ECHO), this number mainly consists of Syrian and Iraqi refugees.[171] The number of Syrians in this sum is reported to be over 440,000.[172] UNHCR also reports that in the first three months of 2016, a total of 170,125 migrants arrived in Europe by sea and that 46 percent of them are Syrian refugees.[173] Data from UNHCR Greece shows that 150,703 of these people traveled to Europe by Aegean Sea, and 49 percent of this figure consists of Syrian refugees.[174] ECHO gives a slightly different account, stating that approximately 100,000 refugees from various nationalities arrived in Greece from Turkey by sea as of March 2016.[175]

According to the EU's statistical office Eurostat, the number of Syrian nationals who applied for asylum in 28 EU Member States increased between 2011 and 2014, and tripled from 2014 to 2015. Although the EU Member States were reluctant to resettle large numbers of Syrian refugees in solidarity with host countries, the number of Syrian nationals who managed to reach Europe and seek asylum was recorded as 122,065 and 368,400 respectively in 2014 and 2015. However, out of these asylum applications only 2,870 in 2014 and 5,800 in 2015 have received a positive final decision.[176] The positive decisions include the recognition of "Geneva convention status", "humanitarian status", "subsidiary protection status", and "temporary protection status".[177] It should be noted that although "temporary protection status" is listed as one of the positive decisions, no Syrian citizen has been granted this status yet.

Eurostat's data reflects that in spite of the reluctance of EU Member States to operate an efficient mechanism for resettling a larger portion of Syrian refugees hosted by neighboring countries, the number of Syrian refugees who reached Europe and applied for asylum has been increasing since the onset of the conflict in 2011. However, the rate of positive decisions regarding Syrian applicants' asylum requests remains significantly low with a recognition rate of 2% in 2014, and 1.5% in 2015.

It is possible that, in the future, the recent judgment of the European Court of Human Rights (ECtHR) on the Case of L.M. and Others v. Russia[178] creates a positive impact for an increase in the recognition rate of Syrian nationals in the EU. In the Case of L.M. and Others v. Russia, that stands as the first ECtHR decision regarding the issue of returns to Syria since the beginning of the displacement crisis, the Court found that the applicants' fundamental rights would be violated upon their forcible

171 ECHO, Turkey: Refugee Crisis Factsheet, *op. cit.*

172 UN, 3RP, *op. cit.*

173 UNHCR, Refugees/Migrants Emergency Response – Mediterranean, *op. cit.*

174 *Ibid.*

175 ECHO, Turkey: Refugee Crisis Factsheet, *op. cit.*

176 *Ibid.*

177 *Ibid.*

178 CoE: ECtHR, L.M. and Others v. Russia, Applications nos. 40081/14, 40088/14 and 40127/14, 15 October 2015.

return to Syria by Russian authorities. The Court therefore found that Russia would violate Article 2 ("right to life") and/or Article 3 ("prohibition of torture and of inhuman or degrading treatment") of the European Convention on Human Rights (ECHR)[179] if the applicants were to be deported back to Syria.

III. EU-Turkey "Refugee Deal" and its Implications

Under this section, firstly, the negotiation process between the EU and GoT, and the final text of the "Refugee Deal" will be reviewed. In the second sub-section, the legality of the "Refugee Deal" will be discussed in terms of the principles of international Human Rights Law and European asylum law. Possible challenges that are likely to arise in the implementation of the "Refugee Deal" will also be studied with an emphasis on the safeguards set out in the "Refugee Deal".

A- Negotiations and the Content of the "Refugee Deal"

Since the beginning of the displacement crisis, the GoT made numerous appeals to the international community, especially to EU Member States, for financial support to its budget for the protection of Syrian refugees, and also demanded for the resettlement of Syrian refugees as a traditional method of responsibility-sharing. UNHCR as well as various scholars and human rights activists backed Turkey's calls for greater responsibility-sharing and cooperation.[180]

The 16th of December 2013 marks the beginning of the road that took EU and GoT to the "Refugee Deal": the EU-Turkey Readmission Agreement has been signed in Ankara, and the EU-Turkey Visa liberalization dialogue has also been initiated.[181] According to the agreement, Turkey will readmit Turkish citizens and the nationals of the third countries and stateless persons who are proven to have reached the EU territory through Turkey by irregular means.[182] Although the agreement entered into force on 1 October 2014, according to the Article 24, the provisions regarding the readmission of third country nationals and stateless persons shall enter into force at the end of a three-year period (on 1 October 2017).[183] In fact, Turkey had previously

179 CoE, ECHR : European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 ("Avrupa İnsan Hakları Sözleşmesi"), 4 November 1950, Official Gazette no. 8662, 19 March 1954.

180 UNHCR, "Guterres, Jolie in Turkey to show solidarity with Syrian refugees", 13 September 2012, available at: http://www.unhcr.org/5051ef1c9.html (accessed on 30 April 2016). UNHCR, "UNHCR's Guterres: Syria refugees reach one million", 6 March 2016, available at: http://www.unhcr.org/513623756.html (accessed on 30 April 2016). UNHCR, "Statement by UN High Commissioner for Refugees, António Guterres on refugee crisis in Europe", 4 September 2015, available at: http://www.unhcr.org/55e9459f6.html (accessed on 30 April 2016). UNHCR, "Grandi calls for action to end war in Syria, misery for refugees", 22 January 2016, available at: http://www.unhcr.org/56a24d5a6.html (accessed on 30 April 2016).

181 OJ L 134, Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing Without Authorization, 7 May 2014, "Türkiye Cumhuriyeti ile Avrupa Birliği Arasında İzinsiz İkamet Eden Kişilerin Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun" No. 6547, 25 June 2014, Official Gazette no. 29044, 29 June 2014, Article 3 and Article 4.

182 *Ibid.*

183 *Ibid.*, Article 24.

signed a Readmission Protocol with Greece (signed on 8 November 2001)[184], and similar bilateral agreements have been signed with Syria (10 September 2001)[185], Kyrgyzstan (6 May 2003)[186], Romania (19 January 2004)[187], Ukraine (7 June 2005)[188], Vietnam (22 August 2007)[189], Pakistan (7 December 2010)[190], Russia (18 January 2011)[191], Moldova (1 November 2012)[192] and Belarus (29 March 2013)[193]. However GoT abstained from signing an agreement with the EU until 2013.[194]

Later on, in the official statement following the special meeting of the European Council on 23 April 2015, the EU expressed its commitment to strengthening their presence at the Mediterranean Sea, fighting human trafficking, stopping illegal migration flows to Europe, and reinforcing international solidarity and responsibility for preventing more deaths in the Mediterranean Sea.[195] The need to "step up cooperation with Turkey in view of the situation in Syria and Iraq" for "preventing illegal migration flows to Europe" was also mentioned in the statement.[196]

On 13 May 2015, the European Commission (EC) adopted a European agenda on

184 Readmission Agreement, Türkiye Cumhuriyeti ile Yunanistan Cumhuriyeti Arasında Türkiye Cumhuriyeti İçişleri Bakanlığı ile Yunanistan Cumhuriyeti Kamu Bakanlığı Suç ile Özellikle Terörizm, Örgütlü Suçlar, Uyuşturucu Madde Kaçakçılığı ve Yasadışı Göç ile Mücadelede İşbirliği Antlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 4654, 26 April 2001, Official Gazette no. 24397, 9 May 2001.

185 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Suriye Arap Cumhuriyeti Hükümeti Arasında Yasadışı Göçmenlerin Geri Kabulüne Sair Antlaşmanın Onaylanmasının Uygun Bulunduğuna İlişkin Kanun, No. 4901, 17 June 2003, Official Gazette no. 26491, 12 April 2007.

186 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Kırgız Cumhuriyeti Hükümeti Arasında Kendi Vatandaşlarının Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5097, 12 February 2004, Official Gazette no. 25376, 17 February 2006.

187 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Romanya Hükümeti Arasında Kendi Vatandaşlarının ve Ülkelerinde Yasadışı Konumda Bulunan Yabancıların Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5249, 21 January 2004, Official Gazette no. 25626, 27 April 2004.

188 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Ukrayna Bakanlar Kurulu Arasında Kişilerin Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5778, 24 June 2008, Official Gazette no. 26926, 4 July 2008.

189 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Vietnam Sosyalist Cumhuriyeti Hükümeti Arasında Terörizm, Organize Suçlar, Uyuşturucu ve Psikotrop Maddeler ile Bunların Katkı Maddeleri ve Benzerlerinin Kaçakçılığı ve Diğer Tiplerdeki Suçlarla Mücadelede İşbirliği Antlaşması, adopted by Cabinet Decree no. 2008/13364, 10 March 2008, Official Gazette no. 26825, 23 March 2008.

190 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Pakistan İslam Cumhuriyeti Hükümeti Arasında İzinsiz İkamet Eden Şahısların Geri Kabulüne Dair Anlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 6703, 7 April 2016, Official Gazette no. 29690, 20 April 2016.

191 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Rusya Federasyonu Hükümeti Arasında Geri Kabul Antlaşmanın Onaylanmasının Uygun Bulunduğuna İlişkin Kanun, No. 6188, 9 March 2011, Official Gazette no. 27872, 12 March 2011.

192 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Moldova Cumhuriyeti Hükümeti Arasında Geri Kabul Antlaşması ile Notaların Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 65174, 15 January 2014, Official Gazette no. 28892, 24 January 2014.

193 Readmission Agreement, Türkiye Cumhuriyeti Hükümeti ile Belarus Cumhuriyeti Hükümeti Arasında Geri Kabul Antlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 6505, 27 November 2013, Official Gazette no. 28842, 5 December 2013.

194 Please see **Ahmet İçduygu**, *The Irregular Migration Corridor between the EU and Turkey: Is it Possible to Block it with a Readmission Agreement?*, EU-US Immigration Systems 2011/14, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2011. Also see **Nuray Ekşi**, *Türkiye Avrupa Birliği Geri Kabul Antlaşması*, Beta, İstanbul, March 2016, pp. 28-32.

195 European Council Statement, Special meeting of the European Council, 23 April 2015, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/ (accessed on 30 April 2016).

196 *Ibid.*

migration whereby it announced that a scheme covering all Member States and "a single European pledge of 20,000 resettlement places" for refugees in North Africa, the Middle East and the Horn of Africa would soon be prepared.[197] Subsequently, on 27 May 2015, the EC put forward the first package of proposals that included a recommendation (adopted on 8 June 2015)[198] requesting Member States to resettle 20,000 refugees from outside of the EU.[199] The European leaders once again expressed their commitment to resettle 20,000 refugees during the European Council meetings of 25-26 June 2015.[200] During the EC Justice and Home Affairs Council meeting on 20 July 2015, the EU Member States officially announced that EU Member States would resettle "through multilateral and national schemes 22,504 displaced persons in clear need of international protection" over a two-year period.[201]

Following the European Agenda on Migration, on 9 September 2015, the EC put forward a second package of proposals that included a proposal for establishing a common European list of "safe countries of origin" which would "support the swift processing of asylum applications from persons originating from countries designated as safe".[202] The list of safe countries of origin proposed by the EC consisted of Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.[203] The package also addressed the external dimension of the refugee crisis under a joint communication which proposed that the funding allocated to Turkey be raised from €130 million for the period 2007-2013 to €245 million for the period 2014-2016.[204]

On 15 October 2015, a Joint Action Plan has been agreed between the EU and GoT for addressing "the crisis" created by the situation in Syria "together in a spirit

197 EC, COM(2015) 240 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Agenda On Migration, 13 May 2015, available at: http://ec.europa.eu/lietuva/documents/power_pointai/communication_on_the_european_agenda_on_migration_en.pdf (accessed on 30 April 2016).

198 EC, C(2015) 3560 final, Commission Recommendation on a European resettlement scheme, 8 June 2015, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf (accessed on 30 April 2016).

199 EC, Press release "European Commission makes progress on Agenda on Migration", 27 May 2015, available at: http://europa.eu/rapid/press-release_IP-15-5039_en.htm (accessed on 30 April 2016).

200 European Council, EUCO 22/15, CO EUR 8, CONCL 3, Meeting conclusions, 26 June 2015, http://www.consilium.europa.eu/en/meetings/european-council/2015/06/EUCO-conclusions-pdf/ (accessed on 30 April 2016).

201 European Council, "Justice and Home Affairs Council", 20 July 2015, available at: http://www.consilium.europa.eu/en/meetings/jha/2015/07/20/ (accessed on 30 April 2016).

202 EC, COM(2015) 452 final, Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Common List of Safe Countries of Origin, 9 September 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_regulation_of_the_ep_and_council_establishing_an_eu_common_list_of_safe_countries_of_origin_en.pdf, p. 2 (accessed on 30 April 2016).

203 *Ibid.*

204 EC, JOIN(2015) 40 final, Joint Communication To The European Parliament And The Council Addressing the Refugee Crisis in Europe: The Role of EU External Action, 9 September 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_addressing_the_external_dimension_of_the_refugee_crisis_en.pdf, p.6 (accessed on 30 April 2016).

of burden sharing".[205] Aiming to strengthen the cooperation between Turkey and EU for addressing the root causes of the Syrian displacement crisis and mass influx, for supporting Syrians in Turkey as well as the host communities in the country, and for "preventing irregular migration flows to the EU", the Joint Action Plan indicated the EU's intention to allocate further financial assistance to Turkey, and GoT's intention to accelerate procedures for readmitting "irregular migrants who are not in need of international protection and were intercepted coming from the Turkish territory in line with the established bilateral readmission provisions".[206] Later, during the EC Justice and Home Affairs Council meeting on 9 November 2015, EU Member States decided to accelerate the process of Turkey's fulfillment of the visa liberalization and to enhance cooperation with Turkey for fully implementing the Readmission Agreement.[207] The need for a stronger cooperation and coordination with Turkey regarding border security and migration management has been discussed repeatedly during the informal meeting of EU heads of State or government on 12 November 2015 and the EC Foreign Affairs Council meeting on 16 November 2015. And on 24 November 2015, the EC announced that it was setting up the legal framework for a €3 billion Refugee Facility for Turkey.[208]

The meeting of the EU heads of State or government with Turkey on 29 November 2015 has been a significant step in the negotiations: the Joint Action Plan of October 2015 has been activated and the process of Turkey's accession to the EU has been re-energized.[209] According to the Joint Action Plan the EU-Turkey Readmission Agreement's provisions regarding the nationals of third countries and stateless persons will enter in force in 1 June 2016 (instead of October 2017 as previously foreseen in Article 24 of the Agreement); Turkey will improve the implementation of the Turkey-Greece Readmission Protocol of 2001; the visa liberalization process for Turkish citizens will be completed by October 2016; and the EU will provide a funding of €3 billion to Turkey for providing assistance to Syrian refugees in the country.[210]

Furthermore, on 15 December 2015, the EC put forward a third package of proposals in line with the European Agenda on Migration, including a Commission Recommendation

205 EC, Factsheet "EU-Turkey joint action plan", 15 October 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm (accessed on 30 April 2016).

206 *Ibid.*

207 European Council, Press release "Council Conclusions on Measures to handle the refugee and migration crisis", 9 November 2015, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/11/09-jha-council-conclusions-on-measures-to-handle-refugee-and-migration-crisis/ (accessed on 30 April 2016).

208 EC, Press release "EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey", 24 November 2015, available at: http://europa.eu/rapid/press-release_IP-15-6162_en.htm (accessed on 30 April 2016).

209 European Council, "Meeting of heads of state or government with Turkey - EU-Turkey statement", 29 November 2015, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/ (accessed on 30 April 2016).

210 EC, "Managing the Refugee Crisis - EU-Turkey Joint Action Plan: Implementation Report", n.d., available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/managing_the_refugee_crisis_-_eu-turkey_join_action_plan_implementation_report_20160210_en.pdf (accessed on 30 April 2016).

for a Voluntary Humanitarian Admission Scheme with Turkey.[211] According to the recommendation, "humanitarian admission should mean an expedited process" whereby EU Member States participating in the scheme would admit persons in need of international protection upon Turkey's referral and UNHCR's recommendation. These persons should "have been registered by the Turkish authorities prior to 29 November 2015".[212] And subsequently on 3 February 2016, EU Member States discussed the details of financing the previously accepted €3 billion Refugee Facility for Turkey.[213]

In this context, the notion of "safe third country" had been introduced for the first time in the EC Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, on 10 February 2016. Welcomed by the European Council during its meetings of 18-19 February 2016,[214] the communication revisited the definition of "safe third country" under the Asylum Procedures Directive (APD)[215]; encouraged all Member States to make necessary changes in their national legislation regarding the notion of "safe third countries", inviting them to set up required legal framework for returning asylum-seekers to "safe third countries" without examining their applications for refugee status; and underlined that "the concept of safe third country as defined in the Asylum Procedures Directive […] does not require that the safe third country has ratified that Convention without geographical reservation",[216] a reference that can be interpreted as the prospective recognition of Turkey as a "safe third country".

On 7 March 2016, the EU and GoT held a meeting during which they discussed new proposals for addressing the "refugee crisis" and for an accelerated full implementation of the Joint Action Plan.[217] The list of proposals included the return of all new irregular migrants crossing to Greece from Turkey; the resettlement of a Syrian from Turkey to the EU for every Syrian readmitted by Turkey from Greece; the acceleration of the implementation of the visa liberalization roadmap and the €3 billion Refugee Facility for Turkey; the opening of new chapters in the negotiation for Turkey's accession to the

211 EC, C(2015) 9490, Commission Recommendation for a voluntary humanitarian admission scheme with Turkey, 15 December 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf (accessed on 30 April 2016).

212 *Ibid.*, p. 4.

213 European Council, Press release "Refugee facility for Turkey: Member states agree on details of financing", 3 February 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/03-refugee-facility-for-turkey/ (accessed on 30 April 2016).

214 European Council, Press release "European Council Conclusions on migration", 18 February 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/18-euco-conclusions-migration/ (accessed on 30 April 2016).

215 EU: Council of the EU, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 26 June 2013, OJ L. 180/60 -180/95, 29 June 2013.

216 EC, COM(2016) 85 final, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, 10 February 2016, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf, p.18 (accessed on 30 April 2016).

217 European Council, "Statement of the EU Heads of State or Government", 8 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/ (accessed on 30 April 2016).

EU; and better cooperation between Turkey and EU for improving the humanitarian situation in Syria.[218] Subsequently on 10 March 2016, the EC Justice and Home Affairs Council welcomed the statement agreed between the EU and GoT.[219]

Finally on 18 March 2016, EU leaders met with the Turkish Prime Minister Davutoğlu, and they agreed on the proposals previously discussed on 7 March.[220] The parties agreed that (1) "all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 […] who did not apply for asylum or whose application has been found unfounded or inadmissible" in accordance with the Asylum Procedures Directive "will be returned to Turkey" and the costs for the return operations will be covered by the EU; (2) "for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU" and "migrants who have not previously entered or tried to enter the EU irregularly" will be prioritized for resettlement; (3) "Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU;" (4) EU Member States will resettle 18,000 Syrian refugees, in accordance with the resettlement scheme adopted in July 2015, and "any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons;" (5) when irregular crossings between Turkey and the EU are stopped completely or kept at a reasonable level, "a Voluntary Humanitarian Admission Scheme will be activated" and EU Member States will contribute to the scheme on a voluntary basis; (6) "the fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016;" (7) the EU "will further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey", and will mobilize "an additional funding for the Facility of an additional €3 billion up to the end of 2018;" (8) the process of Turkey's accession to the EU will be re-energized; (9) and Turkey and the EU will cooperate for "any joint endeavour to improve humanitarian conditions inside Syria".[221] Thus, the "Refugee Deal" was completely shaped during the meeting of 18 March and it was announced on the same day in the EU-Turkey Statement. According to the latter, the "Refugee Deal" would be implemented as of 20 March 2016 and the return of "all new irregular migrants" would start on 4 April 2016.[222]

On 3 April 2016, the Government of Greece adopted a new law for allowing the implementation of the "Refugee Deal" as of 20 April 2016. The new law established

218 European Council, "Meeting of the EU heads of state or government with Turkey", 7 March 2016, available at: http://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/ (accessed on 30 April 2016).

219 European Council, "Justice and Home Affairs Council", 10-11 March 2016, available at: http://www.consilium.europa.eu/en/meetings/jha/2016/03/10-11/ (accessed on 30 April 2016).

220 European Council, "European Council Meeting", 17-18 March 2016, available at: http://www.consilium.europa.eu/en/meetings/european-council/2016/03/17-18/ (accessed on 30 April 2016).

221 European Council, Press release "EU-Turkey statement", 18 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ (accessed on 30 April 2016).

222 *Ibid.*

an Appeals' Authority, the Reception and Identification Service, new Regional Asylum Offices, and also introduced the possibility to grant humanitarian status to asylum seekers with appeals pending for a long time. The law also restructured the Asylum Service.[223]

Similarly, the Circular No: 2016/8 adopted by the Turkish Prime Ministry on 5 April 2016 requested that "all state institutions and organizations, and local authorities" cooperate with DGMM for making necessary preparations for the readmission of "irregular migrants" from Greece as of 4 April, in line with the Readmission Agreement of 16 December 2013 and the statement ("Refugee Deal") of 18 March 2016.[224]

The first two rounds of deportations of refugees from Greece to Turkey took place on 4 and 8 April 2016. So far, a total of 324 refugees (202 deportees on 4 April and 124 deportees on 8 April 2016) have been readmitted by Turkey.[225] On 5 April 2016, it was announced that "the expulsion of migrants from Greece to Turkey has been suspended as authorities admitted that it could take months to process the thousands of asylum seekers stranded on the Aegean islands".[226]

B- Legality and Implications of the "Refugee Deal"

From the moment of its announcement, the "Refugee Deal" has been widely criticized by scholars, legal experts, human rights activists and international NGOs, and is still regarded to fall short of a number of principles and rules set under the international Human Rights Law and the European asylum law. International organizations such as the UNHCR have also been warning that the safeguards described in the statement must be strictly implemented to avoid any possible human rights breaches in the practice of the "Refugee Deal" both on Greek and Turkish soils.[227]

It is important to note that, although it will not be discussed and analyzed in this paper, the legality of the "Refugee Deal" in the context of Turkish national law and its Constitution is the subject of a complicated debate. The questions of whether and how the "Refugee Deal" could be legally binding for both parties (GoT and the EU) is a topic that is currently being discussed among scholars and legal experts.[228]

223 UNHCR, "Operations Cell Daily Report", Regional Bureau Europe, 15 April 2016, available at: https://data.unhcr.org/mediterranean/download.php?id=1055, p. 1 (accessed on 30 April 2016).

224 Circular No. 2016/8 from Prime Ministry on Irregular Migration ("Düzensiz Göçle Mücadele ile İlgili Başbakanlık Genelgesi"), Official Gazette no. 29675, 5 April 2016

225 Mülteci-Der, "Readmissions from Greece to Turkey: What Happens After Readmission?", available at: http://multeci.org.tr/haberdetay.aspx?Id=140 (accessed on 30 April 2016).

226 Nick Squires, Oscar Webb, "Greece suspends expulsion of migrants to Turkey", The Telegraph, 5 April 2016, available at: http://www.telegraph.co.uk/news/2016/04/05/pic-n-pub-greece-suspends-expulsion-of-migrants-to-turkey/ (accessed on 30 April 2016).

227 UNHCR, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", available at: www.unhcr.org/56f3ec5a9.pdf (accessed on 30 April 2016).

228 For further reading, **Nuray Ekşi**, "Türkiye-Avrupa Birliği Geri Kabul Anlaşması: Bir Hatalar Zinciri", Legal Hukuk Dergisi, Volume: 14, Issue:163, 2016.

1- Legality as per the International Human Rights Law and EU Asylum Law

Firstly, according to the principle of *non-refoulement,* one of the core elements of the international Human Rights law, all States are prohibited from sending a person who seeks asylum in their territory, to a country where this person's life or freedom would be at risk. For the first time, the principle of *non-refoulement* was officially enshrined in Article 33 of the 1951 Convention entitled the "prohibition of expulsion or return (*refoulement*)": "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[229] This principle is also contained in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (1984 Convention), under Article 3: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".[230]

The concept of *non-refoulement* also constitutes one of the core principles of the European asylum law. Article 19 of the Charter of Fundamental Rights of the European Union (EU Charter) contains this principle: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".[231] EU Member States are therefore obliged to comply with the principle of *non-refoulement* which is also consolidated in several European Council and European Parliament directives regulating asylum and migration, i.e. Directive 2005/85/EC,[232] Directive 2008/115/EC,[233] Directive 2013/32/EU (also known as the Asylum Procedures Directive -APD-),[234] and Directive 2013/33/EU.[235] For instance, according to the APD, all Member States have the obligation of separately assessing each individual application for international protection, and all asylum seekers have the right to "remain in the Member State pending the examination of the application".[236]

The principle of *non-refoulement* incorporated in Article 14 of the EU-Turkey Readmission Agreement ("Transit Principles").[237] According to the "transit

229 UN, 1951 Convention, *op. cit.*, Article 33.

230 UN, A/RES/39/46, *op. cit*, Article 3.

231 EU, 2012/C 326/02, Charter of Fundamental Rights of the European Union, 26 October 2012, Official Journal no. 2000/C 364/01, 18 December 2000, Article 19.

232 EU, Council of the EU, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005, OJ L 326, 2 January 2006, pp. 1, 11, 13, 14, 21.

233 EU: Council of the EU, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 16 December 2008, OJ L. 348/98-348/107, 24 December 2008, pp. 1, 5-6.

234 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, pp. 60, 68, 77, 80-81, 87.

235 EU: Council of the EU, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), 26 June 2013, OJ L. 180/96 -105/32, 29 June 2013, p. 96.

236 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 9.

237 OJ L 134, *op. cit.*, Article 14.

readmission" described in the Readmission Agreement, third country nationals and stateless persons may be readmitted by Turkey with an aim to be returned to their countries of origin if there are no direct means of transportation to these countries from the EU Member State that requests these persons' readmission. Paragraph 3 of Article 14 states that "if the third-country national or the stateless person runs the real risk of being subjected to torture or to inhuman or degrading treatment or punishment or the death penalty or of persecution because of his race, religion, nationality, membership of a particular social group or political conviction in the State of destination or another State of transit", transit can be refused by Turkey or an EU Member State.[238] However, the Readmission Agreement does not contain any explicit clause that prohibits Turkey from sending third country nationals and stateless persons to their countries of origin where they may be at risk of torture and mistreatment. In other words, the Readmission Agreement does not explicitly prohibit readmissions that would directly or indirectly violate the principle of *non-refoulement*. Nuray Ekşi argues that in compliance with the Preamble and Article 18 ("Non-affection clause")[239] stating that the Readmission Agreement "shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and Turkey arising from international law including from international conventions to which they are party", no readmission request that would violate the principle of *non-refoulement* shall be accepted in the implementation of the Readmission Agreement[240], thus in the implementation of the Refugee Deal.

According to a recent statement of the Turkish Minister of the Interior Efkan Ala, except for Syrian nationals, "persons from other nationalities" readmitted by Turkey will be "deported back to their country of origin" in the implementation of the "Refugee Deal".[241] This would imply a major breach of the principle of *non-refoulement* if any persons at risk of persecution, torture or execution in their country of origin, are to be sent back to Turkey -in other words, if there is a case of "indirect" (or "chain") *refoulement*.[242] As mentioned above, in the EU-Turkey Readmission Agreement, there is no explicit clause that prohibits Turkey from sending readmitted third country nationals and stateless persons to their countries of origin where they would be at risk of persecution. And the likelihood of such a breach of the principle of (direct or indirect) *non-refoulement* cannot be underestimated given the statement of Ala, and in that case, not only the letter but also the spirit of the international system for the protection of refugees would be greatly harmed. If through the implementation of the "Refugee Deal", persons in need of international protection are deported to

238 *Ibid.*, Article 14.

239 *Ibid.* Preamble and Article 18.

240 **Ekşi**, *op. cit.*, pp. 110-112.

241 BBC Türkçe, "Türkiye-AB anlaşması kapsamında ilk göçmen kafilesi Dikili'de", 4 April 2016, available at: http://www.bbc.com/turkce/haberler/2016/04/160403_yunanistan_turkiye_gocmen (accessed on 30 April 2016).

242 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 9.

Turkey and if the latter fails to guarantee these persons' rights recognized under the ECHR, the 1951 Convention and the 1984 Convention, the deal could be considered as "illegal" with regards to the international Human Rights Law and EU asylum law.

In February 2012, the Grand Chamber of the ECtHR delivered its decision on a leading case regarding this matter, namely the case of Hirsi Jamaa and others v. Italy.[243] The applicants, who are from Somalia and Eritrea, were caught outside of the Italian maritime borders by Italian Customs and Coastguard vessels after leaving Libya by sea with the aim of reaching the Italian coast.[244] And an Italian military ship then returned them to Libya, and the applicants were forcibly delivered to Libyan authorities.[245] The ECtHR reiterated that "in accordance with the principle of *pacta sunt servanda*" Italy, as a party to the ECHR, cannot evade its responsibilities under the ECHR by relying on commitments arising from its bilateral readmission agreement with Libya.[246] According to Article 3 of the ECHR ("prohibition of torture and of inhuman or degrading treatment") "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[247] The Court found that Article 3 has been violated twice in the case of Hirsi Jamaa and Others v. Italy: Firstly when Italy sent the applicants back to Libya where they would face torture and mistreatment; and secondly when the applicants have been forcibly returned to their countries of origin (Eritrea and Somalia) by Libyan authorities.[248] In the light of this decision, it can be argued that any violations of the ECHR articles prohibiting direct or indirect *refoulement,* could be brought to the ECtHR. And in the context of the implementation of the "Refugee Deal", both an EU Member State's decision to return a person in need of international protection to Turkey, and Turkey's decision to deport that person to their country of origin where they would be at risk of mistreatment and torture, could be challenged at the ECtHR.

The second question is whether the "Refugee Deal" complies with the principle of "prohibition of mass expulsion" as indirectly contained in Article 13 of the International Covenant on Civil and Political Rights (ICCPR).[249] Adopted by the UN General Assembly on 16 December 1966, the ICCPR states that "an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall […] be allowed to submit the reasons against his expulsion and to have his case reviewed by […] the competent authority".[250] Although

243 CoE: ECtHR, Hirsi Jamaa and Others v. Italy, Application no. 27765/09, 23 February 2012.

244 *Ibid.*, p. 3.

245 *Ibid.*

246 *Ibid.*, pp. 33-38.

247 CoE : ECHR, *op. cit.*, Article 3.

248 CoE: ECtHR, Hirsi Jamaa and Others v. Italy, *op. cit.*, pp. 27-41.

249 **Jean-Marie Henckaerts**, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers, The Hague, 1995, p.48.

250 UN, International Covenant on Civil and Political Rights, 16 December 1966, "Medenî ve Siyasî Haklara İlişkin Uluslararası Sözleşmenin Onaylanmasının Uygun Bulunduğuna Dair Kanun No. 4868", Official Gazette no. 25142, 18 June 2003, Article 13.

this article does not explicitly prohibit the collective expulsions, it is interpreted that mass expulsions would violate this article, which foresees the right of each alien to have their own case and to appeal the decision of their expulsion.

The blanket return of foreigners to a third country is also not consistent with the EU asylum law. Protocol No. 4 to the ECHR prohibits the "collective expulsion of aliens" in its Article 4.[251] Furthermore, according to Article 19 of the EU Charter, "collective expulsions are prohibited".[252] Through several judgments, the ECtHR established the implementation standards for the rule of prohibition of "collective expulsion of aliens". For instance, in the case of Khlaifia and Others v. Italy[253], the Court found that Italy has violated Article 4 of the ECHR by deporting clandestine Tunisian migrants who had arrived on the Italian coast during the events of Arab Spring.[254] Also in the case of Čonka v. Belgium, in which the Slovakian applicants were expulsed to Slovakia by Belgian authorities, the Court decided that Belgium violated Article 4.[255] In both cases, the ECtHR argued that although each applicant in both cases had been issued individual expulsion orders, the Court was not persuaded that the personal circumstances of each of those concerned had been genuinely and individually taken into account prior to their deportation by Italian and Belgian authorities.[256]

However, the "Refugee Deal" does not describe any specific mechanisms for the Greek authorities to fulfill the arduous task of assessing and deciding on the asylum applications of each and every individual prior to readmission by Turkey. As stated in the previous section, the number of refugees from Syria and other countries (i.e. Pakistan, Iraq and Afghanistan) crossing the Aegean Sea and reaching Greece has been escalating since 2014. UNHCR Greece reports that, as of 16 April 2016, since the beginning of the year 153,602 refugees have arrived in Greece by sea, with an average of 870 people per day.[257] It seems almost impossible for the Greek authorities to receive, assess and lawfully decide on the individual asylum applications from all the "irregular migrants" in a short period of time. Therefore, another breach of the core principles of the international Human Rights Law and European asylum law is likely to occur during the implementation of the "Refugee Deal". Refugees on Greek soil risk deportation to Turkey as subjects of a blanket policy without their individual claims being properly assessed in compliance with the 1951 Convention and the APD. As argued by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, the forced return of individuals, who are willing to apply for asylum or

251 CoE: ECHR, *op. cit*., Article 4 "Prohibition of collective expulsion of aliens".

252 EU, 2012/C 326/02, *op. cit.,* Article 19.

253 CoE: ECtHR, Khlaifia and Others v. Italy, Application no 16483/12, 1 September 2015.

254 *Ibid.*

255 CoE: ECtHR, Čonka v. Belgium, 51564/99, 5 February 2002.

256 *Ibid.* CoE: ECtHR, Khlaifia, *op. cit.*

257 "Greece Data Snapshot", UNHCR, 16 April 2016, available at: https://data.unhcr.org/mediterranean/country.php?id=83# (accessed on 30 April 2016).

who are awaiting a decision on their request for asylum or who are willing to appeal the decision of rejection of their request for asylum, would "qualify as a collective expulsion".[258] In sum, the expulsion *en masse* would constitute another illegal aspect of the "Refugee Deal" if refugees are to be readmitted by Turkey without being able to apply for asylum in Greece and receiving a fair decision on their request.

Moreover, Ekşi states that since "asylum seekers" shall not be convicted for travelling to, entering and staying in the country of asylum through illegal ways, they also should not be identified as "irregular migrants" and they should be left out of the scope of the EU-Turkey Readmission Agreement. However, Ekşi argues that if the individuals whose asylum requests are denied by the EU Member States are accepted to fall within the scope of the Readmission Agreement (and thus, the "Refugee Deal"), it could be misused by the EU as a way to return persons in need of international protection to Turkey, and it would be a violation of the international Human Rights Law.[259] Ekşi puts that the Syrian asylum seekers whose asylum requests are rejected by the EU authorities would also fall under the scope of the Readmission Agreement, and that the same risks of legal violation would exist for Syrians in the implementation of the deal.[260]

Thirdly, the "Refugee Deal" mainly focuses on "irregular migrants crossing from Turkey into Greek islands" however it does not mention refugees who may encounter European or Turkish authorities *en route* to the Greek islands, in other words, in the territorial waters. According to Article 3 of the APD, an international protection request may be made in the territorial waters of a Member State,[261] and "officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks, […] should be able to provide third-country nationals or stateless persons who are present in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and who make an application for international protection, with relevant information as to where and how applications for international protection may be lodged. Where those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined".[262]

In the case of Hirsi Jamaa and Others v. Italy, the ECtHR has found that the Italian authorities had violated the Article 4 of the Protocol No. 4 to the ECHR ("prohibition of collective expulsion of aliens"). Thus, for the first time, the ECtHR has ascertained

258 UN Human Rights Office of the High Commissioner, "UN rights chief expresses serious concerns over EU-Turkey agreement", 24 March 2016, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18531&LangID=E (accessed on 30 April 2016).

259 **Ekşi**, *op. cit.,* pp. 113-114.

260 *Ibid.*, pp. 117-118.

261 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 3.

262 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Preamble paragraph 26.

that the Article 4 of Protocol No. 4 "applies to a case involving the removal of aliens to a third State carried out outside national territory".[263] The ECtHR has found that the Italian authorities failed to assess the applicants' personal circumstances before forcibly returning them to Libyan authorities, and it has reiterated the responsibility of all State authorities to inform any individual who is subject to a removal measure, and to provide these individuals with effective access to adequate procedures for appealing the decision of their removal.[264] In light of this judgment by the Grand Chamber of the ECtHR, it can be assumed that any EU Member State may be found guilty of violating the Article 4 of the Protocol No. 4 to the ECHR, if any refugee who comes in contact with European authorities outside of their maritime territories is returned back to Turkey without being given access to the European asylum procedure.

The fourth question regarding the legal and moral merits of the "Refugee Deal" is its aspect that is criticized as being "Kafkaesque" by European Council on Refugees and Exiles (ECRE):[265] The "one in, one out" policy contained in the deal makes the number of resettlement places available in EU countries "dependent on the number of Syrians who risk their lives in the Aegean", however resettlement should not be linked to the number of persons readmitted by Turkey.[266] ECRE argues that this policy may also have other consequences: with an aim to refer as many refugees for resettlement in the EU out of Turkish territories, the GoT may tolerate and turn a blind eye on the increasing numbers of Syrians who risk their lives for crossing to Greek islands.[267] ECRE emphasizes the fact that Turkey has recently started to impose visas to several nationalities that previously did not require one, and GoT is preparing to sign readmission agreements with 14 countries of origin; and it criticizes the "Refugee Deal" by calling it a "a policy of containment in Turkey on behalf of the EU" that can result in "chain refoulement".[268] As mentioned in the previous section, Turkey has signed bilateral readmission agreements with Syria, Kyrgyzstan, Romania, Ukraine, Vietnam, Pakistan, Russia, Moldova, and Belarus. According to Hürriyet Daily News, as of 24 April 2016, the list of countries that Turkey seeks to conclude readmission agreements with in near future includes Iran, Iraq, Afghanistan, Algeria, Bangladesh, Cameroon, Eritrea, Morocco, Ghana, Myanmar, the Republic of Congo, Somali, Sudan and Tunisia.[269]

Lastly, the "Refugee Deal" is focusing only on Syrians in terms of providing international protection, and seems to be based on the argument that Syrians deserve

263 CoE: ECtHR: Hirsi Jamaa and Others v. Italy, *op.cit.*, pp. 45-47.

264 *Ibid.*, pp. 53-54.

265 ECRE, "Memorandum to the European Council Meeting 17 – 18 March 2016: Time to Save the Right to Asylum", Brussels, 11 March 2016, available at: www.ecre.org/component/downloads/downloads/1081.html, p. 2 (accessed on 30 April 2016).

266 *Ibid.*

267 *Ibid.*

268 *Ibid.*

269 **Emine Kart**, "Turkey seeks readmission deals with Iraq, Iran", Hürriyet Daily News, 12 April 2016, available at: http://www.hurriyetdailynews.com/Default.aspx?pageID=238&nID=97699&NewsCatID=510 (accessed on 30 April 2016).

better treatment than refugees from other nationalities who have also fled similar warzones, dictatorships and even ISIS presence, i.e. Afghans, Pakistanis and Iraqis.[270] Such an argument bears the risk of creating a non-equitable, unfair asylum system that favors a particular nationality over the others. Given the fact that, as of April 2016, Syrian nationals constitute only half (53%) of the arrivals in Greece and that the rest is composed of Afghans (23%), Iraqis (9%), Pakistanis (7%) and Iranians (3%),[271] the "Refugee Deal" would be discriminatory as per the international Human Rights Law if it fails to equally consider the need of international protection of non-Syrian refugees. Besides, it is worth mentioning that except for Syrians, refugees from non-European countries are not eligible for temporary protection in Turkey, and they may only enjoy the status of "conditional refugee".[272] As clearly stated in the Article 62 of the LFIP, "conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country".[273] Thus, by making no allowance for the resettlement of non-Syrian refugees, the "Refugee Deal" may be considered to be ignoring the protection needs and rights of non-Syrian refugees in Turkey.

2- Turkey as a "Safe Third Country"

The "Refugee Deal" relies on two notions for returning asylum applicants to Turkey: "safe third country" and "first country of asylum" as defined in the APD. According to Article 33 of the APD, "Member States may consider an application for international protection as inadmissible" (in other words, Member States may reject the application without examining the substance of the application), if "a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38" or "a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35".[274]

To start with the notion of "safe third country", as mentioned in the previous sub-section, the EC Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration of 10 February 2016 underlines that "the concept of safe third country as defined in the Asylum Procedures Directive […] does not require that the safe third country has ratified that Convention without geographical

270 ISIS is reported to be extremely active and to target non-Muslim minorities, academics, journalists, etc. in Asian countries such as Afghanistan Bangladesh, and Pakistan. Arif Rafiq, "What Happened to ISIS's Afghanistan-Pakistan Province?", The Diplomat, 2 February 2016, available at: http://thediplomat.com/2016/02/what-happened-to-isiss-afghanistan-pakistan-province/ (accessed on 30 April 2016). Agence France Press, "Islamic State claims it killed Bangladeshi academic", The Guardian, 23 April 2016, available at: http://www.theguardian.com/world/2016/apr/23/bangladeshi-professor-hacked-to-death-rajshahi-islamists (accessed on 30 April 2016). Associated Press, "Isis claims deadly attack on Pakistani consulate in Afghanistan", The Guardian, 13 January 2016, available at: http://www.theguardian.com/world/2016/jan/13/suicide-bomber-kills-people-eastern-afghanistan-jalalabad (accessed on 30 April 2016).

271 "Greece Data Snapshot", UNHCR, 16 April 2016, *op. cit.*

272 LFIP, *op. cit.*, Article 62.

273 *Ibid.*

274 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 33.

reservation",[275] a reference that can be interpreted as the prospective recognition of Turkey as a "safe third country". Subsequently, the "Refugee Deal" was announced on 18 March 2016 based on the argument that sending "all new irregular migrants crossing from Turkey into Greek islands" back to Turkey would not constitute a violation of the principle of *non-refoulement*, through the recognition of Turkey as a "safe third country". But does this recognition legally comply with the international Refugee Law and EU asylum law?

Article 38 of the APD defines the concept of "safe third country" as a country where (a) the asylum seeker's "life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;" (b) "there is no risk of serious harm;" (c) "the principle of non-refoulement in accordance with the Geneva Convention is respected;" (d) "the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;" (e) "the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention".[276] It is clear that Turkey does not fulfill the criteria listed in Article 38, especially points (c) and (e): As mentioned above, Turkey plans to return non-Syrian refugees readmitted from Greece to their countries of origin which would constitute an act of *refoulement*. Also, as discussed in the previous section, as a result of the geographical limitation that Turkey applies to the 1951 Convention and its 1967 Protocol, asylum seekers from non-European countries do not enjoy the right to obtain "refugee status". The status "conditional refugee" for non-Syrians only allows temporal residence in Turkey while waiting for resettlement. Therefore it is hard to accept the "conditional refugee" status as equivalent to "refugee status" as defined by 1951 Convention.

Furthermore, an HRW analysis on the implementation of the "Refugee Deal", published on 19 April 2016, argues that Turkey cannot be accepted as a "safe third country" since the GoT has violated the principle of non-refoulement by not accepting Syrian asylum seekers at its border: "As of April 18, Turkey was denying entry to up to 100,000 people from Syria, and even shooting at some who were trying to flee fighting".[277] Moreover, on 23 March 2016 Amnesty International reported "the ink wasn't even dry on the EU-Turkey deal when several dozen Afghans were forced back to a country where their lives could be in danger."[278] According to this report, Turkey forcibly returned 30 Afghan asylum seekers a few hours after the "Refugee Deal" has come into force. Thus, in light of the above, it can be argued that the "Refugee Deal" is based on the inaccurate presumption that Turkey is a "safe third country".

275 EC, COM(2016) 85 final, *op. cit.*, p.18.

276 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 36.

277 HRW, "EU/Greece: First Turkey Deportations Riddled With Abuse", Athens, 19 April 2016, available at: https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse (accessed on 30 April 2016).

278 Amnesty International, "Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours After EU Refugee Deal", 23 March 2016, available at: https://www.amnesty.org/en/press-releases/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/ (accessed on 30 April 2016).

The second notion that may be utilized by the EU for sending refugees back to Turkey without assessing their applications for asylum is the concept of "first country of asylum". According to Article 35 of the APD, a country can be considered to be a "first country of asylum" if (a) the applicant has already been recognized in that country as a "refugee" or (b) the applicant "otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement".[279] As discussed above, Turkey does not fulfill the criteria (a); but does it comply with the criteria (b)?

According to ECRE, the Turkish international protection system in place is "largely dysfunctional" and the fundamental rights of non-Syrian refugees are not guaranteed.[280] According to Steve Peers from Essex University, "Turkey also has over five times the number of breaches of the EU Convention on Human Rights as other Balkan states" which further raises questions as to its designation as a "safe third country".[281] Another academic puts that the Turkish asylum and migration system is "still in its infancy" and that the refugees are waiting in a "legal limbo" where they cannot foresee a bright future, which is mainly caused by the lack of experience, training and equipment in the Turkish asylum system.[282] Moreover, as mentioned above, Turkey has already signed bilateral readmission agreements with countries that most of the refugees on Turkish soil originate from, and GoT is planning to significantly enlarge this list of countries. On top of that, as stated above, high-level Turkish authorities confirm that all non-Syrian refugees will be returned to their countries of origin upon readmission from Greece. Thus, Turkey is very likely to violate the principle of *non-refoulement* in the implementation of the "Refugee Deal". And it is, at best, questionable whether Turkey can be recognized as a "first country of asylum".

For these reasons, it can be argued that although the "Refugee Deal" seems to be in keeping with the letter of the law, it does not comply with the spirit of law.

3- The Situation in Greece

ECRE is concerned that the safeguards mentioned in the "Refugee Deal" may not be implemented in practice, given the "limited capacity of the registration system in Greece".[283]

UNHCR reports that the Greek asylum system lacks adequate mechanisms and/or needs to broadly ameliorate existing mechanisms for receiving persons in need

279 EU: Council of the EU, Directive 2013/32/EU, *op. cit.*, Article 35.

280 ECRE, Memorandum, *op. cit.*, pp. 1-2.

281 **Matthew Holehouse**, "EU-Turkey deal on refugees 'would contravene international law", The Telegraph, 8 March 2016, available at: http://www.telegraph.co.uk/news/worldnews/europe/turkey/12187576/EU-Turkey-deal-on-refugees-would-contravene-international-law.html (accessed on 30 April 2016).

282 **Orçun Ulusoy**, "Turkey as a Safe Third Country?", University of Oxford - Faculty of Law, 29 March 2016, available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third (accessed on 30 April 2016).

283 ECRE, Memorandum, *op. cit.*, p. 1.

of international protection and for processing asylum requests.[284] The conditions in the facilities or "hotspots" -that have been closed and turned into detention centers where refugees are kept until readmission by Turkey- in Lesvos (Moria hotspot), Samos (Vathy hotspot), Chios (VIAL hotspot) and the Greek mainland (30 different locations) are deteriorating in terms of sanitation, food, capacity and quality of accommodation, care for persons with special needs, etc.[285] As noted by UNHCR, the EU should urgently support Greece since there is a high probability that "the Greek asylum service to register and process asylum claims" will soon create problems.[286] According to ECRE, shortly after the "Refugee Deal" came into force and as the hotspots were being transformed into closed detention facilities, several international organizations and NGOs "including UNHCR, MSF, the Norwegian Refugee Council, Save the Children, the International Rescue Committee and OXFAM" suspended some of their activities in the hotspots.[287] Marie Elisabeth Ingres from Médecins Sans Frontières (MSF) explains that they pulled out of Moria camp "because continuing to work inside would make [MSF] complicit in a system [they] consider to be both unfair and inhumane. We will not allow our assistance to be instrumentalized for a mass expulsion operation, and we refuse to be part of a system that has no regard for the humanitarian or protection needs of asylum seekers and migrants".[288]

According to the report on the Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016 presented in the Parliamentary Assembly of the Council of Europe (CoE) on 19 April 2016, "the Greek national asylum system has for many years been seriously deficient".[289] The report also expresses CoE's concerns about whether the rights of asylum seekers under APD would be effectively respected in practice during the implementation of the "Refugee Deal" on Greek soil.[290] On that note, it is worth mentioning the judgment of the Grand Chamber of the ECtHR in the case of M.S.S. v. Belgium and Greece of 2011.[291] The ECtHR found that in practice, Greek national legislation on asylum and migration is not applied, and consequently the Greek authorities do not seriously examine asylum applications and appeals. [292] The Court therefore argued that the asylum seekers in Greece "are not

284 UNHCR, "UNHCR urges immediate safeguards to be in place before any returns begin under EU-Turkey deal", 1 April 2016, available at: http://www.unhcr.org/56fe31ca9.html?platform=hootsuite (accessed on 30 April 2016).

285 *Ibid.*

286 *Ibid.*

287 ECRE, Weekly Bulletin, 25 March 2016, available at: http://eepurl.com/bVfPY5 (accessed on 30 April 2016).

288 MSF, Press release "Greece: MSF Ends Activities at Primary Lesvos Transit Camp", 22 March 2016, available at: http://www.doctorswithoutborders.org/article/greece-msf-ends-activities-primary-lesvos-transit-camp (accessed on 30 April 2016).

289 CoE: Parliamentary Assembly, "The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016: Explanatory memorandum by rapporteur Ms. Tineke Strik", Reference to committee: Reference 4189 of 18 April 2016 (debate under urgent procedure), 2016 - Second part-session, Report Doc. 14028, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22612&lang=en (accessed on 30 April 2016).

290 *Ibid.*

291 CoE: ECtHR, M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

292 *Ibid.*, pp. 60-63.

protected against arbitrary removal back to their countries of origin."[293] The ECtHR emphasized that when compared to other EU Member States, the rate of grant of asylum or subsidiary protection remains extremely low.[294] The ECtHR also noted that "because of the deficiencies in the Greek authorities' examination of the applicant's asylum request" the applicant faces the risk "of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy".[295]

Moreover, HRW documented the failure of Greek authorities to implement the safeguards described in the "Refugee Deal" through a detailed report regarding the first two rounds of deportations from Greece to Turkey on 4 and 8 April 2016.[296] The irregularities and violations documented by the HRW are worrying: The deportees were not told that they were going to be sent back to Turkey and were called "on the false pretext that they were to be registered, including asylum".[297] The deportees were not given any information about where they were being sent to, and they were not permitted to take their personal belongings with them.[298] An unknown number of the deportees "had expressed a desire to seek asylum in Greece" however this was not taken into consideration.[299] UNHCR Europe similarly reported that, on the first day of the implementation of the "Refugee Deal", the Greek authorities "forgot" to process the asylum claims of 13 of the 202 asylum seekers who have been sent back to Turkey.[300]

IV. Conclusion

As discussed in the first section of this paper, the sheer scale of the Syrian displacement crisis and its impact on host countries as well as on the EU Member States oblige the international community to cooperate for a durable solution. According to numerous legal tools and frameworks set under the international Human Rights Law, and particularly Refugee Law, refugees fleeing conflict areas *en masse* are not only the responsibility of the host countries receiving them, but the responsibility of the whole international community. The traditional ways of responsibility-sharing include resettlement, financial aid to host countries and other kinds of assistance for the well-being and protection of the refugees. In fact, the only durable solution to

293 *Ibid.*, pp. 60-63.

294 *Ibid.*, pp. 60-63.

295 *Ibid.*, p. 64.

296 HRW, EU/Greece, *op. cit.*

297 *Ibid.*

298 *Ibid.*

299 *Ibid.*

300 **Patrick Kingsley**, "Greece may have deported asylum seekers by mistake, says UN", The Guardian, 5 April 2016, available at: http://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union (accessed on 30 April 2016).

the Syrian displacement crisis is a political one that would stop the armed conflict inside Syria for a safe return of the refugees to their homeland. However, for the time being, in the absence of such a political solution, it is the international community's common responsibility to protect Syrians in need of international protection.

Host countries, including Turkey -the largest host of country for Syrian refugees-, do not possess enough financial, humanitarian and social resources nor the necessary legal framework and practical experience for the care and protection of all Syrian refugees who have been seeking asylum in their territories since the beginning of the armed conflict in 2011. The lack of a comprehensive integration policy in host countries coupled with the lack of any tangible chance for being resettled in the EU through legal ways, are pushing Syrian refugees in Turkey to take the dangerous Mediterranean route to Greece. As a result of the failure of the international community in taking timely action and sharing the responsibility over Syrian refugees, the death toll in the Mediterranean has been accelerating since 2014.

At the end of a long negotiation process, the EU and GoT agreed on the "Refugee Deal". As it has been analyzed in this paper however, the policies described in the "Refugee Deal" are far from creating a tool of responsibility-sharing for the protection and care of the Syrian and non-Syrian refugees in Turkey and on Greek soil. The "Refugee Deal" rather functions as a tool of "responsibility-shifting" that would allow the EU to implement its policies aiming at closing its borders to asylum seekers and other persons in need of international protection. Therefore, it does not seem accurate to accept the "Refugee Deal" as the proper international response for finding a durable solution to the Syrian displacement crisis. The "Refugee Deal" may be assessed to be a band-aid approach that would probably lead to undesirable repercussions in near future.

As shown in detail throughout the second section of this paper, the "Refugee Deal" does not comply with the concepts of *non-refoulement* and "prohibition of collective expulsions" that are the core principles of the international Human Rights Law and EU asylum law. The "Refugee Deal" interprets the notion of responsibility-sharing in a way that would breach these fundamental principles, and it consequently risks to seriously harm the international system for the protection of refugees.

A major legal challenge that is contained in the "Refugee Deal" is the fact that it is built on the assumption that Turkey may be accepted as a "safe third country" or "first country of asylum" in the context of the international Human Rights Law and EU asylum law. However, as discussed in the second section of this paper, although the first step for establishing an effective national system of asylum and migration is to adopt a comprehensive legislation, without adequate training, personnel, policies, infrastructure, practical measures and a sincere commitment to the core principles of the international protection system for refugees (such as *non-refoulement* and

prohibition of collective expulsions) a country cannot be accepted as a safe haven for refugees. As argued by the UN High Commissioner for Human Rights, "even if Turkey does expand its refugee definition to include non-Europeans, or passes laws qualifying certain nationalities for 'temporary protection,' it may not be considered fully safe for all returns in the near future." [301]

In sum, this paper concludes that the "Refugee Deal" is vulnerable to legal challenges with regards to principles governing the international and European Human Rights Law. Several legal experts share this opinion, including Peers who believes that there is a high possibility that "the scheme would be challenged by a migrant in the European courts in Strasbourg and Luxembourg".[302]

Furthermore, as put forth in the CoE report, the "Refugee Deal" seems to have a further detrimental effect on the notion of responsibility-sharing if it is accepted to set a precedent for the solution to other displacement crises: "the Italian Minister of the Interior, referring to the EU-Turkey Agreement, has called for the European Union to reach agreement with African States to provide economic aid in return for taking back their citizens 'and preventing new flows'."[303]

Moreover, there are visible signs that the asylum safeguards mentioned in the "Refugee Deal" may not materialize in practice: as shown in the second section of this paper, Greek authorities lack resources, capacity, training, and personnel that is needed for the implementation of the "Refugee Deal" without committing any serious breaches of the Human Rights Law and EU asylum law.

In sum, the argument that the "Refugee Deal" is a sign of the potential collapse of the international system for the protection of refugees, rather than a new way of responsibility-sharing does not seem to be unfounded.

Overall, the "Refugee Deal" cannot be considered as a new way of responsibility-sharing, and if necessary precautions are not effectively implemented, it may harm the notion of responsibility-sharing in the context of displacement crises. The next question is whether the EU and GoT would take into consideration the warnings and recommendations from the legal experts, human rights activists, international organizations and NGOs for ameliorating the mechanisms and policies set under the "Refugee Deal". The international community's future commitment to the notion of responsibility-sharing, and more broadly, the worldwide trust in the international system for human rights may depend on the fate of Syrian (and also non-Syrian) refugees at the hands of the EU and GoT.

301 UN Human Rights Office of the High Commissioner, *op. cit.*

302 **Holehouse**, *op. cit.*

303 CoE: Parliamentary Assembly, *op. cit.*

For bringing a durable solution to the Syrian displacement crisis and -more broadly- to the question of "irregular migration", without violating the core principles of the international Human Rights Law, the international community should focus on resolving the root causes of these phenomenon (i.e. civil war, political instability, economic crisis, terrorism, climate change, etc.) rather than concluding controversial readmission agreements and similar "deals".

Bibliography

AIDA: Turkey: 2011-2014: Temporary Protection Based on Political Discretion and Improvisation, accessed on 30 April 2016 at: http://www.asylumineurope.org/reports/country/turkey/2011-2014-temporary-protection-based-political-discretion-and-improvisation

AFAD: Current Status in AFAD Temporary Protection Centres, accessed on 30 April 2016 at: https://www.afad.gov.tr/EN/IcerikDetay1.aspx?ID=16&IcerikID=848

Eurostat: Asylum Statistics, accessed on 30 April 2016 at: http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/main-tables

Agence France Press: Agence France Press, "Islamic State claims it killed Bangladeshi academic", The Guardian, 23 April 2016, accessed on 30 April 2016 at: http://www.theguardian.com/world/2016/apr/23/bangladeshi-professor-hacked-to-death-rajshahi-islamists

Alami: Mona Alami, "NGO finds work for Syrian refugees in Turkey", AlMonitor, 7 August 2015, accessed on 30 April 2016 at: http://www.al-monitor.com/pulse/originals/2015/08/syrian-refugees-turkey-ngo-employment.html

Amnesty International: "Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours After EU Refugee Deal", Amnesty International, 23 March 2016, accessed on 30 April 2016 at: https://www.amnesty.org/en/press-releases/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/

Associated Press: Associated Press, "Isis claims deadly attack on Pakistani consulate in Afghanistan", The Guardian, 13 January 2016, accessed on 30 April 2016 at: http://www.theguardian.com/world/2016/jan/13/suicide-bomber-kills-people-eastern-afghanistan-jalalabad

Barnard / Gordon / Schmitt: Anne Barnard /Michael R. Gordon /Eric Schmitt, "Turkey and U.S. Plan to Create Syria 'Safe Zone' Free of ISIS", The New York Times, 27 July 2015, accessed on 30 April 2016 at: http://www.nytimes.com/2015/07/28/world/middleeast/turkey-and-us-agree-on-plan-to-clear-isis-from-strip-of-northern-syria.html

BBC: BBC Türkçe, "Türkiye-AB anlaşması kapsamında ilk göçmen kafilesi Dikili'de", 4 April 2016, accessed on 30 April 2016 at: http://www.bbc.com/turkce/haberler/2016/04/160403_yunanistan_turkiye_gocmen

Belfast Telegraph: "EU-Turkey deal 'sends clear message to migrants'", Belfast Telegraph, 18 March 2016, accessed on 30 April 2016 at: http://www.belfasttelegraph.co.uk/news/world-news/euturkey-deal-sends-clear-message-to-migrants-34551303.html

BMZ: Newsletter "Special Edition: The BMZ's response to the refugee crisis", BMZ (German Federal Ministry for Economic Cooperation and Development), February 2016, accessed on 30 April 2016 at: https://www.bmz.de/en/service/nl/Newsletter_Februar_2016/index.html

Bora: Bircе Bora, "Analysis: Is Turkey's 'open door policy' an illusion?", AlJazeera, 24 November 2015, accessed on 30 April 2016 at: http://www.aljazeera.com/news/2015/11/analysis-turkey-open-door-policy-illusion-151124084706365.html

Boswell: Christina Boswell, "Burden-sharing in the New Age of Immigration", Migration Policy Institute, 1 November 2003, accessed on 30 April 2016 at: http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration

Circular: Circular No. 2016/8 from Prime Ministry on Irregular Migration ("Düzensiz Göçle Mücadele ile İlgili Başbakanlık Genelgesi"), Official Gazette no. 29675, 5 April 2016

Circular: Circular No: 2014/21 on Education Services for Foreign Nationals ("Yabancılara Yönelik Eğitim-Öğretim Hizmetleri"), No. 10230228/235/4145933, 23 September 2014

Cumhuriyet: "Karın deşip kafa derisi yüzen gasp çetesi yakalandı", Cumhuriyet, 6 December 2005, available at: http://www.cumhuriyet.com.tr/haber/turkiye/443766/Karin_desip_kafa_derisi_yuzen_gasp_cetesi_yakalandi.html

Çetin: İhsan Çetin, "Why do Syrian refugees leave Turkey?", Middle East Monitor, 18 January 2016, accessed on 30 April 2016 at: https://www.middleeastmonitor.com/articles/europe/23384-why-do-syrian-refugees-leave-turkey

CoE: CoE, ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 ("Avrupa İnsan Hakları Sözleşmesi"), 4 November 1950, Official Gazette no. 8662, 19 March 1954

CoE: ECtHR: Čonka v. Belgium, 51564/99, CoE: ECtHR, 5 February 2002

CoE: ECtHR: Hirsi Jamaa and Others v. Italy, CoE: ECtHR, Application no. 27765/09, 23 February 2012

CoE: ECtHR: Khlaifia and Others v. Italy, CoE: ECtHR, Application no. 16483/12, 1 September 2015

CoE: ECtHR: L.M. and Others v. Russia, CoE: ECtHR, Applications nos. 40081/14, 40088/14 and 40127/14, 15 October 2015

CoE: ECtHR: M.S.S. v. Belgium and Greece, CoE: ECtHR, Application no. 30696/09, 21 January 2011

Coe: Parliamentary Assembly: "The situation of refugees and migrants under the EU-TurkeyAgreement of 18 March 2016: Explanatory memorandum by rapporteur Ms. Tineke Strik", Reference to committee: Reference 4189 of 18 April 2016 (debate under urgent procedure), 2016 - Second part-session, CoE: Parliamentary Assembly, Report Doc. 14028, accessed on 30 April 2016 at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22612&lang=en

Co-hosts: "Co-Hosts Declaration of the Supporting Syria and the Region Conference", London, 4 February 2016, accessed on 30 April 2016 at: https://2c8kkt1ykog81j8k9p47oglb-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/FINAL-Supporting-Syria-the-Region-London-2016-4-Feb.pdf

Del Carpio: Del Carpio, Ximena V. / Mathis Wagner. The Impact of Syrians Refugees on the Turkish Labor Market, Policy Research Working Paper 7402, World Bank – Boston College, August 2015

DeYoung / Sly: Karen DeYoung / Liz Sly, "U.S.-Turkey deal aims to create de facto 'safe zone' in northwest Syria", Washington Post, 26 July 2015, accessed on 30 April 2016 at: https://www.washingtonpost.com/world/new-us-turkey-plan-amounts-to-a-safe-zone-in-northwest-syria/2015/07/26/0a533345-ff2e-4b40-858a-c1b36541e156_story.html

Durukan / Eşsiz / Tümer: Durukan, Oktay / Veysel Eşsiz / Öykü Tümer. Country Report: Turkey, Asylum Information Database (AIDA), December 2015, available at: http://mhd.org.tr/assets/aida_tr_update.i.pdf

EC: C(2015) 3560 final, Commission Recommendation on a European resettlement scheme, European Commission, 8 June 2015, accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf

EC: C(2015) 9490, Commission Recommendation for a voluntary humanitarian admission scheme with Turkey, European Commission, 15 December 2015, accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_ voluntary_humanitarian_admission_scheme_with_turkey_en.pdf

EC: COM(2015) 240 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Agenda On Migration, European Commission, 13 May 2015, accessed on 30 April 2016 at: http://ec.europa.eu/lietuva/documents/power_pointai/communication_on_the_european_agenda_on_migration_en.pdf

EC: COM(2015) 452 final, Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Common List of Safe Countries of Origin, European Commission, 9 September 2015, accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_regulation_of_the_ep_and_council_establishing_an_eu_common_list_of_safe_countries_of_origin_en.pdfEC: COM(2016) 85 final, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, European Commission, 10 February 2016, accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_ crisis_state_ of_play_20160210_en.pdf

EC: JOIN(2015) 40 final, Joint Communication To The European Parliament And The Council Addressing the Refugee Crisis in Europe: The Role of EU External Action, European Commission, 9 September 2015, accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_addressing_the_external_dimension_of_the_refugee_crisis_en.pdf

EC: Factsheet "EU-Turkey joint action plan", European Commission, 15 October 2015, accessed on 30 April 2016 at: http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm

EC: "Managing the Refugee Crisis - EU-Turkey Joint Action Plan: Implementation Report", European Commission, n.d., accessed on 30 April 2016 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda- migration/background-information/docs/managing_the_refugee_crisis_-_eu-turkey_join_action_plan_implementation_report_20160210_en.pdf

EC: Press release "EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey", European Commission, 24 November 2015, accessed on 30 April 2016 at: http://europa.eu/rapid/press-release_IP-15-6162_en.htm

EC: Press release "European Commission makes progress on Agenda on Migration", European Commission, 27 May 2015, accessed on 30 April 2016 at: http://europa.eu/rapid/press-release_IP-15-5039_en.htm

ECHO: Turkey: Refugee Crisis Factsheet, European Commission Humanitarian Aid and Civil Protection (ECHO), Brussels-Belgium, March 2016

ECRE: "Memorandum to the European Council Meeting 17 – 18 March 2016: Time to Save the Right to Asylum", ECRE, Brussels, 11 March 2016, accessed on 30 April 2016 at: www.ecre.org/component/downloads/downloads/1081.html

ECRE: Weekly Bulletin, ECRE, 25 March 2016, accessed on 30 April 2016 at: http://eepurl.com/bVfPY5

EDAM: Public Opinion Surveys of Turkish Foreign Policy 2014/1 "Reaction mounting against Syrian refugees in Turkey", EDAM, n.p., 2014

Ekşi: Ekşi, Nuray. Türkiye Avrupa Birliği Geri Kabul Antlaşması, Beta, İstanbul, March 2016

Ekşi: Nuray Ekşi, "Türkiye-Avrupa Birliği Geri Kabul Anlaşması: Bir Hatalar Zinciri", Legal Hukuk Dergisi, Volume: 14, Issue:163, 2016

Erdoğan: Erdoğan, M. Murat. Syrians in Turkey: Social Acceptance and Integration Research Executive and Summary Report, HUGO, Ankara, November 2014

EU: EU, 2012/C 326/02, Charter of Fundamental Rights of the European Union, 26 October 2012, OJ 2000/C 364/01, 18 December 2000

EU: EU, Council of the EU, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005, OJ L 326, 2 January 2006,

EU: EU: Council of the EU, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 16 December 2008, OJ L. 348/98-348/107, 24 December 2008

EU: EU: Council of the EU, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 26 June 2013, OJ L. 180/60 -180/95, 29 June 2013

EU: EU: Council of the EU, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), 26 June 2013, OJ L. 180/96 -105/32, 29 June 2013

European Council: EUCO 22/15, CO EUR 8, CONCL 3, Meeting conclusions, European Council, 26 June 2015, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/meetings/european-council/2015/06/EUCO-conclusions-pdf/

European Council: "European Council Meeting", European Council, 17-18 March 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/meetings/european-council/2016/03/17-18/

European Council: "Justice and Home Affairs Council", European Council, 20 July 2015, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/meetings/jha/2015/07/20/

European Council: "Justice and Home Affairs Council", European Council, 10-11 March 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/meetings/jha/2016/03/10-11/

European Council: "Meeting of heads of state or government with Turkey - EU-Turkey statement", European Council, 29 November 2015, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/

European Council: "Meeting of the EU heads of state or government with Turkey", European Council, 7 March 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/

European Council: Press release "Council Conclusions on Measures to handle the refugee and migration crisis", European Council, 9 November 2015, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2015/11/09-jha-council-conclusions-on-measures-to-handle-refugee-and-migration-crisis/

European Council: Press release "EU-Turkey statement", European Council, 18 March 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/

European Council: Press release "European Council Conclusions on migration", European Council, 18 February 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/18-euco-conclusions-migration/

European Council: Press release "Refugee facility for Turkey: Member states agree on details of financing", European Council, 3 February 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/03-refugee-facility-for-turkey/

European Council: Statement, Special meeting of the European Council, European Council, 23 April 2015, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/

European Council: "Statement of the EU Heads of State or Government", European Council, 8 March 2016, accessed on 30 April 2016 at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/

Frelick: Bill Frelick, "Why Don't Syrians Stay in Turkey", HRW, 29 September 2015, accessed on 30 April 2016 at: https://www.hrw.org/news/2015/09/29/why-dont-syrians-stay-turkey

GMF: Turkish Perceptions Survey 2015, GMF, Washington DC, 2015

Güneş / Lowe: Güneş, Cengiz / Robert Lowe. The Impact of the Syrian War on Kurdish Politics Across the Middle East, Chatham House, London, August 2015

Gürses / Rinke: Ercan Gürses / Andreas Rinke, "Germany seeking 'safe zones' in Syria to shelter refugees", Reuters, 23 April 2016, accessed on 30 April 2016 at: http://www.reuters.com/article/us-europe-migrants-turkey-germany-idUSKCN0XK0BS

Hall / Ferris: A. Matthew Hall / Elizabeth Ferris, "What Would the Turkish Buffer Zone Mean for Syria's Displaced?", Atlantic Council, 3 November 2014, accessed on 30 April 2016 at: http://www.atlanticcouncil.org/blogs/menasource/what-would-the-turkish-buffer-zone-mean-for-syria-s-displaced

Henckaerts: Henckaerts, Jean-Marie. Mass Expulsion in Modern International Law and Practice, Martinus Nijhoff Publishers, The Hague, 1995

Holehouse: Matthew Holehouse, "EU-Turkey deal on refugees 'would contravene international law", The Telegraph, 8 March 2016, accessed on 30 April 2016 at: http://www.telegraph.co.uk/news/worldnews/europe/turkey/12187576/EU-Turkey-deal-on-refugees-would-contravene-international-law.html

HRW: "EU/Greece: First Turkey Deportations Riddled With Abuse", HRW, Athens, 19 April 2016, accessed on 30 April 2016 at: https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse

HRW: "Turkey: Syrians Pushed Back at the Border Closures Force Dangerous Crossings with Smugglers", HRW, 23 November 2015, accessed on 30 April 2016 at: https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border

HRW: When I Picture My Future, I See Nothing: Barriers to Education for Syrian Refugee Children in Turkey, HRW, USA, November 2015

ILO: The ILO Response to the Syrian Refugee Crisis, ILO, February 2016, accessed on 30 April 2016 at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_357159.pdf,

İçduygu: İçduygu, Ahmet. Syrian Refugees in Turkey: the Long Road Ahead, Migration Policy Institute, Washington DC, April 2015

İçduygu: İçduygu, Ahmet. The Irregular Migration Corridor between the EU and Turkey: Is it Possible to Block it with a Readmission Agreement?, EU-US Immigration Systems 2011/14, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2011.

IOM: Migration Flows – Europe, accessed on 30 April 2016 at: http://migration.iom.int/europe/

Jalbout: Maysa Jalbout, Partnering for a Better Future: Ensuring Educational Opportunity for All Syrian Refugee Children and Youth in Turkey, Theirworld, 10 September 2015, accessed on 30 April 2016 at: http://www.aworldatschool.org/page/-/uploads/Reports/Theirworld%20-%20Educational%20Opportunity%20for%20Syrian%20Children%20and%20Youth%20in%20Turkey%202015_09_10%20Release.pdf?nocdn=1

Kanat /Üstün: Kanat, Kılıç / Buğra, Kadir Üstün. Turkey's Syrian Refugees Toward Integration, SETA, Ankara, 2015

Kart: Emine Kart, "Turkey seeks readmission deals with Iraq, Iran", Hürriyet Daily News, 12 April 2016, accessed on 30 April 2016 at: http://www.hurriyetdailynews.com/Default.aspx-?pageID=238&nID=97699&NewsCatID=510

Kenyon: Peter Kenyon, "For Syrian Migrants, Many Reasons To Leave Turkey For Europe", NPR, 17 September 2015, accessed on 30 April 2016 at: http://www.npr.org/sections/parallels/2015/09/17/441168633/for-syrian-migrants-many-reasons-to-leave-turkey-for-europe

Kenyon: Peter Kenyon, "Turkey's Migrant Policy: They Can Come, But They Can't Settle", NPR, 22 October 2015, accessed on 30 April 2016 at: http://www.npr.org/sections/parallels/2015/10/22/450855100/turkeys-migrant-policy-they-can-come-but-they-cant-settle

Kilberg: Rebecca Kilberg, "Turkey's Evolving migration Identity", Migration Information Source, 14 July 2014, accessed on 30 April 2016 at: http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity

Kingsley: Patrick Kingsley, "Greece may have deported asylum seekers by mistake, says UN", The Guardian, 5 April 2016, accessed on 30 April 2016 at: http://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union

Kirişçi: Kemal Kirişçi, "Europe's refugee/migrant crisis: Can "illiberal Turkey" save "liberal Europe" while helping Syrian refugees?", Brookings Institute, 19 February 2016, accessed on 30 April 2016 at: http://www.brookings.edu/research/articles/2016/02/19-turkey-eu-syria-kirisci

Kirişçi: Kemal Kirişçi, "Turkey's Syria Challenge", Brookings Institute, 19 February 2016, accessed on 30 April 2016 at: http://www.brookings.edu/research/opinions/2016/02/19-turkey-syria-challenges-kirisci

Kirişçi: Kemal Kirişçi, "Why 100,000s of Syrian refugees are fleeing to Europe", Brookings Institute, 3 September 2015, accessed on 30 April 2016 at: http://www.brookings.edu/blogs/order-from-chaos/posts/2015/09/03-eu-refugee-crisis-kirisci

Kirişçi / Ferris: Kirişçi, Kemal / Elizabeth Ferris. Not Likely to Go Home: Syrian Refugees and the Challenges to Turkey – and the International Community, Turkey Project Policy Paper no. 7, Brookings Institute, Washington DC, September 2015

LFIP: Law on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanunu"), Official Gazette no. 28615, 11 April 2013

MFA: "Speech by H.E. Mevlüt Çavuşoğlu, Minister of Foreign Affairs of the Republic of Turkey at the Opening Session of the Eighth Annual Ambassadors Conference", MFA, Ankara, 11 January 2016, accessed on 30 April 2016 at: http://www.mfa.gov.tr/speech-by-h_e_-mevl%C3%BCt-%C3%A7avu%C5%9Fo%C4%9Flu_-minister-of-foreign-affairs-of-the-republic-of-turkey-at-the-opening-session-of-the-eighth-annual-ambassadors-conference_-11-january-2016_-ankara.en.mfa

Mortera-Martinez: Camino Mortera-Martinez, "Doomed: Five Reasons Why the EU-Turkish Refugee Deal Will Not Work", Centre for European Reform, 24 March 2016, accessed on 30 April 2016 at: http://www.cer.org.uk/ insights/doomed-five-reasons-why-eu-turkish-refugee-deal-will-not-work

MSF: Press release "Greece: MSF Ends Activities at Primary Lesvos Transit Camp", MSF, 22 March 2016, accessed on 30 April 2016 at: http://www.doctorswithoutborders.org/article/greece-msf-ends-activities-primary-lesvos-transit-camp

Mülteci-Der: "Readmissions from Greece to Turkey: What Happens After Readmission?", Mülteci-Der, accessed on 30 April 2016 at: http://multeci.org.tr/haberdetay.aspx?Id=140

OJ L 134: Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing Without Authorization, OJ L 134, 7 May 2014, "Türkiye Cumhuriyeti ile Avrupa Birliği Arasında İzinsiz İkamet Eden Kişilerin Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun" No. 6547, 25 June 2014, Official Gazette no. 29044, 29 June 2014

Oktav: Özden Zeynep Oktav, "Turkey's growing unease about the consequences of the Syrian crisis", Middle East Monitor, 30 June 2015, accessed on 30 April 2016 at: https://www.middleeastmonitor.com/articles/guest-writers/19564-turkeys-growing-unease-about-the-consequences-of-the-syrian-crisis

Omar: Ghabra Omar, "Why Syrian Refugees in Turkey Are Leaving for Europe", The Nation, 29 September 2015, accessed on 30 April 2016 at: http://www.thenation.com/article/why-syrian-refugees-in-turkey-are-leaving-for-europe/

ORSAM: Effects of the Syrian Refugees on Turkey, Report no: 195, ORSAM, Ankara, January 2015

Ostrand: Nicole Ostrand, "The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States", Journal on Migration and Human Security, vol. 3 no. 3, 2015

Özden: Özden, Şenay. Syrian Refugees in Turkey, Migration Policy Centre, Italy, May 2013

Pitel: Laura Pitel, "Turkey in crisis: 'Ripple effect' from Syria and Iraq sees worst flare-up in Kurdish conflict in 20 years", Independent, 17 January 2016, accessed on 30 April 2016 at: http://www.independent.co.uk/news/world/middle-east/turkey-in-crisis-ripple-effect-from-syria-and-iraq-sees-worst-flare-up-in-kurdish-conflict-in-20-a6818331.html

Rafiq: Arif Rafiq, "What Happened to ISIS's Afghanistan-Pakistan Province?", The Diplomat, 2 February 2016, accessed on 30 April 2016 at: http://thediplomat.com/2016/02/what-happened-to-isiss-afghanistan-pakistan-province/

REACH: Migration Trends & Patterns of Syrian Asylum Seekers Travelling to the European Union, REACH, 28 September 2015, accessed on 30 April 2016 at: data.unhcr.org/mediterranean/download.php?id=125

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Belarus Cumhuriyeti Hükümeti Arasında Geri Kabul Antlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 6505, 27 November 2013, Official Gazette no. 28842, 5 December 2013

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Kırgız Cumhuriyeti Hükümeti Arasında Kendi Vatandaşlarının Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5097, 12 February 2004, Official Gazette no. 25376, 17 February 2006

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Moldova Cumhuriyeti Hükümeti Arasında Geri Kabul Antlaşması ile Notaların Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 65174, 15 January 2014, Official Gazette no. 28892, 24 January 2014

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Pakistan İslam Cumhuriyeti Hükümeti Arasında İzinsiz İkamet Eden Şahısların Geri Kabulüne Dair Anlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 6703, 7 April 2016, Official Gazette no. 29690, 20 April 2016

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Romanya Hükümeti Arasında Kendi Vatandaşlarının ve Ülkelerinde Yasadışı Konumda Bulunan Yabancıların Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5249, 21 January 2004, Official Gazette no. 25626, 27 April 2004

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Rusya Federasyonu Hükümeti Arasında Geri Kabul Antlaşmanın Onaylanmasının Uygun Bulunduğuna İlişkin Kanun, No. 6188, 9 March 2011, Official Gazette no. 27872, 12 March 2011

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Suriye Arap Cumhuriyeti Hükümeti Arasında Yasadışı Göçmenlerin Geri Kabulüne Sair Antlaşmanın Onaylanmasının Uygun Bulunduğuna İlişkin Kanun, No. 4901, 17 June 2003, Official Gazette no. 26491, 12 April 2007

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Ukrayna Bakanlar Kurulu Arasında Kişilerin Geri Kabulüne İlişkin Antlaşmanın Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 5778, 24 June 2008, Official Gazette no. 26926, 4 July 2008

Readmission Agreement: Türkiye Cumhuriyeti Hükümeti ile Vietnam Sosyalist Cumhuriyeti Hükümeti Arasında Terörizm, Organize Suçlar, Uyuşturucu ve Psikotrop Maddeler ile Bunların Katkı Maddeleri ve Benzerlerinin Kaçakçılığı ve Diğer Tiplerdeki Suçlarla Mücadelede İşbirliği Antlaşması, adopted by Cabinet Decree no. 2008/13364, 10 March 2008, Official Gazette no. 26825, 23 March 2008

Readmission Agreement: Türkiye Cumhuriyeti ile Yunanistan Cumhuriyeti Arasında Türkiye Cumhuriyeti İçişleri Bakanlığı ile Yunanistan Cumhuriyeti Kamu Bakanlığı Suç ile Özellikle Terörizm, Örgütlü Suçlar, Uyuşturucu Madde Kaçakçılığı ve Yasadışı Göç ile Mücadelede İşbirliği Antlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun, No. 4654, 26 April 2001, Official Gazette no. 24397, 9 May 2001

Regulation: Regulation on Work Permit of Foreigners Under International Protection ("Uluslararası Koruma Başvuru Sahibi ve Uluslararası Koruma Statüsü Sahibi Kişilerin Çalışmasına Dair Yönetmelik"), Official Gazette no. 29695, 26 April 2016

Regulation: Regulation on Work Permit of Foreigners Under Temporary Protection (Geçici Koruma Sağlanan Yabancıların Çalışma İzinlerine Dair Yönetmelik"), Official Gazette no. 29594, 15 January 2016

Roth: Ken Roth, "Human Rights Watch Letter to EU Leaders on Refugees", HRW, 15 March 2016, accessed on 30 April 2016 at: https://www.hrw.org/news/2016/03/15/human-rights-watch-letter-eu-leaders-refugees

Sevinçlidir: Pınar Sevinçlidir, "Why do Syrians want to leave Turkey?", BBC, 22 September 2015, accessed on 30 April 2016 at: http://www.bbc.co.uk/monitoring/why-do-syrians-want-to-leave-turkey

Shetty / Roth / Woollard: Salil Shetty / Ken Roth / Catherine Woollard, "Say No to a Bad Deal with Turkey", Amnesty International, 17 March 2016, accessed on 30 April 2016 at: https://www.amnesty.org/en/latest/news/2016/03/say-no-to-a-bad-deal-with-turkey/

Squires, Webb: Nick Squires, Oscar Webb, "Greece suspends expulsion of migrants to Turkey", The Telegraph, 5 April 2016, accessed on 30 April 2016 at: http://www.telegraph.co.uk/news/2016/04/05/pic-n-pub-greece-suspends-expulsion-of-migrants-to-turkey/

TİSK: Perspectives, Expectations and Suggestions of the Turkish Business Sector on Syrians in Turkey, TİSK (Turkish Confederation of Employer Associations), Publication no: 354, Ankara, 30 December 2015

TPR: Temporary Protection Regulation ("Geçici Koruma Yönetmeliği"), Official Gazette no. 29153, 22 October 2014

Traynor: Ian Traynor, "EU refugee summit in disarray as Tusk warns 'greatest tide yet to come'", The Guardian, 24 September 2015, accessed on 30 April 2016 at: http://www.theguardian.com/world/2015/sep/24/eu-refugee-summit-in-disarray-as-donald-tusk-warns-greatest-tide-yet-to-come

Ulusoy: Orçun Ulusoy, "Turkey as a Safe Third Country?", University of Oxford - Faculty of Law, 29 March 2016, accessed on 30 April 2016 at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third

UN: 1951 Convention Relating to the Status of Refugees, UN General Assembly, 28 July 1951, "Mültecilerin Hukuki Durumuna İlişkin Sözleşme", Official Gazette no. 10898, 5 September 1961

UN: 1967 Protocol Relating to the Status of Refugees, UN General Assembly, 31 January 1967, "Mültecilerin Hukuki Durumuna İlişkin Protokol", Official Gazette no. 12968, 5 August 1968

UN: 2014 Syria Regional Response Plan (RRP6) Strategic Overview, UN, n.p., December 2013

UN: A/RES/39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 10 December 1984, "İşkenceye ve Diğer Zalimane, Gayriinsani veya Küçültücü Muamele veya Cezaya Karşı Birleşmiş Milletler Sözleşmesi", Official Gazette no. 19895, 10 August 1988

UN: Convention on the Rights of the Child ("Çocuk Haklarına Dair Sözleşme"), UN General Assembly, 20 November 1989, Official Gazette no. 22184, 27 January 1995

UN: International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, "Medenî ve Siyasî Haklara İlişkin Uluslararası Sözleşmenin Onaylanmasının Uygun Bulunduğuna Dair Kanun no. 4868", Official Gazette no. 25142, 18 June 2003

UN: Overview: 2015 Syria Response Plan and 2015-2016 Regional Refugee and Resilience Plan, UN, Berlin, 18 December 2015

UN: Regional Refugee & Resilience Plan (3RP) 2015-2016: Regional Strategic Overview, UN, n.p., December 2014

UN: Regional Refugee & Resilience Plan (3RP) 2016-2017: Regional Strategic Overview, UN, n.p., November 2015

UN: Regional Refugee & Resilience Plan (3RP) 2016-2017: Turkey, UN, n.p., November 2015

UN: Syrian Arab Republic Humanitarian Assistance Response Plan (SHARP) 2014, UN, n.p., 15 December 2013

UN: Syrian Arab Republic Humanitarian Response Plan (HRP) 2016, UN, n.p., December 2015

UN: "UN rights chief expresses serious concerns over EU-Turkey agreement", UN Human Rights Office of the High Commissioner, 24 March 2016, accessed on 30 April 2016 at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18531&LangID=E

UN: 3RP - Regional Refugee & Resilience Plan 2016-2017 in Response to the Syria Crisis, accessed on 30 April 2016 at: http://www.3rpsyriacrisis.org/crisis/

UNHCR: Refugees/Migrants Emergency Response – Mediterranean, accessed on 30 April 2016 at: http://data.unhcr.org/mediterranean/regional.php

UNHCR: Syria Situation Map as of 9 March 2016, accessed on 30 April 2016 at: http://reliefweb.int/sites/reliefweb.int/files/resources/SyriaSituationMapasof09March2016.pdf

UNHCR: Global Consultations on International Protection, accessed on 30 April 2016 at: http://www.unhcr.org/3b95cbce4.html

UNHCR: Finding Solutions for Syrian Refugees: Resettlement, Humanitarian Admission, and Family Reunification, UNHCR, 18 October 2013, accessed on 30 April 2016 at: http://www.refworld.org/docid/53ad36614.html

UNHCR: "Grandi calls for action to end war in Syria, misery for refugees", UNHCR, 22 January 2016, accessed on 30 April 2016 at: http://www.unhcr.org/56a24d5a6.html

UNHCR: "Greece Data Snapshot", UNHCR, 16 April 2016, accessed on 30 April 2016 at: https://data.unhcr.org/mediterranean/country.php?id=83#

UNHCR: "Greece Data Snapshot", UNHCR, 27 April 2016, accessed on 30 April 2016 at: https://data.unhcr.org/mediterranean/download.php?id=1106

UNHCR: "Guterres, Jolie in Turkey to show solidarity with Syrian refugees", UNHCR, 13 September 2012, accessed on 30 April 2016 at: http://www.unhcr.org/5051ef1c9.html

UNHCR: "High Commissioner welcomes Turkish work permits for Syrian refugees", UNHCR, 18 January 2016, accessed on 30 April 2016 at: http://www.unhcr.org/569ca19c6.html

UNHCR: "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", UNHCR, accessed on 30 April 2016 at: www.unhcr.org/56f3ec5a9.pdf

UNHCR: Multilateral Framework of Understandings on Resettlement, FORUM/2004/6, UNHCR, 16 September 2004, accessed on 30 April 2016 at: http://www.refworld.org/docid/41597d0a4.html

UNHCR: "Operations Cell Daily Report", UNHCR Regional Bureau Europe, 15 April 2016, accessed on 30 April 2016 at: https://data.unhcr.org/mediterranean/download.php?id=1055

UNHCR: Position Paper on the Strategic Use of Resettlement, UNHCR, 4 June 2010, accessed on 30 April 2016 at: http://www.refworld.org/docid/4c0d10ac2.html

UNHCR: Press release "UNHCR on EU-Turkey Deal: Asylum Safeguards Must Prevail in Implementation", UNHCR, 18 March 2016, accessed on 30 April 2016 at: http://www.unhcr.org/56ec533e9.html

UNHCR: Projected Global Resettlement Needs for 2016, UNHCR July 2015, accessed on 30 April 2016 at: http://www.unhcr.org/protection/resettlement/ 558019729/unhcr-projected-global-resettlement-needs-2016.html

UNHCR: Refugee Resettlement Trends 2015, UNHCR, June 2015, available at: http://www.refworld.org/docid/55aca1864.html

UNHCR: Resettlement Handbook, UNHCR, July 2011, accessed on 30 April 2016 at: http://www.refworld.org/docid/4ecb973c2.html,

UNHCR: "Resettlement and Other Forms of Legal Admission for Syrian Refugees", UNHCR, 18 March 2016, accessed on 30 April 2016 at: https://data.unhcr.org/syrianrefugees/download.php?id=10772

UNHCR: "Statement by UN High Commissioner for Refugees, António Guterres on refugee crisis in Europe", UNHCR, 4 September 2015, accessed on 30 April 2016 at: http://www.unhcr.org/55e9459f6.html

UNHCR: UN High Commissioner for Refugees Antonio Guterres, "Written text of speech to the UN Security Council", UNHCR, 26 February 2015, accessed on 30 April 2016 at: http://www.unhcr.org/54ef66796.html

UNHCR: "UNHCR urges immediate safeguards to be in place before any returns begin under EU-Turkey deal", UNHCR, 1 April 2016, accessed on 30 April 2016 at: http://www.unhcr.org/56fe31ca9.html?platform=hootsuite

UNHCR: "UNHCR's Guterres: Syria refugees reach one million", UNHCR, 6 March 2016, accessed on 30 April 2016 at: http://www.unhcr.org/513623756.html

UN ECOSOC: UN ECOSOC E/RES/248(IX), 6 August 1949

UN ExCom: UN ExCom No. 100 (LV) - 2004, General Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, contained in United Nations General Assembly document A/AC.96/1003

UN General Assembly: UN General Assembly, A/RES/319(IV) A, 3 December 1949

UN General Assembly: UN General Assembly, Note on International Protection, A/AC.96/830, 7 September 1994

UNOCHA: Financial Tracking Service (FTS) accessed on 30 April 2015 at: https://fts.unocha.org/

UNOCHA: Syria: Key Figures, accessed on 30 April 2016 at: http://www.unocha.org/syria

Zete: "Suriyeli çocuk 50 lira haftalığını vermediği için öldürülmüş", Zete, 27 March 2016, accessed on 30 April 2016 at: https://zete.com/suriyeli-cocuk-50-lira-haftaligini-vermedigi-icin-oldurulmus/

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 153–166

DOI: 10.26650/annales.2017, *49*(66).0006

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Thoughts on an Advance Tax Ruling Given about the Recognition as an Expense of Compensation Paid Pursuant to Foreign Arbitration Awards

Assoc. Prof. Dr. İrfan Barlass[1]

Abstract

Compensation paid as a result of foreign arbitration decisions can be taken as expense when determining the tax base. On the other hand, the tax rulings given by the tax administrations look for the enforcement of such decisions as a precondition in order to be able to make an expense depending on the foreign arbitration decisions. However, it is not possible to adopt this approach, just because tax administration want so, which obliges taxpayers to start a legal dispute. It may thought that the tax administration considers the issue as a kind of treasury loss that an untaxed income in Turkey is accepted as an expense for another taxpayer in Turkey. However it is not possible to sustain the evaluation of the tax authorities based on such a reason. In this article, the basic concepts and institutions related to the subject will be explained by using various sources. Later, the illegal consequences of seeking this stipulation by tax rulings, which is not foreseen in the Law, will be discussed.

Keywords

Expense In Taxation • Tax Base • Foreign Arbitration Decisions

Öz

Yabancı tahkim kararları neticesinde ödenen tazminatlar matrahın tespitinde gider olarak nazara alınabilir. Diğer taraftan vergi idaresinin verdiği özelgelerde yabancı tahkim kararlarına bağlı olarak giderleştirme yapılabilmesi için söz konusu kararların tenfizini bir ön koşul olarak aradığı görülmektedir. Oysa mükellefi salt vergi idaresi istediği için hukuki bir uyuşmazlık başlatmaya zorlayan bu yaklaşımı benimsemek mümkün değildir. Vergi idaresinin Türkiye'de vergilendirilmeyen bir gelirin Türkiye'de bir başka mükellef için gider kabul edilmesini bir tür hazine zararı olarak görerek meseleyi değerlendirdiği düşünülmektedir. Diğer yandan böyle bir gerekçeye dayanarak vergi idaresinin değerlendirmesini ayakta tutmak mümkün değildir. Makalede, çeşitli kaynaklardan yararlanılarak başta özelgeler olmak üzere konuya ilişkin temel kavram ve kurumların açıklanmasına yer verilecektir. Daha sonra ise Kanunda öngörülmeyen bu koşulun özelgeler vasıtasıyla aranmasının hukuka aykırılığı ve yaratacağı menfi sonuçlar tartışılacaktır.

Anahtar Kelimeler

Giderleştirme • Vergi Matrahı • Yabancı Tahkim Kararları

1 **Corresponding Author:** İrfan Barlass (Assoc. Prof. Dr.), Istanbul University, Faculty of Law, Department of Lecturer at the Financial Law, Istanbul, Turkey. Email: barlass@istanbul.edu.tr

To cite this article: Barlass, İrfan: "Thoughts on an Advance Tax Ruling Given about the Recognition as an Expense of Compensation Paid Pursuant to Foreign Arbitration Awards", *Annales de la Faculté de Droit d'Istanbul, 49*(66), 2017, p.153-166. https://dx.doi.org/10.26650/annales.2017.49.66.0006

Introduction

International trade and the relations associated therewith have led to a preference for solution of any legal disputes arising therefrom on an international scale. Within this framework, the effect of foreign arbitration awards, that is, of the awards rendered about at least one of the parties in dispute in consequence of handling of the dispute by an arbitrator or an arbitration tribunal outside the country of that party, on the internal law is a subject that has been discussed by various disciplines of law. The effect of foreign arbitration awards on the internal law also invites various discussions in terms of tax dimension of the awards. In this paper, we shall analyse the approach of the tax administration to foreign arbitration awards in terms of recognition as an expense of any payments made pursuant to such awards, and share our opinions on the subject matter.

The advance tax ruling with Ref. No. 19341373-125[ÖZELGE-2013/11]-35, dated 28.04.2014, of the Presidency of Adana Tax Office[2] states in summary that in order that a taxpayer can recognize as an expense of compensations payable by them in consequence of a foreign arbitration award, that award must be enforced, and that if expense recognition is made based on an arbitration award that has not been enforced, the practice will be criticized.

The advance tax ruling with Ref. No. 62030549-125[11-2016/312]-209510, dated 14.07.2017, of the Presidency of Istanbul Tax Office[3] shows that the tax administration preserves this opinion of them. In this advance tax ruling of very recent date, a taxpayer against whom an arbitration award has been rendered as a result of arbitration proceedings in abroad requests an advance tax ruling from the tax administration regarding whether they can recognise as an expense of the compensations that they have become obliged to pay pursuant to the decision of enforcement given at the end of the appeal examination of the arbitral award. While the tax administration expresses the opinion that the compensations paid can be recognised as an expense, an *argumentum a contrario* of the evidence indicated by the administration such that "*[I]n order that a judgment rendered in a civil lawsuit in a foreign country and finalised in accordance with the laws of that country can be enforced in the country where the enforcement of the judgment is sought, the judgment must have been enforced by a competent court in the country. In addition, appeal of such decision of enforcement is also possible,"* shows that the enforcement condition must be satisfied for recognition as an expense of any compensations paid pursuant to an arbitration award.

The main basis of this paper will be the legal evaluation of the approach of the tax administration as shown in its advance tax ruling with Ref. No. 19341373-125[ÖZE LGE-2013/11]-35, dated 28.04.2014.

2 (Online) http://www.gib.gov.tr/node/95341, 12.11.2017

3 (Online) http://www.gib.gov.tr/node/123655, 12.11.2017

Before sharing our opinions, we would like to state that there is no difference between the judgments of foreign courts and the awards of foreign arbitration tribunals and that therefore both the advance tax ruling and our opinions on it are extendable verbatim to judgments of foreign courts.

Terminologically, there is no difference between the terms of "arbitration award" and "arbitral award," wherever they are used, including the said advance tax ruling, all being meant an arbitration award that finally resolves of a dispute out of court.

I. The Case about which an Advance Tax Ruling is Requested From the Tax Administration, and the Content of the Advance Tax Ruling Given by the Tax Administration

A company being a corporation taxpayer in Turkey (the "Buyer") made an agreement with a company based in abroad (the "Seller") to buy a commodity by letter of credit. However, the bank that would issue the letter of credit rejected later on to issue the letter of credit on the excuse of adverse market conditions, upon which the Seller in abroad applied to arbitration in the UK against the Buyer, claiming compensation, by relying on the terms of the agreement signed between them. Although the advance tax ruling states in the respective section that the Seller applied to a court, it actually means the arbitration as the entirety of the ruling indicates.

As a result of the arbitration proceedings, the dispute was concluded against the Buyer, upon which the parties signed a settlement agreement, establishing the amount and the terms of the compensations payable. The Buyer requested from the tax administration a ruling as to whether they were allowed to recognise as an expense of the payments made by them pursuant to the arbitration award and the ensuing settlement agreement.

In the advance tax ruling issued by the tax administration, after the references to the relevant articles of the Income Tax Law and the Corporation Tax Law, it is stated that any payments in nature of compensations made pursuant to an award rendered as a result of arbitration proceedings are allowed to be recognised as an expense. In other words, the tax administration has expressed the opinion that such payments are deductible from the Corporation Tax base, with the condition precedent that the respective arbitration award has been enforced by the respective judicial body in Turkey.

The reasons given by the tax administration for the said condition precedent are the fact that any arbitration award rendered in abroad becomes enforceable in Turkey only after it has been enforced by a Turkish court on the one hand and the fact that the Turkish courts may dismiss an application for enforcement on the other. In addition, the administration reminds that a decision of enforcement given by a local court can be appealed.

In the light of the foregoing, the main idea of the advance tax ruling is that the party against whom the compensations have been awarded must show a legal resistance before paying them and that if the compensations are paid without resistance, they are not allowed to be deducted from the tax base of the respective fiscal period.

II. Legal Nature of the Advance Tax Ruling and of the Decisions of Recognition and Enforcement

Before sharing our opinions about the advance tax ruling which is at the centre of this paper and summarised above, we would like to provide some general explanations about the advance tax ruling and the decisions of recognition and enforcement in order to facilitate the understanding of the subject matter. The reason that we include the decision of recognition in our explanations in this sub-section, though no reference is made to it in the advance tax ruling, is that when the tax administration makes reference to the concept of enforcement in its ruling, it is possible that they actually meant the 'recognition' rather than the 'enforcement', probably for the reason that they do not have full grasp of the respective institutions of the private law.

II.1 Legal Nature of the Advance Tax Ruling in the Turkish Tax Law

An advance tax ruling means a written explanation given by the tax administration as special to a taxpayer upon the application of that taxpayer personally to the tax administration on matter about which the taxpayer is in doubt in terms of the tax practice.[4] An advance tax ruling is an administrative transaction that interprets and explains something, is not enforceable, and therefore is immune to any legal action against it[5]. A taxpayer's request for an advance tax ruling must always be based on a real event[6] and that event must always be related with the own tax obligation of the person, and because of this lawyers, chartered public accountants, financial advisors and similar professionals may not request an advance tax ruling about subjects that are not directly related with themselves[7] unless they have a power of attorney from their client specifically given for this purpose. Various legal systems across the world have the advance tax ruling institution. In the legal systems of the EU-member states, the authority issuing the advance tax ruling varies from one country to another, and some countries charge a fee for issuing an advance tax ruling, but the advance tax rulings are generally deemed binding on the tax administration in the legal systems of the EU-member states to the extent that satisfy the conditions such as 'the situation or

4 **Osman Pehlivan,** Vergi Hukuku [*Tax Law*], Trabzon, Murathan Yayınevi, 2012, p.32.

5 **Billur Yaltı,** Vergisel İzahatlar: Sirküler ve Özelge Düzeninde Değişen-Değişmeyen Hükümlere Genel Bakış [*Taxational Clarifications: An Outlook to Legal Provisions that Change and Unchange by Circulars and Tax Rulings*], A Tribute to Prof. Dr. Sadık Kırbaş, Istanbul, 2011, pp.313-336, p.319.

6 **Leyla Ateş,** Vergi İdaresinde Demokrasinin Vazgeçilmez Aracı Olarak Mukteza [*Advance Ruling by Tax Administration as an Indispensible Means of Democracy*], A Tribute to Prof. Dr. Mualla Öncel, Ankara, 2009, pp.623-655, p.626.

7 **Mehmet Ali Özyer,** Vergi Usul Kanunu [*Code of Tax Procedure*], 3rd Ed., Istanbul, Hesap Uzmanları Derneği Yayınları, 2004, p.943.

the transactions are completely or accurately described in the request - the situation or the transactions realised at a later stage do not differ from those on the bases of which the request was filed - the advance tax ruling is and stays in accordance with domestic, European Union or international law provisions (no contra legem advance tax rulings) - the applicable legal provision on which the advance tax ruling relies did not change - there are no fraudulent means.[8]

The legal basis of the advance tax ruling in the Turkish tax system is article 413, titled 'Taxpayers' Requests for Clarification', of the Code of Tax Procedure. The advance tax rulings are considered not among the binding sources of the tax law but among the auxiliary sources in the foundational textbooks for the reason that they do not establish a new tax norm and that because of this, they permit even the administration issuing the advance tax ruling to execute a transaction which is in contradiction with it subsequently[9]. On the other hand, the legislative amendments over the time have strengthened the position of the advance tax rulings within the tax system, making even the right of the administrative to execute an administrative transaction which is in contradiction with its ruling questionable.

For instance, the law provides late payment interest shall not be charged in addition to the tax penalty to a tax payer who has acted as advised by an advance tax ruling; this gives the advance tax rulings a somewhat binding effect. Similarly, second paragraph[10] of article 140, titled 'Principles Applicable to Tax Inspection,' of the Code of Tax Procedure provides that "*[B]efore the tax inspection reports issued by the Tax Inspectors and the Assistant Tax Inspectors are delivered to the respective tax office for processing, they shall be evaluated by a report evaluation commission formed by minimum three Tax Inspectors who have experience of at least ten years in the profession, for their compliance with the tax laws and the relevant decrees, regulations, bylaws, communiques, circulars, and advance tax rulings. If a difference arises between the person who made the inspection and the commission, the respective tax inspection report shall be evaluated for its compliance with the tax laws and the relevant decrees, bylaws, regulations, communiques, circulars, and advance tax rulings. by a central report evaluation commission formed by the Presidency of Tax Inspection Board with five persons, of whom one is the Vice President acting as the chairman and four are the group presidents as the upper evaluation authority and, if the tax inspection report recommends a tax assessment in an amount exceeding such amounts established by the Ministry of Finance, by the same commission directly. The persons who made the inspection shall issue their tax inspection report in compliance*

8 **Elly Van De Velde,** Tax Rulings in EU Member States, Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, 2015, p.44.

9 **Selim Kaneti,** Vergi Hukuku [*Tax Law*], 2nd Ed., Istanbul, Filiz Kitapevi, 1989, p.26. Mualla Öncel / Ahmet Kumrulu / Nami Çağan, Vergi Hukuku [*Tax Law*], 17th Ed., Turhan Kitapevi, 2009, p.16

10 This paragraph added to the article by article 9 of the Law No. 6009, which was promulgated in the Official Gazette no. 28659 of 01.08.2010, with the effective date being 01.01.2011.

with the evaluation made by this commission and deliver it to their department for processing." Here, the law indirectly stipulates that a tax inspection report may not impose tax which is in contradiction with any advance tax ruling and thus gives a greater binding effect to the advance tax rulings.[11] In the doctrine, there are opinions that personal advance tax rulings should have a wholly binding effect on any tax matter, including the principal tax. This opinion is based on the argument that the confidence of a taxpayer who has acted in accordance with a personal advance tax ruling in the accuracy of the administrative interpretation in the advance tax ruling as well as the rightful expectation arising from that confidence should be protected.[12]

Also the amendments made by the Law No. 6009 to the principles and procedures applicable to the issuing of advance tax rulings are another factor enhancing the power of the advance tax ruling to give direction to the tax practice. Namely, the following paragraphs have been added by article 15 of the Law No. 6009 to article 413 of the Code of Tax Procedure:

"*The Presidency of Revenue Administration can answer a clarification request by means of an advance tax ruling as well as issue a circular in order to give direction to and clarify the practice in question for all taxpayers in the same situation.*

The circulars and advance tax rulings shall be issued by a commission formed by minimum three heads of departments, chaired by the President of Revenue Administration or a vice president appointed by him, within the body of the Presidency of Revenue Administration.

Where a clarification is requested on an issue which is wholly identical in terms of the subject matter, the scope and the applicable legislation with the issued dealt with in a previous circular or advance tax ruling issued by that commission, advance tax rulings can be issued by the provincial organisation of the Presidency of Revenue Administration, provided that they are in compliance with the circular or the advance tax ruling issued by the commission.

The circulars and the advance tax rulings can be published by the Presidency of Revenue Administration on the Internet, provided that the privacy of the taxpayer is protected in the case of advance tax rulings."

11 **Ertunç Şirin,** Özelge Ve Sirkülerlerin Vergi Hukuku Kaynağı Olarak Konumları Ve İşlevleri: 6009 Sayılı Yasa **Öncesi** Ve Sonrası Durum [*Positions and Functions of Tax Rulings and Circulars as a Source of Tax Law: Situation Before and After the Law No. 6009*], A Tribute to Prof. Dr. Sadık Kırbaş, Istanbul, 2011, pp.230-242, p.238 "[S]ub-paragraph 5 of article 140 of the Code of Tax Procedure, on the other hand, provides that inspectors may not issue a tax inspection report which is in contradiction with the 'tax laws and the relevant decrees, bylaws, regulations, communiques, and circulars,' but the tax rulings are not mentioned here. This implies that a tax inspector can issue a report which is in contradiction with a tax ruling. On the other hand, the paragraphs added to article 140 of the Code of Tax Procedure after the added sub-paragraphs 5 and 6 clearly provide that a tax inspection report issued by a tax inspector shall be evaluated by the report evaluation commissions for its compliance with the 'tax laws and the relevant decrees, bylaws, regulations, communiques, circulars, and tax rulings. This implies that if a tax inspector has issued his report in contradiction with a tax ruling, the report is to be reversed by the commission, just like in the case that it is in contradiction with the law. In other words, it will no longer be possible to issue a report in contradiction with a tax ruling. If a tax is levied based on a tax inspection report which is contrary to a tax ruling, it will be possible to have that tax annulled."

12 **Yaltı,** ibid., p.330.

The regulations introduced later require establishment of an advance tax ruling pool in the first instance. The advance tax rulings included in the pool will be prepared by the commission to be formed as specified in the relevant article of the law, and the local units of the tax administration will select the advance tax ruling answering the question of a taxpayer from the pool and send it to the taxpayer. If the clarification requested by a taxpayer has not been provided by an advance tax ruling previously, it will be notified to the commission, who will issue an advance tax ruling providing the clarification requested by the taxpayer. With this functionality, the institution of advance tax ruling has become more objective and reliable, preventing issuance of any advance tax rulings contradicting each other. Also the publication of the advance tax rulings on the website of the Presidency of Revenue Administration as accessible by everybody is favourable.

On the other hand, the inconsistency between the objectivity given to the institution of advance tax ruling as we explicated above and the first paragraph of article 369, titled 'Mistake and Change of Opinion,' of the Code of Tax Procedure is an issue that must be underlined. The said paragraph provides that:

"*In the event that a taxpayer is given a wrong clarification in writing by a competent authority or that a precedence on the application of a provision has been changed, no tax penalty and late payment interest shall be charged to the taxpayer.*" As it is seen, the positive effects of an advance tax ruling, such as relief from tax penalty and late payment interest, are for the benefit of the taxpayer to whom the advance tax ruling has been given directly only.[13] Accordingly, of any two or more taxpayers who have executed any taxation transaction in compliance with an advance tax ruling providing clarification to such transaction, the one(s) who have obtained a private advance tax ruling from the administration will be immune to any tax penalty and late payment interest, while the one(s) who have not will be burdened with the payment of them; this is not fair. On the other hand, in various studies on the subject matter, it is argued that an advance tax ruling should relieve the taxpayers from any tax, tax penalty and late payment interest assessed and charged in contradiction with the respective advance tax ruling, but it is also emphasized that an advance tax ruling can be used for the benefit of the taxpayer to whom it has been issued only.[14]

II.2 Legal Nature of Recognition and Enforcement Decisions

Judgments of foreign courts are enforceable under the Turkish law by way of either recognition or enforcement of the judgment by a Turkish court depending on

13 **Nurettin Eroğlu,** Vergi Usul Kanunu [*Code of Tax Procedure*], Ankara, Sevinç Matbaası, 1989, p.696. **Gürol Üner**, Güncel Vergi Usul Kanunu Uygulaması [*Current Practice of the Code of Tax Procedure*], Ankara, Yaklaşım Yayıncılık, 2003, p.774 "[I]f a taxpayer acts in accordance with an advance tax ruling given to other taxpayers and if the tax administration criticises the act, the provisions of mistake will not be applicable. In this case, the tax will be assessed together with a penalty."

14 **Christophe Waerzeggers / Cory Hillier,** Introducing An Advance Tax Ruling (Art) Regime, Tax Law, IMF Technical Note, Volume 1, IMF Legal Department, 2016, p.2

the nature of the foreign judgment. In order that the judgment of a foreign court can produce a legal consequence like the judgment of a local court, a decision of recognition or enforcement has to be filed with the respective local court.[15]

An attempt to provide a consummate elucidation as to the legal nature of recognition and enforcement decisions is far beyond the scope of this paper. Therefore, we will confide ourselves to the provision of general information that will allow us to share our findings regarding the Tax Law.

In the doctrine, the recognition is defined as admission of the final ruling power of a court judgment in a foreign country and the enforcement as a mechanism that sets the public power into motion so as to enforce a court judgment owing to its final ruling power.[16]

Article 54, titled 'Conditions for Enforcement,' of the Law No. 5718 on the International Private Law and Procedural Law provides the legal conditions for the rendering of an enforcement decision as follows:

"(1) The competent court shall render an enforcement decision in accordance with the following conditions:

a) If there is a reciprocity treaty between the Republic of Turkey and the state where the judgment has been rendered or if that state's law or actual practice allows enforcement of the judgments rendered by the Turkish courts;

b) If the judgment has been rendered on an issue which is not within the exclusive jurisdiction of the Turkish courts or if the judgment has not been rendered by a court of a state which attributes jurisdiction to itself despite the fact that it has no genuine relevance with the subject matter or the parties of the lawsuit, provided that the defendant party has raised an objection in this regard;

c) If the judgment is not openly against the public order;

ç) If the judgment has not been rendered in the absence of the person against whom the enforcement is requested in the course of the proceedings where that person was not summoned to the court or was not represented by a lawyer in accordance with the law of the state in question and if the person in question has not filed an objection with the Turkish court against the request for enforcement on the grounds of any of the aforesaid facts."

Pursuant to article 58, titled 'Recognition,' of the same Law, the conditions, other than the conditions set forth in sub-paragraph (a) of article 54, apply verbatim for rendering of a recognition decision.

15 **Cemil Şanlı / Emre Esen / İnci Ataman-Figanmeşe,** Milletlerarası Özel Hukuk [*International Private Law*], 5th ed., Istanbul, Vedat Kitapçılık, 2016, p.482.

16 **Aysel Çelikel / Bahadır Erdem,** Milletlerarası Özel Hukuk [*International Private Law*], 14th ed., Istanbul, Beta Yayıncılık, 2016, p.651.

III. Evaluation of the Advance Tax Ruling Given by the Administration

We must state first of all that in the case discussed here, there is no doubt that the compensations paid can be recognised as an expense pursuant to first paragraph of article 40, titled 'Allowable Expenditures,' of the Income Tax Law No. 193, which reads, "*The following expenditures are allowable in the assessment of the net earnings,*" and to sub-paragraph 3 of that paragraph, which reads, "*Any losses and compensations paid pursuant to a contract or a court judgment or a rule of law, provided that they are related with the business.*" Paragraph 1 of article 6, titled 'Non-Allowable Expenditures,' of the same Law, which reads, "*All fines and tax penalties as well as compensations incurred as a result of any criminal act of the owner of the enterprise (any compensations paid pursuant to a penalty clause of a contract are not deemed compensation of penal nature)*," confirms that any penalty paid pursuant to a contract can be recognized as an expense.

Also Article 11, titled 'Non-Allowable Expenditures,' of the Corporation Tax Law No. 5520, which reads,

"*(1) The following are not allowable in the assessment of the corporate earnings:*

...

e) Any material and moral damages arising from any criminal act of the company or any shareholder, officer or employee of it, except for any compensations paid pursuant to a penalty clause in a contract,"

reinforces this evaluation. Reference to the foregoing provisions of the law as we quoted above has been made by the tax administration in the advance tax ruling given by it.

The aforesaid provisions of law all together show that the legislator accepts any payments made in order to continue the commercial activity as expenditure. As this characteristic of a payment becomes weaker, it becomes difficult, and even impossible, to allow it as an expenditure. For example, it is not readily possible to explain an expense incurred to publish an announcement of death of an employee in a newspaper as an expenditure incurred to continue the commercial activity, with weak reasons such as elevating the morale of the employees, reinforcing the sense of solidarity, etc. aside.[17]

Whether any payments made by a taxpayer are an expenditure in the sense of taxation can always be made a topic of debate by the tax administration, of course. On the other hand, such debate must not be sustained as detached from its context. Every debate raised by the tax administration by way of putting itself in the shoes of the taxpayer and questioning the justifiability of any commercial preferences of the taxpayer is doomed to be detached from its context.

17 **Hayrullah Doğan / Hasan Yalçın,** Vergi Uygulamaları [*Tax Practices*], Istanbul, 2008, p.157.

To explain this view of us with a factual event, the Legislator has ruled that any compensations paid pursuant to a legally valid contract between the parties can be recognised as an expense, event in the absence of a court judgment in this regard. In other words, a taxpayer may choose to pay any compensations pursuant to a contract when he knows that he has failed to fulfil a contractual obligation which requires payment of the compensations, before filing of a lawsuit against him, the results of which would be more detrimental to him, and he can recognise the compensations paid by him as an expense. This is a commercial choice and a legal right of the taxpayer.

Another taxpayer in the same position may become aware that he has failed to fulfil a contractual obligation at the end of resolution of the dispute in question before a court.

When we compare the positions of these two taxpayers, we can admit by relying on the logic that 'many includes few as well' that the taxpayer who has paid the compensations pursuant to a court judgment will be more rightful to recognise the compensations as an expense than the taxpayer who has paid the compensations without a court judgment. Some studies on the subject matter argue that for the reason that the court judgments must prescribe enforcement, a payment may not be recognised as an expense based on a negative declaratory judgment.[18] We are not of the same opinion for the reason that it is possible that a taxpayer knows that he is obliged to pay compensation but finds out its amount as a result of a negative declaratory action. It is even possible that he becomes aware as a result of a negative declaratory action that he has failed to fulfil its contractual obligations. In all such fictional situations, we must accept that a payment has been made pursuant to a contract and that a declaratory action functions to clarify the contract for the taxpayer who has made the payment.

An important point here is that the payment to be recognised as an expense has actually been made. In other words, any compensations debited but not paid may not be recognised as an expense,[19] for any compensations that have become payable after an arbitration award are not an item of accounting that has been related with the profit or loss account before it. For this reason, the principle of assessment, which means that an expense can be allowed once it has been debited to the account, even if it has not been paid actually, under both the corporate accounting and the unincorporated accounting practices,[20] is not applicable here.

18 **Recep Bıyık / Aydın Kıratlı,** Giderler ve İndirimler [*Allowable Expenses*], 6th Ed., Ankara, PWC Business School Yayınları, 2010, p.311.

19 **Abdurrahman Tanrıkulu / Bülent Canani Tuzcuoğlu,** Yabancı Mahkeme Ya Da Tahkim Kurulu Kararlarına İstinaden Oluşan Zarar, Ziyan ve Tazminatların Kurumlar Vergisi Kanunu Karşısındaki Durumu [*Status of Any Loss or Damage Payable Pursuant to a Judgment of a Foreign Court or an Award of a Foreign Arbitration Tribunal Before the Corporation Tax Law*], Vergi Sorunları Dergisi, Sayı 114, Istanbul, Maliye Gelirler Kontrolörleri Derneği Yayınları, pp.11-20, p.18.

20 **Safiye Öngen,** Vergi Muhasebesi [*Tax Accounting*], Ankara, Yaklaşım Yayıncılık, 2000, p.519. Doğan Şenyüz / Adnan Gerçek / Mehmet Yüce, Türk Vergi Sistemi [*Turkish Tax System*], Ankara, Yaklaşım Yayıncılık, 2008, p.11 "[I]f a taxpayer has incurred an expense but not yet paid it, that is to say, if he has become indebted, this expense is allowable pursuant to the principle of assessment and will be entered into the records, for the expense is considered an income for the opponent party pursuant to the principle of assessment."

Going back to the approach of the tax administration, we find that the tax administration, in its said advance tax ruling, forces the taxpayer to sustain the dispute despite the fact that the taxpayer is aware that he is the wrongful party before the court. Moreover, the nature of this forcing is not to sustain the legal debate, for the enforcement is in essence the enforcement of the underlying judgment. The purpose of a trial for enforcement of a foreign court judgment or arbitration award is not to make a legal review of the merits of the case in dispute. A trial for enforcement only makes an analysis as to whether the foreign court or arbitration tribunal has jurisdiction to render a judgment or an award on the case or not and whether the trial has been done in accordance with the law chosen by the parties or not and whether the parties have been allowed to use their right to defend their case or not.

As the present system requires a taxpayer, who wishes to pay compensations based on an arbitration award, to obtain an enforcement of the underlying award, it forces the taxpayer to incur interest, expenses of the trial for enforcement, and attorney fees. Moreover, the creditor who has obtained the enforcement of the award can immediately apply to the debt collection office in order to collect the debt, in which case the debtor will additionally incur debt collection expenses.

The advance tax ruling also reminds that "*In addition, the enforcement decision can be appealed.*" This suggests that the tax administration may not be satisfied with the result of the action for enforcement and may require the use of any legal remedy available. However, there is nothing in the legislation that justifies the tax administration to be so hesitant and suspicious toward the taxpayers who are willing to pay the compensations pursuant to a foreign arbitration award and recognise them as an expense accordingly.

A private person who has lost his case before a foreign judicial body after a serious trial and has been convinced of his wrongfulness based on the reasoned judgment or award should not be forced to start a new dispute merely for the sake of satisfying any tax concerns and completing a formal formality. Just as a taxpayer who has lost his case before a local court pays the awarded compensations without appealing the judgment of the court and accordingly recognises the compensations as an expense in the domestic legal system, the taxpayer must be able to do the same based on a foreign court judgment or arbitration award.

In our opinion, the reason why the tax administration gives such an advance tax ruling is their desire to prevent any loss of revenue by the treasury. That a tax arising from a contractual relationship between the parties is paid to the treasury of a foreign country and that the amount so paid is recognised as an expense and deducted from the tax base in Turkey is not a favourable development for the Turkish treasury, of course. On the other hand, there is not a norm of positive law that allows the practice accepted by the tax administration as a solution.

Let's assume a case where two local companies paying tax in Turkey have referred a dispute between them to and solved it through a foreign arbitration tribunal. If the tax administration requires enforcement of the arbitration award in Turkey, it will be contrary to the law in addition to the problems explained so far, for the party who has won the case and received the payment will add it as an income to its tax base. The basic principle of the Turkish Tax Law is that an income for a party is an expense for the other. A view contrary to this will mean a duplicate taxation for the benefit of the tax administration. In such a hypothetical event, a taxpayer who has recognised a payment made by him pursuant to an unratified arbitration award as an expense cannot be criticised.

Some studies on the subject matter agree with the tax administration by arguing that the arbitration trial is a way of amicable settlement of disputes, and some even claim that payments made pursuant to an arbitration award may not be recognised as an expense.[21] However, the arbitration trial is not a way of amicable settlement of a dispute. The parties have agreed on the duty and jurisdiction beforehand. This agreement is not different from the prior agreement on the competent court. The only reason why the parties go to arbitration is actually the fact that they could not have amicably settled the dispute. The fact that an arbitration award can be rendered without the participation of one of the parties in the arbitration proceedings and that the consequences of such award will be binding like a judgment of a foreign court shows that the arbitration trial is not a way of amicable settlement of disputes. Moreover, even if it is possible to accept for a moment that the arbitration tribunal is an amicable settlement of a dispute, there is not any legal obstacle for recognising as an expense of a payment made under an out of court settlement agreement.[22]

One can think that the tax administration should require at least a recognition decision in the absence of an enforcement decision so as to allow a taxpayer to recognise as an expense of the compensations paid by him. In our understanding, to demand a recognition decision, too, lacks a legal basis, for the obtaining of a recognition decision will be a loss of time and money for the taxpayer who has made the payment. In view of the fact that a taxpayer who has become aware that he is obliged to pay compensations pursuant to the contract and has paid the compensations without a court judgment can recognise as an expense of the sum paid as compensations, criticising a taxpayer who did the same on the grounds that he failed to have the judgment recognised by the local jurisdiction will be a contradictory approach. Even when this problem is addressed strictly in terms of taxation technique, we have the

21 **Tanrıkulu / Tuzcuoğlu,** ibid., p.20 "Any loss or compensation paid pursuant to foreign arbitration awards which have been finalized and become enforceable may not be recognised as an expense for the reason that the arbitration procedure is in essence a way of amicable settlement of disputes. As frequently seen in the practice, however, faced with a dispute in abroad, companies can be forced to go to arbitration by the respective foreign country, even if they are relatively rightful. Where their ability to continue their commercial activity depends on their acceptance of the arbitration as a result of such forcing, since the arbitration will have been accepted for the sake of continuing and maintaning of the commercial relationship, any loss or compensation paid pursuant to the arbitration award can be recognised as an expense as per article 40/1 of the Income Tax Law."

22 **Özyer,** ibid., p.685.

opinion that the tax administration may criticise a taxpayer who recognised as an expense of a payment during the year when the decision of recognition was obtained on the grounds that by doing this he aimed an irregular tax planning.

Even if we assume that the tax administration is rightful to demand a recognition decision in the cases when it is difficult for it to see the relationship between the payment and the contract in terms of the law of evidence, we have the opinion that a more practical solution should be adopted in this regard. Accordingly, submission of a copy of the duly notarized translations of the arbitration contract or clause between the parties and of the arbitration award should be accepted as sufficient proof of the basis of the compensations paid. These will constitute the proof of the compensations paid and recognised as an expense. This approach will be consistent with the provision of first paragraph of article 322, titled 'Worthless Receivables,' of the Code of Tax Procedure No. 213, which reads, "*Any receivable which is no longer collectible as proven by a court judgment or by an opinion-giving document.*"

Conclusion

The belief that the Legislator has not established adequate legal mechanisms to protect the treasury and that, therefore, the administration has a duty to protect the treasury when it needs protection, though such a duty has not been explicitly assigned to the administration by the law, is a false notion frequently pursued by the administration.

Imposition of some conditions that are not provided in the law for recognition as an expense of a payment incurred as a result of a commercial activity and made compulsorily because of this is contrary to the law on the one hand and puts additional burden on the taxpayer as the meeting of such conditions will require the taxpayer to incur expenses. In this regard, the administrator's imposition of certain conditions precedent which are not provided in the law for the use of certain rights allowed by the law in the realm of taxation creates a problem that must be addressed in terms of the legality of such conditions imposed by the administration.

To think that a taxpayer will personally have a court judgment or an arbitration award rendered against him in abroad ratified is not meaningful, for this will be like expecting the taxpayer to initiate a debt collection proceeding against himself. Therefore, by demanding an enforcement decision as a condition precedent to the recognition as an expense of the compensations paid, the tax administration is actually compelling the creditor of the taxpayer to initiate the debt collection procedure at the expense of the taxpayer who will incur more expenses.

If the taxpayer believes that the arbitration award cannot be enforced in Turkey, he may by his free will take such steps that will ensure the stepping-in of the judicial process in this regard. On the other hand, respect must be shown to the will of a taxpayer to end a

dispute once he has been convinced of his wrongfulness after the arbitration award and as he does not want to bear more financial burden. An approach contrary to this will become an interpretation of the right to have access to court as protected by article 36, titled 'Right to Legal Remedies,' of the Constitution, which reads, "*Every person has the right to fair trial through claim and defence as plaintiff or defendant before judicial bodies by using legitimate means and ways,"* that turns that right into an obligation.

References

Ateş, Leyla; Vergi İdaresinde Demokrasinin Vazgeçilmez Aracı Olarak Mukteza [*Advance Ruling by Tax Administration as an Indispensible Means of Democracy*], A Tribute to Prof. Dr. Mualla Öncel, Ankara, 2009, pp.623-655.

Bıyık, Recep / Kıratlı, Aydın; Giderler ve İndirimler [*Allowable Expenses*], 6th Ed., Ankara, PWC Business School Yayınları, 2010.

Çelikel, Aysel / Erdem, Bahadır; Milletlerarası Özel Hukuk [*International Private Law*], 14th ed., Istanbul, Beta Yayıncılık, 2016.

Doğan, Hayrullah / Yalçın, Hasan; Vergi Uygulamaları [*Tax Practices*], Istanbul, 2008.

Eroğlu, Nurettin; Vergi Usul Kanunu [*Code of Tax Procedure*], Ankara, Sevinç Matbaası, 1989.

Kaneti, Selim; Vergi Hukuku [*Tax Law*], 2nd Ed., Istanbul, Filiz Kitapevi, 1989.

Öncel, Mualla / Kumrulu, Ahmet / Çağan, Nami; Vergi Hukuku [*Tax Law*], 17th Ed., Turhan Kitapevi, 2009.

Öngen, Safiye; Vergi Muhasebesi [*Tax Accounting*], Ankara, Yaklaşım Yayıncılık, 2000.

Özyer, Mehmet Ali; Vergi Usul Kanunu [*Code of Tax Procedure*], 3rd Ed., Istanbul, Hesap Uzmanları Derneği Yayınları, 2004.

Pehlivan, Osman; Vergi Hukuku [*Tax Law*], Trabzon, Murathan Yayınevi, 2012.

Şanlı, Cemil / Esen, Emre / Ataman-Figanmeşe, İnci; Milletlerarası Özel Hukuk [*International Private Law*], 5th ed., Istanbul, Vedat Kitapçılık, 2016.

Şenyüz, Doğan; Gerçek, Adnan; Yüce, Mehmet; Türk Vergi Sistemi [*Turkish Tax System*], Ankara, Yaklaşım Yayıncılık, 2008.

Şirin, Ertunç; Özelge Ve Sirkülerlerin Vergi Hukuku Kaynağı Olarak Konumları Ve İşlevleri: 6009 Sayılı Yasa Öncesi Ve Sonrası Durum [*Positions and Functions of Tax Rulings and Circulars as a Source of Tax Law: Situation Before and After the Law No. 6009*], A Tribute to Prof. Dr. Sadık Kırbaş, Istanbul, 2011, pp.230-242.

Tanrıkulu, Abdurrahman / Tuzcuoğlu, Bülent Canani; Yabancı Mahkeme Ya Da Tahkim Kurulu Kararlarına İstinaden Oluşan Zarar, Ziyan ve Tazminatların Kurumlar Vergisi Kanunu Karşısındaki Durumu [*Status of Any Loss or Damage Payable Pursuant to a Judgment of a Foreign Court or an Award of a Foreign Arbitration Tribunal Before the Corporation Tax Law*], Vergi Sorunları Dergisi, Sayı 114, Istanbul, Maliye Gelirler Kontrolörleri Derneği Yayınları, pp.11-20.

Üner, Gürol; Güncel Vergi Usul Kanunu Uygulaması [*Current Practice of the Code of Tax Procedure*], Ankara, Yaklaşım Yayıncılık, 2003.

Van De Velde, Elly; Tax Rulings in EU Member States, Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, 2015.

Yaltı, Billur; Vergisel İzahatlar: Sirküler ve Özelge Düzeninde Değişen-Değişmeyen Hükümlere Genel Bakış [*Taxational Clarifications: An Outlook to Legal Provisions that Change and Unchange by Circulars and Tax Rulings*], A Tribute to Prof. Dr. Sadık Kırbaş, Istanbul, 2011, pp.313-336.

Waerzeggers, Christophe / Hillier, Cory; Introducing An Advance Tax Ruling (Art) Regime, Tax Law, IMF Technical Note, Volume 1, IMF Legal Department, 2016. http://www.gib.gov.tr/

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 167–188

DOI: 10.26650/annales.2017, *49*(66).0007

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Zivilrechtlicher Schutz Gegen Negative Bewertungen Bei Online Handelsplatformen Am Beispiel Ebay

Civil Law Protection Against Negative Reviews On Online Trading Platforms Using The Example Of Ebay

Assist Prof. Dr. Pelin Karaaslan[1] **Assist. Prof. Dr. Ramazan Durgut**[2]

Abstract

Feedbacks and comments in online trading platforms, such as Ebay, have a huge affect on the purchase decision of other customers. Therefore, it is important for sellers that after a transaction, they and their products are positively rated by buyers. But it is not uncommon for user ratings to be far from objectivity. Unfair opinions and untrue factual claims can permanently damage the reputation of the seller. The following study deals with the question whether and how sellers can legally defend themselves against negative comments due to German and Turkish civil law.

For that purpose, the Ebay's feedback system is first presented (in Part II) and then part III discusses Ebay's measures to protect sellers from unfair comments. In addition (in Part IV.A), the civil law claims against the author of the negative comment are to be examined separately according to contractual claims, tort and competition law claims. Subsequently, in Part IV.B the claims against Ebay are briefly explained. Part V examines the topic from the point of view of Turkish Law. Finally Part VI concludes the study with a brief summary of the research.

The study comes to the conclusion that because of the abuse of the Ebay feedback system, the seller may claim against both the author of the negative comment and Ebay. However the second way is not advisable since Ebay has limited its obligation to control the content of comments by its user agreement in a permissible manner. The author of the negative comment may be liable not only for the tort of defamation but also for breach of contractual obligations. It is because that the Feedback Policy of the portal operator (Ebay), wherein buyers are prohibited from leaving unlawful comments for sellers, should be considered as a secondary obligation of the contract of sale between the transaction parties.

Posting fake and negative comments may furthermore constitute an unfair competition. However, to claim for unfair competition under German Law, the negative comment must be given purposefully to gain an unfair advantage against a competitor or to injure competitor. On the other hand, in order to assume an infringement, a distinction should be made as to whether the comment given is a factual claim or a value judgment. While value judgments up to the limit of the abusive criticism and insult by the freedom of opinion from Art. 5 GG and Art. 26 of the Turkish Constitution are protected in principle; false factual claims are generally not protected by the German and Turkish Law.

Keywords

Negative Comments • Online Trading • Online Auction • Unfair Competition • Ebay/gittigidiyor

1 **Corresponding Author:** Pelin Karaaslan (Dr.), Anadolu University, School of Law, Department of Civil Law, Eskişehir Turkey. Email: pkaraaslan@istanbul.edu.tr.

2 Ramazan Durgut (Dr.), Istanbul University, School of Business Administation, Department of Business Law, Istanbul Turkey. Email: rdurgut@anadolu.edu.tr.

To cite this article: Karaaaslan, Pelin/Durgut, Ramazan: "Civil Law Protection Against Negative Reviews On Online Trading Platforms Using The Example Of Ebay'', Annales de la Faculté de Droit d'Istanbul, 49(66), 2017, p.167-188. https://dx.doi.org/10.26650/annales.2017.49.66.0007

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Ebay Örneği Üzerinden, İnternet Satış Platformlarında Yapılan Olumsuz Yorumlara Karşı Özel Hukuka Dayalı Koruma Yolları

Assist. Prof. Dr. Pelin Karaaslan[1] **Assist. Prof. Dr. Ramazan Durgut**[2]

Öz

Ebay gibi online satış platformlarında kullanıcılar tarafından yapılan değerlendirme ve yorumlar, diğer müşterilerin satın alma kararları üzerinde büyük bir etkiye sahiptir. Bu nedenle, söz konusu platformlarda satış yapan kimselerin kendileri ve ürünleri hakkında alıcı tarafından olumlu yorum yapılması oldukça önemlidir. Ne var ki yapılan yorumların nesnellikten uzak olması az karşılaşılan bir durum değildir. Haksız değer yargıları ve gerçeği yansıtmayan bilgiler, satıcıların prestijini kalıcı olarak ve olumsuz bir şekilde etkilemektedir. Bu çalışmada, müşteriler tarafından yapılan olumsuz yorumlara karşı satıcının Alman ve Türk Hukuklarında başvurabileceği özel hukuka dayalı koruma yolları ele alınmıştır. Çalışmaya öncelikle, Ebay'in "kullanıcı değerlendirme sistemi" tanıtılarak başlanmış (Bölüm II), akabinde ise (Bölüm III'te) olumsuz yorumlara karşı Ebay'in kendisi tarafından alınan önlemler açıklanmıştır. Bunun ardından (Bölüm IV.A'da) yorum yapanın kendisine karşı yöneltilebilecek özel hukuka dayalı koruma yolları, sözleşme hukuku, haksız fiil hukuku ve haksız rekabet hukuku alt dallarına ayrılarak incelenmiştir. Sonrasında (Bölüm IV.B'de) Ebay'in kendisine karşı ileri sürülebilecek hukuk yolları kısaca açıklanmıştır. Bölüm V'te ise, bahsi geçen konular Türk Hukuku açısından incelenmiş ve Bölüm VI'da çalışmada ulaşılan sonuçlar özetlenmiştir.

Çalışmada varılan sonuç, Ebay'in değerlendirme sisteminin kötüye kullanılması sebebiyle ilgili kişinin hem olumsuz yorumun sahibine hem de Ebay'e karşı dava açabileceği yönündedir. Ancak Ebay'e karşı dava açılması pek tavsiye edilebilecek bir hukuki yol değildir; zira Ebay kendi kullanıcı şartnamesi ile yorumların içeriğini denetleme yükümlülüğünü uygun bir şekilde sınırlandırmıştır.

Olumsuz yorumu yapan kişinin sorumluluğu sadece haksız fiil hükümlerine değil, aynı zamanda da sözleşmeye aykırılık hallerine dayandırılabilir. Bunun nedeni, Ebay'in kullanıcı sözleşmesinde yer alan haksız ve hukuksuz yorum yapmama yükümlülüğünün alıcı ile satıcı arasındaki sözleşmenin bir yan edim yükümlülüğü olarak değerlendirilmesi gerekliliğidir.

Yanlış ve olumsuz yorumların haksız rekabet teşkil etmesi de mümkündür. Bununla birlikte, Alman Hukukuna göre haksız rekabet iddiasında bulunabilmek için olumsuz yorumun rakipler karşısında haksız bir avantaj elde etmek ya da rakibe zarar vermek amacıyla yapılmış olması gerekir. Öte yandan, bir hukuka aykırılıktan söz edebilmek için yapılan yorumun bir değer yargısı mı yoksa olgusal bir iddia mı olduğu yönünde bir ayrım yapılmalıdır. Değer yargısı içeren yorumlar, "küfür içeren bir eleştiri" ya da "hakaret" olarak nitelendirilmedikçe Alman Anayasası m.5 ve Türk Anayasası m. 26'da düzenlenen ifade özgürlüğü çerçevesinde serbestçe yapılabilecekken, gerçeği yansıtmayan olgusal iddialar Türk ve Alman hukuklarında korumaya tabi değildirler.

Anahtar Kelimeler

Olumsuz Yorumlar • Online Ticaret • Online Açık Artırma • Haksız Rekabet • Ebay/gittigidiyor

I. EINLEITUNG

Während viele klassische, stationäre Einzelhändler Jahr für Jahr mit ihren verminderten Umsätze zu kämpfen haben, verzeichnet der Online-Handel einen stärken Umsatzzuwachs dar. Das Internet wird immer wieder attraktiver für Käufer, Verkäufer, Verbraucher und Unternehmer. Die große Mehrzahl dieser Teilnehmer von Internet-Markt wählt hierfür die Onlinehandelsplattform Ebay.

Das Onlineauktionshaus Ebay wurde 1995 in Kalifornien-USA gegründet und ist seit 1999 auch auf dem deutschen Markt tätig. Insgesamt sind inzwischen mehr als jeder vierte Deutsche – über 20 Millionen Menschen – Mitglied bei Ebay, womit das US Unternehmen sogar den ADAC weit hinter sich lässt.

Für diesen Erfolg ist mitbestimmend, dass Ebay den Marktplatz von unseriösen Teilnehmern frei hält, indem das Auktionshaus seinen Mitgliedern die Möglichkeit bietet, die Zuverlässigkeit ihren Geschäftspartnern zu bewerten. Somit können sich Interessenten im Vorhinein über ihren künftigen Vertragspartner informieren und ihre eigene Kaufentscheidung bestimmen, ohne mit Vertragspartnern in persönlichen Kontakt zu treten. Nicht selten fühlt sich jedoch der Bewertete durch die auf dem Bewertungsportal veröffentlichte Äußerung ungerecht behandelt[3]. Es ist besonders für die gewerblichen Verkäufer wichtig, dass ihr guter Ruf nicht durch negative Bewertungen beeinträchtigt wird[4].

Vor diesem Hintergrund beschäftigt sich die vorliegende Arbeit mit der Frage, ob und wie man zivilrechtlich gegen die negativen Ebay-Bewertungen vorgehen kann und welche Ansprüche hierfür zur Verfügung stehen.

II. DER EBAY-BEWERTUNGSMECHANISMUS[5]

Jeder Ebay-Nutzer hat ein Bewertungsprofil**.** Es beinhaltet eine Verzeichnung sämtlicher Bewertungen, die andere Mitglieder für Käufe oder Verkäufe mit diesem Mitglied abgegeben haben. Die Bewertung besteht aus zwei Teilen, die Beurteilung und der Kommentar. Im Beurteilungsteil kann ein Käufer nach dem Kauf den Verkäufer positiv, negativ oder neutral bewerten. Ein Verkäufer kann jedoch einen Käufer nur positiv bewerten. Der Nutzer hat im zweiten Teil zudem die Möglichkeit, seine Bewertung mit einem kurzen Kommentar zu ergänzen.

Beurteilungen und Kommentare werden dauerhaft im Bewertungsprofil des Mitglieds gespeichert. Für jede positive Bewertung wird ein Punkt zum Bewertungspunktestand addiert. Eine neutrale Bewertung wirkt sich nicht auf den

3 **Ruth Janal,** Profilbildende Maßnahmen: Möglichkeiten der Unterbindung virtueller Mund-zu-Mund-Propaganda, NJW 2006, 870.

4 Siehe **Wolfgang Bücher,** Soziale Medien, Bewertungsplattformen & Co, GRUR 2017, 433.

5 Informationen unter diesem Titel sind auf der Webseite von Ebay (www.ebay.de) abrufbar.

Bewertungspunktestand aus. Für jede negative Bewertung wird ein Punkt vom Bewertungspunktestand subtrahiert. Je höher der Bewertungspunktestand eines Mitglieds ist, desto mehr positive Bewertungen hat das Mitglied erhalten. Wenn man sich über die Gründe der Abgabe eine positive, negative oder ggf. neutrale Bewertung informieren möchte, sollte man auch die entsprechenden Kommentare lesen.

Es kommt aber nicht selten vor, dass die Kommentare rechtswidrig und rufbeeinträchtigend abgegeben sind. Genau dies legt die Bedeutung eines hinreichenden Schutz der Bewerteten dar.

III. DAS EBAY-SCHUTZSYSTEM BEZÜGLICH DES BEWERTUNGSMECHANISMUS[6]

A. Zu beachtende Regeln bei Abgabe einer Bewertung

Nach § 7 Abs. 2 der Ebay-AGB sind die Mitglieder verpflichtet, in den von ihnen abgegebenen Bewertungen ausschließlich wahrheitsgemäße Angaben zu machen und die gesetzlichen Bestimmungen einzuhalten. Die von ihnen abgegebenen Bewertungen müssen sachlich sein und dürfen keine Schmähkritik enthalten.

B. Reaktionsmöglichkeiten des Nutzers

Käufer und Verkäufer können ihre Sichtweise des Falles mitteilen, indem sie auf die abgegebene Bewertung antworten. Ihre Antwort wird direkt unter dem Kommentar des anderen Ebay-Mitglieds angezeigt.

Zudem können Käufer und Verkäufer einen Ergänzungskommentar zu einer von ihnen abgegebenen Bewertung abgeben, um ihre Bewertung genauer zu erläutern. Der Ergänzungskommentar wird unter der ursprünglichen Bewertung angezeigt.

Ferner haben Verkäufer die Möglichkeit den Käufer zu bitten, eine abgegebene Bewertung zu überarbeiten. Die Überarbeitung einer Bewertung kann nur dann beantragt werden, wenn das Problem, das der Käufer mit der Transaktion hatte, zuvor geklärt wurde oder wenn der Verkäufer davon ausgehen kann, dass der Käufer die Bewertung unbeabsichtigt abgegeben hat.

C. Bewertungsentfernung durch Ebay

Das Löschen negativer Bewertungen durch Ebay erfolgt bei folgenden Gründen:

- Die Bewertung muss aufgrund einer vollstreckbaren richterlichen Entscheidung (zum Beispiel Beschluss, Urteil, Vergleich) gegen denjenigen, der die Bewertung abgegeben hat, entfernt werden.

6 Angaben unter http://pages.Ebay.de/rechtsportal/allg_4.html.

- Der Bewertungskommentar enthält vulgäre, obszöne, diskriminierende, rassistische, nicht jugendfreie oder im strafrechtlichen Sinne beleidigende Bemerkungen.
- Das Mitglied hat die negative Bewertung versehentlich einem falschen Mitglied zugeordnet.
- Die Bewertung wurde von einer Person abgegeben, die zum Zeitpunkt der Transaktion oder der Bewertungsabgabe hierzu nicht berechtigt war (zum Beispiel wegen Minderjährigkeit).
- Der negative Kommentar enthält persönliche Angaben über den Betroffenen, wie zum Beispiel den Namen, die Adresse, Telefonnummer oder E-Mail-Adresse.

IV. RECHTSSCHUTZ GEGEN UNZUTREFFENDE BEWERTUNGEN

Sowohl wegen der strengen Anforderungen, die durch Ebay für Bewertungsentfernung angesetzt werden, wie auch der Reaktionszeit, ist es für den Betroffenen nicht immer nachvollziehbar, sich durch oben genannte Methoden gegenüber negativen Kommentaren zu Wehr setzen[7]. Daraus folgt allerdings nicht, dass die Betroffenen schutzlos sind. Auch die Gerichte haben sich mit Unterlassungs-, Beseitigungs- und Schadenersatzansprüchen bezüglich dieser Bewertungen zu beschäftigen. Hierfür stehen verschiedene Anspruchsgrundlagen zur Verfügung.

A. Ansprüche gegen den Verfasser

1. Vertragliche Ansprüche

a) Anspruch aus §§ 280 Abs. 1, 241 Abs. 2 BGB in Verbindung mit § 7 Abs. 2 der Ebay - AGB

Nach dieser Anspruchsgrundlage kann der Betroffene Beseitigung, Unterlassung oder Schadenersatz verlangen[8], wenn es eine Nebenpflichtverletzung der Vertragspartei vorliegt. Hierfür vorausgesetztes Schuldverhältnis ist im zwischen beiden Parteien geschlossenen Vertrag zu sehen[9].

aa) Nebenpflichten sowie ihre Einbeziehung in den Vertrag

Die Nebenpflichten im Sinne des § 241 Abs.2 BGB sind durch § 7 Abs. 2 der Allgemeinen Geschäftsbedingungen von Ebay konkretisiert[10]. Demnach hat der

7 Ausführlich hierzu: **Tanja Dörre / Kai Kochmann,** Zivilrechtlicher Schutz gegen negativen EBAY Bewertungen, ZUM 2007, 30, 32.

8 Vgl. AG Erlangen, MMR 2004, 635; AG Detmold, MMR 2007, 472.

9 Ausführlich zum Vertragsschluss bei Internetauktionen **Andreas Deutsch,** Vertragsschluss bei Internetauktionen-Probleme und Streitstände, MMR 2004, 586.

10 **Thomas Hoeren**, Bewertungen bei Ebay, CR 2005, 498, 499.

Nutzer die Verpflichtung wie folgt zu bewerten:

- Wahrheitsgemäß
- Gemäß den gesetzlichen Bestimmungen
- Sachlich
- Ohne Schmähkritik

Die Auktionsteilnehmer stimmen jedoch den Ebay-AGB ausdrücklich lediglich im Rahmen des „Nutzungsverhältnis“[11] zu. Strittig ist deshalb, auf welchen dogmatischen Grundlagen die Ebay-AGB auf das Verhältnis zwischen Verkäufer und Käufer anzuwenden ist[12]. Lösungen zu dieser Problematik können in drei Kategorien zusammengefasst werden.

(1) Auslegungslösung

Nach dem überwiegenden Teil der Literatur[13] würden die AGB-Klauseln, obwohl sie nicht direkt zwischen den Parteien des Kaufvertrages vereinbart werden, eine Auslegungsgrundlage dafür bilden, wie die Bieter als Erklärungsempfänger die durch die Freischaltung der Angebotsseite gemachte Willensäußerung verstehen dürfen. Die Teilnahme an eine Ebay-Auktion setze zwingend die Zustimmung zu den Ebay-AGB voraus. Daher können die Mitglieder im Wege einer Auslegung im Sinne des §§ 133, 157 BGB davon ausgehen, dass auch den anderen Teilnehmern der Inhalt dieser Klauseln geläufig sei[14].

(2) Einbeziehung nach den Grundsätzen des Vertrags zugunsten Dritter

Vereinzelt wird vertreten, dass die Allgemeinen Geschäftsbedingungen des Auktionshauses über ein „Vertrag zu Gunsten Dritter“ im Sinne des §§ 328 ff. BGB in das Verhältnis zwischen den Aktionsparteien einbezogen würden[15].

Ein Teil der Literatur weist jedoch darauf hin, der Inhalt der Ebay-AGB sei den Dritten nicht nur begünstigend, sondern auch belastend geregelt[16]. Dieser Kritik ist zuzustimmen und daher ist diese Lösung abzulehnen. Verträge zu Lasten Dritter sind mit der Privatautonomie grundsätzlich nicht vereinbar und im BGB folgerichtig auch nicht vorgesehen[17].

11 Das Vertragsverhältnis zwischen dem Auktionshaus und den Auktionsteilnehmern.

12 Vgl. LG Arnsberg, Urteil v. 18.05.2005, Az. 3 S 22/05, das Gericht hat die Einbeziehung im Voraus abgelehnt.

13 **Dörre/Kochmann,** ZUM 2007, 30, 36 f; **Bernhard Ulrich,** Die enttäuschende Internetauktion- LG Münster, JuS 2000, 947, 949; **Thomas Rüfner,** Virtuelle Marktordnungen und das AGB-Gesetz, MMR 2000, 597, 598.

14 **Dörre/ Kochmann,** ZUM 2007, 30, 37.

15 Vgl. **Andreas Wiebe,** Vertragsschluss bei Online-Auktionen, MMR 2000, 323, 325; **Robert Koch,** Geltungsbereich von Internet-Auktionsbedingungen, CR 2005, 502, 505.

16 **Dörre/ Kochmann,** ZUM 2007, 30, 38.

17 **Dörre/ Kochmann,** ZUM 2007, 30, 38.

(3) Rahmenvertragslösung

Die Vertreter dieser Auffassung[18] gehen davon aus, dass mit der Anmeldung eines Nutzers beim Auktionshaus ein Nutzungsvertrag zwischen dem Nutzer und Betreiber zustande komme. Mit Abschluss dieses Vertrages gebe der Nutzer ein konkludentes Angebot an alle Teilnehmer ab, sich mit diesen in einem künftigen Vertrag über die Rahmenbedingungen der Auktion zu einigen[19]. Das Auktionshaus handle als Empfangsvertreter aller Teilnehmer, gem. § 164 Abs. 3 BGB[20]. Die AGB fänden dann über § 242 BGB analog Anwendung[21]. Die Marktteilnehmer müssen also den Abschluss des Nutzungsvertrages nach Treu und Glauben mit Rücksicht auf die Verkehrssitte dahingehend verstehen, dass die AGB des Betreibers auch für die Teilnehmer untereinander gelten sollen[22].

Der Gedanke hinter der Auslösungslösung ist überzeugend. Da an einer Ebay-Auktion nur Personen teilnehmen, die zuvor einen Nutzungsvertrag mit Ebay abgeschlossen und den Ebay-AGB zugestimmt haben, kann jeder Auktionsteilnehmer davon ausgehen, dass auch sein Vertragspartner den Vertrag nach Maßgabe der Ebay-AGB schließen will[23].

bb) Reichweite des Sachlichkeitsgebotes

Mit den Ebay-AGB versuchen die Portalbetreiber die vertraglichen Schutzpflichten genauer zu definieren. Hierzu gehört das oben bereits genannte Gebot der Sachlichkeit. Da es sich hier um einen unbestimmten Rechtsbegriff handelt, ist eine Auslegung erforderlich.

(1) Rechtsprechung

In der Rechtsprechung[24] wird zum Teil die Auffassung vertreten, dass eine Verletzung des Gebots sachlicher Bewertungen schon dann vorliege, wenn Gründe für eine negative Bewertung nicht mitgeteilt geworden seien. Die andere Ansicht[25] hat dagegen die Unsachlichkeit erst dann bejaht, wenn eine bewusste Fehlbeurteilung vorgenommen würde oder die Bewertung als nicht mehr vertretbar oder indiskutabel erscheine. Das AG Koblenz hat jedoch in einer Entscheidung[26] die Grenze der Sachlichkeit höher berechnet und die Äußerung „*„Nie wieder! So was habe ich bei 500 Punkten nicht erwartet!! Rate ab!!“* als „sachlich“ im Sinne der Ebay-AGB eingestuft.

18 **Ulrich Burghard,** Online-Marktordnung und Inhaltskontrolle, WM 2001, 2102, 2105 ff; **Gerhard Spindler,** Vertragsabschluss und Inhaltskontrolle bei Internet Auktionen, ZIP 2001, 809, 812.

19 **Spindler,** ZIP 2001, 809, 812.

20 **Burgard,** WM 2001, 2102, 2107.

21 Vgl. **Spindler,** ZIP 2001, 809, 816.

22 **Burgard,** WM 2001, 2102, 2106.

23 **Karl-Nikolaus Peifer/ Tanja Dörre,** Übungen im Medienrecht, 2. Auflage, Berlin/Boston 2012, s. 155 f.

24 AG Erlangen, MMR 2004, 635, für eine Bewertung mit dem Inhalt „*Also ich und ein Freund würden hier ganz bestimmt nicht mehr kaufen, sorry!“*.

25 LG Saarbrücken, Urt. v. 9. 2. 2007 – 13 A S 46/06, BeckRS 2007, 03162.

26 AG Koblenz, MMR 2004, 638, 639.

(2) Literatur

In der Literatur[27] wird eher zur weiten Auslegung der Sachlichkeit zugestimmt. *Dörre/Kochmann*[28] gehen davon aus, dass die Bewertungen erst dann als unsachlich angesehen werden können, wenn sie komplett ohne erkennbaren Tatsachenbezug erfolgten. *Janal*[29] meint, es sei auch die Form der Äußerung zu beachten. Während nüchterne und zurückhaltende Bewertungen noch als sachlich anzuerkennen seien, könne scharfe und schonungslose Kritiken ggf. gegen das Sachlichkeitsgebot verstoßen.

(3) Stellungnahme

Strenge Anforderungen an die Sachlichkeit führen bei der Bewertenden Gefährdungen bezüglich der freien Äußerung ihrer Meinung. Außerdem ist jedem Nutzer klar, dass der Ebay-Bewertungsmechanismus von wirklicher Objektivität weit entfernt ist[30]. Dennoch nehmen die Mitglieder willkürlich auf dem Markt teil, übernehmen also bewusst das Risiko, auch mit negativen Kritiken zu konfrontieren[31]. Schließlich sollte man nicht missachten, dass auf Grund der beschränkten Länge der Kommentare, ist es nicht immer möglich, dass man seine Bewertungen begründet[32]. Aus diesen Gründen ist die Sachlichkeitsgrenze höher anzusetzen.

b) Rechtsfolgen

Der Betroffener kann nach §§ 280 Abs.1, 241 Abs. 2 in Verbindung mit § 249 Abs. 1 BGB ein Beseitigungsanspruch haben. Dies ist in der Praxis weitaus wichtigster Behelf des Betroffenen gegenüber Negativbewertende. Nach einer Entscheidung zur Beseitigung wird Ebay rechtsgültig dazu aufgefordert, die Bewertung zu entfernen[33].

Bei Vorliegen einer Wiederholungsgefahr, kann sich ein geltend gemachter Unterlassungsanspruch bereits aus § 280 Abs. 1 BGB ergeben[34], da die rechtmäßige Bewertung und Kommentarabgabe selbst eine Nebenleistungspflicht darstellt[35]. Die Rechtsfolgen des § 280 BGB sind also –über den Gesetzeswortlaut hinaus- auch auf Unterlassung gerichtet[36].

---

27 **Dörre/ Kochmann,** ZUM 2007, 30, 37; **Janal,** NJW 2006, 870, 872 f; **Jörg Petershagen,** Negativkommentare im Bewertungsportal von Internetauktionshäusern-Einstweilige Verfügung oder Hauptsacheverfahren, NJW 2008, 953, 954 f; **Thomas Hoeren/Ulrich Sieber,** Handbuch Multimedia-Recht, Rechtsfragen des elektronischen Rechtsverkehrs, Loseblattsammlung, München 2008, Teil: 15, Rn. 136.

28 **Dörre/ Kochmann**, ZUM 2007, 30, 37.

29 **Janal,** NJW 2006, 870, 873.

30 **Stephan Ernst,** Anmerkung zum AG Koblenz, MMR 2004, 640.

31 Vgl. **Petershagen,** NJW 2008, 953, 955.

32 Vgl. AG Koblenz, MMR 2004, 638, 639.

33 http://pages.Ebay.de/help/feedback/feedback-disputes.html.

34 OLG Hamburg, NJW 2005, 3003, 3004; LG Potsdam, Urteil vom 21.11.2008- 1 O 330/ 08; **Otto Palandt,** Kommentar zum Bürgerlichen Gesetzbuch, 68. Auflage, München 2009, § 280 Rn. 33.

35 **Palandt,** § 241 Rn. 4.

36 OLG Hamburg, NJW 2005, 3003, 3004.

Der Betroffene kann von dem Bewertenden in Verbindung mit § 249 ff. BGB auch den Schadenersatz verlangen. Dazu gehört auch der entgangene Gewinn im Sinne des § 252 S.2 Alt.1 BGB. Die Höhe des entgangenen Gewinns wird jedoch wegen der Ermittlungsschwierigkeiten durch das Gericht frei eingeschätzt, § 287 Abs.1 S.1 ZPO[37].

2. Deliktische Ansprüche

In den bisherigen Verfahren wurden §§ 823 Abs.1 und 2 sowie § 824 BGB als Anspruchsgrundlagen herangezogen[38]. Ein Anspruch gemäß § 826 BGB spielt eine untergeordnete Rolle.

a) Anspruch aus § 823 Abs. 1 BGB

Ein solcher Anspruch gegen eine als ungerechtfertigt empfundene Kritik könnte sich entweder auf das Allgemeine Persönlichkeitsrecht oder auf das Recht am eingerichteten und ausgeübten Gewerbebetrieb stützen. Beide sind als „sonstiges Recht" die über § 823 Abs.1 BGB geschützten Rechtsgüter anerkannt[39].

Im Fall eines Eingriffs in den Gewerbebetrieb muss der Eingriff sich unmittelbar auf den Betrieb beziehen[40]. Außerdem muss die Beeinträchtigung über eine bloße Belästigung oder sozialübliche Behinderung hinausgehen[41]. Dass jemand sich negativ über einen Gewerbetreibenden äußert, geht nicht über eine sozial übliche Behinderung hinaus[42]. Es ist daher schwierig anzunehmen, dass eine einzelne Bewertung den Gewerbebetrieb auf solche Weise beeinträchtigen kann[43].

Die Verletzung des Allgemeinen Persönlichkeitsrechts durch die negative Bewertung ist dagegen in der Praxis sehr relevant. Für die Erfolgsaussicht einer Klage ist jedoch eine umfassende Abwägung zwischen durch Art. 5 Abs.1 Satz 1 Alt.1 GG geschützte Meinungsfreiheit und Allgemeine Persönlichkeitsrecht erforderlich[44]. Der Grund dafür ist, dass das Allgemeine Persönlichkeitsrecht (wie das Recht am eingerichteten und ausgeübten Gewerbebetrieb) ein Rahmenrecht im Sinne des § 823 Abs. 1 BGB ist, und die Rechtswidrigkeit positiv und mit Hilfe einer umfassenden Interessen- und Güterabwägung festgestellt werden muss[45].

37 **Dörre/ Kochmann,** ZUM 2007, 30, 39.

38 OLG Oldenburg, MMR 2006, 556; LG Konstanz, NJW-RR, 1635, 1636; LG Arnsberg, Urteil v. 18.05.2005, Az. 3 S 22/05.

39 **Palandt,** § 823 Rn. 19 f.

40 BGHZ 29, 65, 69.

41 AG Nordhorn, Urteil vom 28.01.2009, Az.: 3 C 1308/08.

42 AG Koblenz, MMR 2004, 639.

43 **Dörre/Kochmann,** ZUM 2007, 30, 33.

44 Vgl. **Holger Greve/ Florian Schärdel,** Der digitale Pranger-Bewerbungsportale im Internet, MMR 2008, 644, 646.

45 **Karl-Nikolaus Peifer,** Schuldrecht – Gesetzliche Schuldverhältnisse, 1.Auflage, Baden-Baden 2005, § 3 Rn. 51.

aa) Grundsatz : Meinungsfreiheit

Das Grundrecht der Meinungsfreiheit gewährleistet jedermann das Recht, seine Meinung frei zu äußern. Der Schutz besteht unabhängig davon, ob die Äußerung rational oder emotional, begründet oder grundlos ist und ob sie von anderen für nützlich oder schädlich, wertvoll oder wertlos gehalten wird[46]. Dazu gehört also auch Kommentare, die im Rahmen einer Ebay Bewertung abgegeben werden.

Die Meinungsfreiheit umfasst grundsätzlich Tatsachenbehauptungen und Werturteile[47]. Tatsachenbehauptungen sind konkrete Zustände der Vergangenheit oder Gegenwart, die dem Beweis zugänglich sind[48]. Demgegenüber zeichnen sich Werturteile dadurch aus, dass sie bloße Meinungsäußerungen darstellen und einem Beweis unzugänglich sind[49]. Inwiefern diese von der Meinungsfreiheit geschützt wird, hängt davon ab, was genau die Aussage beinhaltet.

bb) Tatsachenbehauptungen

Unwahre Tatsachenbehauptungen werden grundsätzlich nicht vom Schutzbereich des Art. 5 Abs.1 Satz 1 Alt.1 GG umfasst[50]. Dieser Ansicht schließt sich auch das AG Eggenfelden[51] mit folgenden Wörtern an: *„ Das Grundrecht der Meinungsfreiheit i.S.v Art. 5 Abs.1 Satz 1 Alt.1 GG gibt der Bekl. Nicht die Befugnis, falsche Tatsachenbehauptungen in Bezug auf den Kl. Aufzustellen."* Das OLG Oldenburg[52] beurteilt die Bewertung: „*Bietet, nimmt nicht ab, schade, obwohl selber großer Verkäufer*" als unwahre Tatsachenbehauptung und spricht dem Käufer einen Anspruch auf Löschung zu, weil es festgestellt wurde, dass die gelieferte Ware mangelhaft war und der Verkäufer erklärt hat, dass er mit der Rückabwicklung einverstanden war.

Wenn jedoch die unwahren Tatsachen unbewusst geäußert werden, können sie in eingeschränktem Umfang unter den Schutz des Art. 5 Abs. 1 Satz 1 GG fallen, weil es sonst zu einer übermäßigen Hemmung der Kommunikation käme[53].

Wahre Tatsachenbehauptungen sind im Regelfall zulässig. Sie können aber rechtswidrig sein, wenn sie die Intimsphäre der Betroffenen berühren, es sei denn, ein Rechtsfertigungsgrund kommt in Betracht[54].

46 OLG Köln, Urteil vom 27.11.2007 - Az. 15 U 142/07.

47 **Palandt,** § 823 Rn. 101.

48 **Hoeren,** CR 2005, 498.

49 **Florian Schmitz/ Stefan Laun**, Die Haftung kommerzieller Meinungsportale im Internet, MMR 2005, 208, 209.

50 **Hoeren,** CR 2005, 498; **Hannes Ludyga,** Ansprüche gegen die Bewertung eines Anbieters einer Online-Auktion, DuD 2008, 277, 279; **Dörre/ Kochmann,** ZUM 2007, 30, 32.

51 AG Eggenfelden, MMR 2005, 132.

52 OLG Oldenburg, MMR 2006, 556; vgl. hier auch AG München Endurteil v. 23.9.2016 – 142 C 12436/16, BeckRS 2016, 121400.

53 **Georgios Gounalakis / Lars Rhode,** Persönlichkeitsschutz im Internet, 1. Auflage, München 2002, Rn. 243.

54 **Palandt,** § 823 Rn. 101a.

cc) Werturteile

Bei Werturteilen ist dem Zweck, Inhalt und der Form der Äußerung zu beachten. Die Grenze zur zulässigen Meinungsäußerung ist dann überschritten, wenn es sich um eine bloße Schmähkritik handelt[55]. Schmähkritik liegt dann vor, wenn nicht mehr die Sache im Vordergrund steht, sondern es nur noch um die Diffamierung, Herabwürdigung und Schädigung des Betroffenen geht[56]. In Betracht kommen für diese Fallgruppe vor allem beleidigende Bewertungen, die Schimpfworten erhalten und keinen erkennbaren Bezug zur Transaktion aufweisen[57]. Es ist jedoch bislang nicht ersichtlich, dass die Gerichte in einem Fall schmähkritische Ebay-Bewertungen bejaht haben. Der Grund liegt vermutlich darin, dass Ebay solche Äußerungen mit Hilfe einer Filtersoftware aufspürt und von sich aus entfernt[58].

Wenn die Grenze zur Schmähkritik überschritten wird oder eine Behauptung unwahrer Tatsachen vorliegt, stehen dem Betroffenen Unterlassungs- und Schadenersatzansprüche gegen den Verfasser zu[59].

dd) Beweislast

In der Praxis stellt sich hinsichtlich der Unwahrheit der Tatsache die Frage nach der Beweislast. Die Beweislast dafür, dass die in der Bewertung enthaltene Aussage wahr ist, trifft grundsätzlich den Bewertenden, also den Beklagten[60]. Das ergibt sich aus dem Rechtsgedanken in § 186 StGB, nach dem derjenige, welcher eine herabwürdigende Tatsachenbehauptung aufstellt, für deren Wahrheitsgehalt beweispflichtig ist[61]. Wenn allerdings der Beklagte ein berechtigtes Interesse an der Verbreitung der Tatsache hat, entfällt die Beweislastumkehr, so dass es dem Bewerteten obliegt, die Unwahrheit darzutun[62]. Die Frage nach ob der Bewertende das „berechtigte“ Interesse in Anspruch nehmen kann, wird in der Rechtsprechung verschieden gelöst.

Das AG Peine[63] hat ein solches Interesse mit der Begründung bejaht, dass die Bewertung als Grundlage für die Kaufentscheidung anderer diene. Der Bewertete wisse, dass er von seinem Vertragspartner öffentlich bewertet werde und er somit den Effekt einer positiven Bewertung als Werbung nutzte, so dass er auch die Auswirkungen negativer Bewertungen hinnehmen müsse. Dagegen urteilte LG

55 BVerfG, NJW 1983, 1415; BGH, NJW 1977, 626, 627; vgl. auch AG Aschaffenburg Endurteil v. 11.5.2015 – 116 C 89/15, BeckRS 2016, 6021.

56 **Schmitz/ Laun,** MMR 2005, 208, 209.

57 **Petershagen,** NJW 2008, 953, 954.

58 **Dörre/ Kochmann,** ZUM 2007, 30, 34 (Fn. 39).

59 **Schmitz/ Laun,** MMR 2005, 208, 209.

60 BGH, NJW 1996, 1131, 1133; BGH, NJW 1998, 3047, 3049.

61 **Janal,** NJW 2006, 870, 871.

62 BGH, NJW 1998, 3047, 3049.

63 AG Peine, NJW-RR 2005, 275.

Konstanz[64] ohne Begründung, dass das Beweislast bei Bewertende bleibe.

Die Auffassung des AG Peine erscheint plausibler. Das führt ebenfalls zu freier Bewertungsabgabe und verstärkt die Bewertungsintegrität.

b) Anspruch aus § 823 Abs. 2 BGB in Verbindung mit §§ 185 ff. StGB

Dieser Anspruch setzt voraus, dass das rechtswidrige und schuldhafte Verhalten des Bewertenden die Tatbestandsvoraussetzungen des jeweiligen Schutzgesetzes erfüllt. In Betracht kommt die unter der Überschrift „Beleidigung" zusammengefassten §§ 185, 186, 187 StGB als Schutzgesetze.

Diese Normen gewähren Schutz vor Beleidigung, übler Nachrede und Verleumdungen, die in Form eines rechtswidrigen Angriffes auf die Ehre einer anderen Person durch vorsätzliche Kundgabe ihrer Missachtung oder Nichtachtung erfolgen. Eine Bewertung bei Ebay stellt eine schriftliche und gegen einen Dritten gerichtete Äußerung dar. Während § 185 StGB herabsetzende Werturteile oder verletzende Tatsachenbehauptungen vorausgesetzt[65], erfordert § 186, 187 StGB nicht erweislich wahre oder unwahre Tatsachenbehauptungen[66].

Bloße Unhöflichkeit und Nachlässigkeit im Umgang mit anderen ist noch keine Missachtung im Sinne des § 185 StGB[67]. Dagegen können Formalbeleidigungen, Schmähkritiken, Zumutung strafbarer oder unsittlicher Handlungen eine Beleidigung gemäß § 185 StGB darstellen[68]. Die Abgrenzung ist nicht immer leicht zu treffen. Die Rechtswidrigkeit dieser Äußerungen ist wiederum durch eine umfassende Abwägung der Meinungsfreiheit mit dem Allgemeinen Persönlichkeitsrecht des Bewerteten zu ermitteln[69]. Insofern kann auf die Ausführungen im D.I.2.a) verwiesen werden.

c) Anspruch aus § 824 BGB

Eine Beeinträchtigung durch die negative Bewertung kann auch bei Vorliegen einer Kreditgefährdung gegeben sein. Die Norm bezweckt die Verhinderung von beruflichen und geschäftlichen Nachteilen durch unwahre Tatsachenbehauptungen[70]. Für die Verwirklichung von § 824 BGB ist eine unmittelbare Betroffenheit des Anbieters in seinen wirtschaftlichen Interessen durch die Bewertung ist erforderlich[71]. Unmittelbarkeit könnte sich durch unberechtigte Bewertung des Produktes eines

64 LG Konstanz, NJW-RR 2004, 1635, 1636.

65 **Thomas Fischer**, Kommentar zum Strafgesetzbuch (StGB), 56. Auflage, München 2009, § 185 Rn. 5.

66 **Fischer,** StGB, § 187 Rn. 2; **Gounalakis/Rhode,** Persönlichkeitsschutz im Internet, Rn. 107.

67 **Johannes Wessels / Michael Hettinger,** Strafrecht Besonderer Teil 1, 32. Auflage, Heidelberg 2008, Rn. 509.

68 **Wessels/ Hettinger,** Strafrecht BT 1, Rn. 508.

69 **Dörre/ Kochmann**, ZUM 2007, 30, 35.

70 Die Charakterisierung einer Tatsachenbehauptung wurde bereits unter IV.A.2.a) bb) erörtert, zur näheren Erläuterung siehe dort.

71 **Ludyga,** DuD 2008, 277, 278.

Gewerbetreibenden, des Mitarbeiterkreises oder Geschäftsmethoden ergeben[72]. Für Verwirklichung des § 824 BGB ist die fahrlässige Kenntnis der Unrichtigkeit der Tatsache ausreichend. Im Verhältnis zu § 823 Abs. 2 BGB in Verbindung mit 185 ff. StGB ist daher § 824 BGB der vorteilhaftere Anspruch[73]. Parallel zu § 185 ff. StGB ermöglicht auch diese Vorschrift den Ersatz reiner Vermögensschaden bei geschäftsschädigenden Äußerungen[74].

d) Anspruch aus § 826 BGB

Gemäß § 826 BGB ist derjenige schadensersatzpflichtig, der in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt. Ein solcher Schaden könnte durch sogenannten „Rache-Bewertungen" entstehen[75]. In der Praxis kann jedoch für den Betroffenen nicht immer leicht sein, seiner Beweislast nachzukommen, die er für den Tatvorsatz, die schädigende Handlung, den Schaden einschließlich des Zurechnungszusammenhangs und die die Sittenwidrigkeit begründenden Umstände trägt[76].

e) Rechtsfolge

Sofern die negative Bewertung einen rechtswidrigen Eingriff in die oben genannten Rechtsgüter des Bewerteten darstellt, kann dies nach §§ 823 Abs. 1, 2 sowie 824, 826 in Verbindung mit. § 1004 BGB (analog) einen Unterlassungs-und Beseitigungsanspruch begründen. Der Anspruch gemäß § 1004 Abs.1 BGB gilt unmittelbar nur für das Eigentum und kraft Gesetzes entsprechend für beschränkte Rechte, in analoger Anwendung von § 1004 Abs.1 BGB genießen die über §§ 823 ff. BGB geschützten Rechtsgüter aber einen quasinegatorischen und verschuldensunabhängigen Schutz, der ebenfalls zu Beseitigungs-und Unterlassungsansprüchen führen kann.[77] Der Unterlassungsanspruch setzt Wiederholungsgefahr voraus[78].

Bei rechtswidrigem und schuldhaftem Verhalten kann der Betroffene auch durch Naturalrestitution gem. §§ 823 Abs. 1, 2 sowie 824, 826 in Verbindung mit. § 249 Abs.1 BGB die Beseitigung des widerrechtlichen Zustands verlangen.

Auch der Schadensersatzanspruch kommt in Betracht. Dieser kann gemäß § 823 Abs. 1, 2 sowie 824, 826 BGB in Verbindung mit § 249 ff. BGB ersetzt verlangt werden. Soweit für die Verletzung den Ersatz der immateriellen Schadens verlangt

72 **Ludyga,** DuD 2008, 277, 278.

73 **Gounalakis/Rhode**, Persönlichkeitsschutz im Internet, Rn. 108.

74 Vgl. **Palandt,** § 824 Rn. 11.

75 Vgl. **Janal,** NJW 2006, 870, 873.

76 **Ludyga,** DuD 2008, 277, 280.

77 **Othmar Jauernig,** Kommentar zum Bürgerlichen Gesetzbuch, 13.Auflage, München 2009, § 1004 Rn. 2.

78 **Kropholler,** § 1004 Rn. 7.

wird, ist allein § 823 Abs.1, 2 und 824, 826 BGB in Verbindung mit Art. 1 Abs. 1, 2 Abs. 1 GG unter Ausschluss des § 253 Abs.2 BGB anwendbar[79].

3. Wettbewerbsrechtliche Ansprüche

Unternehmerische Auktionsteilnehmern können auch durch Ansprüche aus § 8 UWG in Verbindung mit §§ 3, 4 Nr. 3, Nr.7, Nr. 8 UWG nach Beseitigung oder Unterlassung verlangen. Erforderlich ist eine gezielte Negativbewertung zwecks Geschäftsschädigung sowie positive Eigenwerbung[80]. Da aber die Bewertungen in der Regel nicht zu diesen Zwecken getätigt werden, kommt die UWG Vorschriften in der Regel als Anspruchsgrundlage nicht in Betracht[81].

B. Ansprüche gegen Ebay

Ebay hat in seinem Grundsatz zur Entfernung von Bewertungen[82] festgeschrieben, dass der Bewertungskommentar von Ebay entfernt wird, wenn es vulgäre, obszöne, rassistische, nicht jugendfreie oder im strafrechtlichen Sinne beleidigende Bemerkungen enthält.

Grundsätzlich ist es also denkbar, Beseitigungs- und Unterlassungsansprüche gegen Ebay geltend zu machen, wenn er seinen Aufgaben nicht nachkommt. Als Anspruchsgrundlagen kommen sowohl außervertragliche Unterlassungsansprüchen nach § 823 ff., 1004 BGB, wie auch Ansprüche aus vertraglichen Schutzpflichten in Betracht[83], da Ebay und Mitglieder sich auf Basis des Rahmenvertrags über die Nutzung des Bewertungsportals zur gegenseitigen Rücksichtname gemäß § 242 BGB verpflichtet sind[84]. Diese Ansprüche sind, wie oben beschrieben wurden, zu prüfen.

Fraglich ist, ob Ebay auch für die anderen unzulässigen Bewertungen verantwortlich ist. Die Rechtsprechung[85] knüpft den Unterlassungsanspruch gegenüber einem mittelbaren Störer an die zusätzliche Voraussetzung dass, dieser seinen Prüfungspflichten verletzt hat. In § 7 Abs. 1 von Ebay-AGB liegt dagegen vor, dass die Bewertungen von Ebay nicht überprüft werden und unzutreffend oder irreführend sein können. Da Ebay in seinem Grundsatz zumindest für offensichtlich beleidigende Äußerungen selbst eine Löschung veranlasst, ist § 7 Abs. 1 Ebay-AGB von einem großen Teil der Literatur[86] zu Recht nicht als überraschend oder

79 **Palandt,** § 253 Rn. 10.

80 **Dörre/ Kochmann,** ZUM 2007, Fn. 16.

81 **Bücher,** GRUR 2017, 433, 436; vgl. auch **Schmitz/ Laun,** MMR 2005, 208.

82 http://pages.Ebay.de/help/policies/feedback-removal.html.

83 **Ruth Janal,** *Abwehransprüche im elektronischen Markt der Meinungen*, CR 2005, 873, 874; **Petershagen,** NJW 2008, 953, 956.

84 **Janal,** NJW 2006, 870, 873.

85 BGH, MMR 2001, 671, 673; BGH, GRUR 1997, 313, 315 f.

86 Vgl. **Janal,** CR 2005, 873, 874; **Petershagen,** NJW 2008, 953, 956; vgl. **Schmitz/ Laun,** MMR 2005, 208, 212.

unangemessen benachteiligend gesehen, so dass die Klausel einer Kontrolle anhand der § 307, 309 Nr. 7 lit. b BGB standhält.

Folglich ist Ebay nicht zu einer detaillierten Überprüfung der Bewertungen, sondern lediglich zur Sperrung offensichtlicher Beleidigungen und der Verletzungen der Intimsphäre verpflichtet. Schadenersatzpflichten trifft Ebay gemäß § 10 TMG[87] nicht, sofern Ebay keine tatsächliche Kenntnis von der rechtswidrigen Handlung hat[88].

V. ERGEBNISSE AUS SICHT DES TÜRKISCHEN RECHTS

Durch Auktionen Online-Verkauf bietende Webseiten sind auch in der Türkei verfügbar. Ebay ist in der Türkei unter die Webadresse „www.gittigidiyor.com" (Im Folgenden: *GittiGidiyor*) tätig. Welche Sanktionen gegen die negative und gesetzwidrige Kommentare der Nutzer diese Webseiten zu verhängen sind, wurde allerdings bislang in der türkischen Rechtsprechung und Literatur noch nicht diskutiert. Dieses Thema wird im Folgenden im Rahmen des Vertragsrechts, des Lauterkeitsrechts und der Bestimmungen des türkischen Zivilgesetzbuchs (TMK) über Persönlichkeitsschutz gesondert behandelt.

A. Vertragsrechtliche Haftung

Es ist möglich, die aus Vertragsbeziehung resultierende Haftung im Hinblick auf (1) die Beziehung zwischen Nutzer (Käufer, Kommentierende) und Internetserviceanbieter sowie (2) die Beziehung zwischen Verkäufer und Käufer (Kommentierende) zu behandeln.

Die Beziehung zwischen Nutzer (Käufer, Kommentierende) und Internetserviceanbieter (hier: das Auktionshaus „*GittiGidiyor*") wird durch den zwischen den Parteien abgeschlossene Nutzungsvertrag gebildet[89]. Obwohl das Auktionshaus den Missbrauch von Nutzerkommentare im Vertrag nicht explizit geregelt hat, wird unter Art. 15 des Nutzungsvertrages dargelegt, dass Nutzer die in der Internetseite veröffentlichten Bestimmungen und Prinzipien als einen Bestandteil dieses Vertrags annehmen müssen, so dass die in der Webseite festgelegten Bestimmungen darüber, wie die Kommentare gemacht werden müssen als untrennbarer Bestandteil des Vertrages gelten[90]. Die wichtigste der bei der Kommentarabgabe zu berücksichtigenden Punkte, sind in der Webseite wie folgt bestimmt[91]:

87 Telemediengesetz vom 26. Februar 2007 (BGBl. I S. 179), das Gesetz ist an die Stelle des Teledienstgesetz und des Medienstaatsvertrags getreten und enthält Vorschriften zur Verantwortlichkeit von Dienstanbietern.

88 Vgl. **Olaf Meyer,** Haftung der Internet-Auktionshäuser für Bewertungsportale, NJW 2004, 3151, 3153 der Verfasser besagt, diese Haftungsprivilegierung erfasse nicht vertragliche Ansprüche des Betroffenen gegen das Aktionshaus.

89 Zur rechtlichen Einordnung des Vertrags zwischen Nutzer (Käufer) und Internetserviceanbieter siehe **Zarife Şenocak,** İnternette Kurulan Açık Artırma ile Satım Sözleşmesi, http://dergiler.ankara.edu.tr/dergiler/38/289/2635.pdf, (zuletzt besucht: 09/05/2017).

90 http://yardim.gittigidiyor.com/sozlesmeler-kurallar/kullanici-sozlesmesi.

91 http://yardim.gittigidiyor.com/satici-rehberi/puan-ve-yorum.

„Die vergebenen Bewertungspunkte und Kommentare dürfen nachher durch die Nutzer nicht geändert oder gelöscht werden. Alle gemachten Kommentare werden von GittiGidiyor in einer für alle Nutzer zugänglichen Weise gespeichert. Die Nutzer haften für ihre Kommentare aus jeglichen Rechtsgründen.

Unten beschriebene Kommentare dürfen -weil diese als Missbrauch des Kommentierungsrechts gelten- gelöscht werden. Sonstige, nicht unter diese Bestimmung fallende Kommentare können dagegen nicht gelöscht werden.

1. Wenn bei dem Auktionshaus „GittiGidiyor" eine Gerichtsentscheidung eingereicht wird, die zeigt, dass der Kommentar, der den Klagegrund darstellt, verleumderisch, verunglimpfend, ehrverletzend und gesetzwidrig ist.

2. Schimpf- bzw. unsittliche Wörter und rassistische Ausdrücke beinhaltende Kommentare

3. Persönliche Angaben, Telefon, e-Mailadresse, Link und Script usw. beinhaltende Kommentare (soweit diese für alle GittiGidiyor-Besucher nicht zugänglich sind)

Bei Nichteinhaltung dieser Regeln droht außerdem den Kommentierende bzw. den Käufer die Vertragssanktion, dass der Mitgliedschafts- bzw. der Nutzungsvertrag durch das Auktionshaus gekündigt wird. Darüber hinaus wird im Nutzungsvertrag vorgesehen, dass die Nutzer verpflichtet sind, für den Schaden zu entschädigen, den das Auktionshaus wegen rechtswidriger Kommentare erlitten hat[92].

Die Beziehung zwischen den Parteien der Auktionstransaktion bildet dagegen ein Kaufvertrag. Obwohl die im Nutzungsvertrag vorgesehene „rechtsmäßige Kommentierungspflicht" nicht eine direkte und primäre Leistungspflicht des Schuldners dieses Kaufvertrags ist, kann dies -wie beim deutschen Recht- als eine Nebenpflichtleistung des Vertrages betrachtet werden. Auch in der Türkei müssen Verträge nach Treu und Glauben ausgelegt werden. So wird im Art. 2 TMK (Das Türkische Zivilgesetzbuch) bestimmt, dass jeder bei der Ausübung seiner Rechte und Erfüllung seiner Pflichten ehrlich verhalten muss. Das Vermeiden von rechtswidrigen Kommentaren kann durchaus als eine aus Treu und Glauben abgeleitete Nebenpflichtleistung des Schuldners des Kaufvertrags zu sehen.

Außerdem können nach Treu und Glauben auch nachvertragliche Pflichten (culpa post pactum perfectum) zu einer rechtsmäßige Kommentierungspflicht führen[93]. Es wurde in der Literatur angenommen, dass nach

92 Siehe Art. 12 und 13 des Nutzungsvertrags, http://yardim.gittigidiyor.com/sozlesmeler-kurallar/kullanici-sozlesmesi.

93 In einigen Webseiten können Nutzer auch ohne Beteiligung der Transaktion über die Kaufsache bzw. über den Käufer kommentieren. Eben in dieser Phase ist der Nutzer verpflichtet, nach Grundsatz von Treu und Glauben zu handeln. Im Falle von Missbrauch des Kommentierungsrechtes ist der Nutzer –auch wenn er keine Absicht zur Vertragsschließung hat- verantwortlich gemäß des Grundsatz „culpa in contrahendo" (**Huriye Reyhan Demircioğlu**, Culpa in Contrahendo Sorumluluğu, Dissertation, Ankara 2007, s. 225 ff.)

Beendung eines Vertragsverhältnis, einige schuldhafte Fehlverhalten der Parteien dem Leistungsstörungsrecht und nicht dem Deliktsrecht zu unterwerfen ist[94]. Es liegt nah, auch das Verhalten eines Nutzers (Käufers), der nach Ablauf des Vertrages über die Kaufsache oder den Verkäufer rechtswidrig kommentiert, als ein typisches Beispiel von "Culpa post pactum perfectum" zu betrachten.

Folglich ist anzunehmen, dass ein Nutzer, der über die Kaufsache oder den Verkäufer wahrheitswidrig, herabsetzend oder ungerecht kommentiert, seine Pflichten aus dem Vertrag verletzt. Gemäß die Bestimmungen des türkischen Obligationsgesetzes (Art. 112 ff. TBK) ist er verpflichtet, die durch den negativen Kommentar dem Verkäufer entstandenen Schaden zu entschädigen.

B. Haftung im Rahmen des Lauterkeitsrechts

„Unlauterkeit" als eine spezielle Art von „Delikt" wird in Art. 57 TBK und Art. 54 ff. TTK geregelt. Für die nicht kommerziellen Handlungen wird die Vorschrift des Art. 57 TBK und im Falle einer geschäftlichen Handlung wird Art. 54 ff. TTK angewendet[95].

Wenn der Nutzer bezüglich eines nicht als Händler einzustufenden und ohne gewerblichen Zweck Waren im Auktionshaus anbietenden Verkäufers oder im Bezug auf von ihm angebotenen Waren negative und rechtwidrige Kommentare abgibt, dann kann der Verkäufer gemäß Art. 56 TBK das Löschen des betreffenden Kommentars und –soweit der Nutzer schuldhaft verhandelt hat- einen Schadenersatz fordern.

Wenn dagegen der Verkäufer zugleich ein Gewerbetreibender ist und er die Kaufsache zu gewerblichen Zwecken anbietet, dann greifen im Fall einer Abgabe rechtswidrigen Kommentare durch den Käufer die Vorschriften des Art. 54 TTK ein. Dabei spielt es keine Rolle, ob auch der Käufer zugleich ein Händler ist und ob er unter gewerblichen Zwecken handelt. Im Rahmen dieser Vorschriften genügt es, dass der abgegebenen Kommentar unlauter ist und gegen das Gebot von Treu und Glauben verstößt. Dabei kann der Kommentar des Käufers eine der im Rahmen der Art. 55 TTK speziell geregelte Unlauterkeitstatbestände darstellen. Wenn beispielsweise der Käufer in der Weise kommentiert, dass er den Verkäufer durch unrichtige, irreführende oder unnötig verletzende Äußerungen herabsetzt, dann tritt der Spezieltatbestand des Art. 55/1a1 TTK in Anwendung[96].

Im Falle einer Unlauterkeit hat der Verkäufer die Befugnis, von im Art. 56 ff. TTK geregelten Klage- und Forderungsrecht Gebrauch zu machen. Dies umfasst die

94 **Kemal Oğuzman / Turgut Öz,** Borçlar Hukuku – Genel Hükümler, Cillt 1, İstanbul 2015, s. 38.

95 Vgl. hierzu die Auffassung in **Füsun Nomer Ertan,** Haksız Rekabet Hukuku, İstanbul 2016, s. 30 f, wonach die unter türkischem Handelsgesetz geregelten Bestimmungen über Unlauterkeit auch für die nicht geschäftlichen Handlungen angewendet werden können, so dass es kein Bedarf bestehe, dass Art. 56 TBK weiter in Anwendung sei.

96 Dass eine Herabsetzung bzw. Verunglimpfung auch durch persönliche Kommentare im Internet gemacht werden können und zur Anwendungsbeispiele siehe **Nomer Ertan,** s. 132 f.

Feststellungs-, Unterlassungs-, Beseitigungsansprüche sowie Ansprüche auf materielle und immaterielle Entschädigung[97]. Diese Ansprüche können zudem auch gegen das Auktionshaus „*GittiGidiyor*" gerichtet werden, falls das Auktionshaus die Angaben über die negativ kommentierende Person nicht mitteilt oder die Identität dieser Person nicht festgestellt werden kann oder wenn keine Verklagungsmöglichkeit des Käufers bzw. des Kommentierende vor den türkischen Gerichtshöfen besteht (Art. 58/1 TTK).

C. Haftung gemäß türkischem Zivilgesetzbuch

Der Art. 24 TMK bestimmt, dass jeder Angriff auf die Persönlichkeit rechtswidrig ist, es sei denn, es ist gerechtfertigt, weil der Angriff mit der Zustimmung der verletzten Person oder aufgrund höherer privaten und öffentlichen Interessen geschieht oder auf gesetzlicher Befugnissen beruht. Abweichend von den Bestimmungen des Lauterkeitsrecht ist aber hier von der Schutzmöglichkeit nur direkt und ausschließlich auf die Persönlichkeit gerichtete Handlungen erfasst, so dass Angriffe, welche einen Verstoß gegen die Eigentums- und Vermögensrechte darstellen nur unter Bestimmungen des Lauterkeitsrecht zu bewerten sind[98].

Folglich ist der Art. 24 TMK eine der in Betracht kommenden Anspruchsgrundlagen für einen Person, dessen Persönlichkeitsrechte durch die negativen und rechtswidrigen Kommentare eines Nutzers beeinträchtigt wurden. Auch hier ist aber wie beim deutschen Recht zu beachten, dass eine Abwägung zwischen der Meinungsfreiheit im Sinne des Art. 26 der türkischen Verfassung und dem Persönlichkeitsrecht in jedem konkreten Fall notwendig ist. Sollte die Meinungsäußerungsfreiheit gegenüber dem Persönlichkeitsrecht überwiegen, findet die Bestimmung des Art. 24 TMK keine Anwendung.

VI. FAZIT

Wegen des möglichen Missbrauchs der Ebay-Bewertungen kann der Betroffene sowohl den Verfasser des negativen Kommentars als auch Ebay in Anspruch nehmen, wobei der zweite Weg- da Ebay seine Prüfungspflichten durch seine AGB in zulässiger Weise beschränkt hat- nicht ratsam ist. Das in den AGB der Portalbetreiber enthaltene Sachlichkeitsgebot ist bei der Prüfung vertragsrechtlicher Ansprüche zwischen den Beteiligten mit einzubeziehen und die Grenze des Sachlichkeitsgebot ist weit auszulegen. Im Übrigen ist die Annahme einer unzulässigen Rechtsgutverletzung davon abhängig, ob es sich bei dem abgegebenen Kommentar um eine Tatsachenbehauptung

97 Da die Nutzerkommentare einen großen Einfluss auf die Kaufentscheidung anderer Kunden haben, ist es für Unternehmen wichtig, gegen negative Bewertungen vorzugehen (Für eine detaillierte Studie über den Einfluss von Benutzerkommentare auf Kaufentscheidung siehe **M. Emin AKKILIÇ / Volkan ÖZBEK,** İnternet Üzerinden Yapılan Alışverişlerde Ürüne Yönelik Yorumların Tüketici Satın Alma Kararı Üzerindeki Etkisi, http://www.pazarlama.org.tr/dergi/yonetim/icerik/makaleler/37-published.pdf, (zuletzt besucht am 09/05/2017).

98 Siehe **Nomer Ertan**, s. 146-147 (Es ist der Auffassung der Autorin zuzustimmen, dass es sowohl ein Verstoß gegen die Persönlichkeitsrecht als auch eine Unlauterkeit darstellt, wenn ein Nutzer durch seinen Kommentar unrichtiger Weise behauptet, dass jemand eine Zahlungsschwäche hat oder gefälschte Produkte anbietet.)

oder ein Werturteil handelt. Während Werturteile bis zu Grenze der Schmähkritik und Beleidigung durch die Meinungsfreiheit aus Art.5 GG und Art. 26 der türkischen Verfassung grundsätzlich geschützt werden, stehen falsche Tatsachenbehauptungen in der Regel nicht unter Schutz des Grundgesetzes.

ABKÜRZUNGEN

a.A./A.A.:	anderer Ansicht
a.F.:	alte Fassung
Abs.:	Absatz
AGB:	Allgemeine Geschäftsbedingungen
Alt.:	Alternative
Art.:	Artikel
Az.:	Aktienzeichen
BeckRS:	Beck online Rechtsprechung
BGB:	Bürgerliches Gesetzbuch
BGBl.:	Bundesgesetzblatt
BGH:	Bundesgerichtshof
BGHZ:	Entscheidungen des Bundesgerichtshofs in Zivilsachen
bspw.:	beispielsweise
BVerfG:	Bundesverfassungsgericht
bzgl.:	bezüglich
bzw.:	beziehungsweise
CR:	Computer und Recht (Zeitschrift)
d.h.:	das heißt
DuD:	Datenschutz und Datensicherheit (Zeitschrift)
EuGH:	Europäischer Gerichtshof

f./ff.:	folgende/fortfolgende
Fn.:	Fußnote
FS:	Festschrift
GG:	Grundgesetz
ggf.:	gegebenenfalls
GRUR:	Gewerblicher Rechtsschutz und Urheberrecht (Zeitschrift)
h.L.:	herrschende Lehre
h.M.:	herrschende Meinung
Hrsg.:	Herausgeber
i.d.R.:	in der Regel
i.R.d.:	im Rahmen der/des
i.R.v:	im Rahmen von
i.S.d.:	im Sinne der/des
i.S.v.:	im Sinne von
i.V.m.:	in Verbindung mit
JuS:	Juristische Schulung (Zeitschrift)
K&R:	Kommunikation und Recht (Zeitschrift)
LG:	Landgericht
lit.:	littera
MMR:	MultiMedia und Recht (Zeitschrift)
NJW:	Neue Juristische Wochenschrift (Zeitschrift)
NJW-RR:	Neue Juristische Wochenschrift, Rechtsprechungsreport (Zeitschrift)
Nr.:	Nummer
OLG:	Oberlandesgericht
Rn.:	Randnummer

S.:	Strafgesetzbuch
sog.:	sogenannte
StGB:	Seite(n), Satz
TBK:	Türk Borçlar Kanunu
TMG:	Telemediengesetz
TTK:	Türk Ticaret Kanunu
u.a.:	unter anderem
UWG:	Gesetz gegen den unlauteren Wettbewerb
WM:	Wertpapier-Mitteilungen (Zeitschrift)
WRP:	Wettbewerb in Recht und Praxis (Zeitschrift)
ZIP	Zeitschrift für Wirschaftsrecht
z.B.:	zum Beispiel
ZPO:	Zivilprozessordnung
ZUM:	Zeitschrift für Urheber- und Medienrecht

LITERATURVERZEICHNIS

Akkiliç, M. Emin / Özbek, Volkan: İnternet Üzerinden Yapılan Alışverişlerde Ürüne Yönelik Yorumların Tüketici Satın Alma Kararı Üzerindeki Etkisi, http://www.pazarlama.org.tr/dergi/yonetim/icerik/makaleler/37-published.pdf.

Burghard, Ulrich: Online-Marktordnung und Inhaltskontrolle, WM 2001, 2102-2113.

Bücher, Wolfgang: Soziale Medien, Bewertungsplattformen & Co, GRUR 2017, 433-441.

Demircioğlu, Huriye Reyhan: Culpa in Contrahendo Sorumluluğu, Dissertation, Ankara 2007.

Deutsch, Andreas: Vertragsschluss bei Internetauktionen- Probleme und Streitstände, MMR 2004, 586-589.

Dörre, Tanja/ Kochmann, Kai*:* Zivilrechtlicher Schutz gegen negativen E-BAY Bewertungen, ZUM 2007, 30-40.

Ernst, Stephan: Anmerkung zum AG Koblenz, MMR 2004, 640.

Ertan, Füsun Nomer: Haksız Rekabet Hukuku, 1. Baskı, İstanbul 2016.

Fischer, Thomas*:* Kommentar zum Strafgesetzbuch, 56. Auflage, München 2009.

Gounalakis, Georgios/Rhode, Lars: Persönlichkeitsschutz im Internet, 1.Auflage, München 2002.

Greve, Holger/Schärdel, Florian: Der digitale Pranger-Bewerbungsportale im Internet, MMR 2008, 644-650.

Hoeren, Thomas*:* Bewertungen bei Ebay, CR 2005, 498-502.

Hoeren,Thomas/ Sieber, Ulrich (Hrsg.): Handbuch Multimedia-Recht, Rechtsfragen des elektronischen Rechtsverkehrs, Loseblattsammlung, München 2008 .

Janal, Ruth: Abwehransprüche im elektronischen Markt der Meinungen, CR 2005, 873-878.

Janal, Ruth: Profilbildende Maßnahmen: Möglichkeiten der Unterbindung virtueller Mund-zu-Mund-Propaganda, NJW 2006, 870-874.

Jauernig, Othmar: Kommentar zum Bürgerlichen Gesetzbuch, 13.Auflage, München 2009.

Koch, Robert: Geltungsbereich von Internet-Auktionsbedingungen, CR 2005, 502-505.

Ludyga, Hannes: Ansprüche gegen die Bewertung eines Anbieters einer Online-Auktion, DuD 2008, 277-280.

Meyer, Olaf: Haftung der Internet-Auktionshäuser für Bewertungsportale, NJW 2004, 3151-3154.

Palandt, Otto: Kommentar zum Bürgerlichen Gesetzbuch, 68. Auflage, München 2009.

Peifer, Karl-Nikolaus: Schuldrecht – Gesetzliche Schuldverhältnisse, 1.Auflage, Baden-Baden 2005.

Peifer, Karl-Nikolaus / Dörre, Tanja: Übungen im Medienrecht, 2. Auflage., Berlin/Boston 2012.

Petershagen, Jörg*:* Negativkommentare im Bewertungsportal von Internetauktionshäusern-Einstweilige Verfügung oder Hauptsacheverfahren, NJW 2008, 953-958.

Oğuzman, Kemal / Öz, Turgut: Borçlar Hukuku – Genel Hükümler, 13. Baskı, İstanbul 2015.

Rüfner, Thomas: Virtuelle Marktordnungen und das AGB-Gesetz, MMR 2000, 597-602.

Schmitz, Florian/Laun, Stefan*:* Die Haftung kommerzieller Meinungsportale im Internet, MMR 2005, 208-213.

Spindler, Gerhard*:* Vertragsabschluss und Inhaltskontrolle bei Internet Auktionen, ZIP 2001, 809-819.

Şenocak, Zarife: İnternette Kurulan Açık Artırma ile Satım Sözleşmesi, http://dergiler.ankara.edu.tr/dergiler/38/289/2635.pdf.

Ulrich, Bernhard: Die enttäuschende Internetauktion- LG Münster, MMR 2000, 947-951.

Wessels, Johannes/ Hettinger, Michael: Strafrecht Besonderer Teil 1, 32. Auflage, Heidelberg 2008.

Wiebe, Andreas: Vertragsschluss bei Online-Auktionen, MMR 2000, 323-329.

Sonstige Internetquellen:

www.ebay.de

www.gittigidiyor.com

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 189–215

DOI: 10.26650/annales.2017, *49*(66).0008

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Ship Mortgage vs. Maritime Lien What Are The Changes In Favour Of The Mortgagee Under Turkish Law?

Assist. Prof. Dr. Kübra Yetiş Şamlı[1]

Abstract

The new Turkish Commercial Code (TCC), adopted on 13.1.2011 under Nr. 6102 and entered into force on 1.7.2012, contains a great number of necessary changes in maritime law, which may be considered as an extensive, long-awaited reform in this area of law. Maritime lien is one of the fields in which essential changes were made. Through this reform, the position of the mortgagee against the holder of the maritime lien has been redesigned. The subject of this paper is these changes redesigning the position of the ship mortgagee and reregulating the legal concept of maritime lien. Firstly, the basic rules of TCC regarding ship mortgage and maritime lien are summarized. After that, the changes are highlighted and their practical and concrete outcomes are studied. Lastly, it is examined whether this reform is sufficient to correspond with the recent developments in this area of law.

Keywords

Turkish Commercial Code Nr. 6102 • Maritime Law • Reform In Maritime Law • Ship Mortgage • Maritime Lien • Changes İn Favour Of The Ship Mortgagee • Reregulation Of The Concept Of Maritime Lien

Özet

13.1.2011 tarihinde kabul edilen ve 1.7.2012 tarihinde yürürlüğe giren 6102 sayılı Türk Ticaret Kanunu (TTK), deniz ticareti hukukuna ilişkin çok sayıda önemli değişiklik içermektedir. Bu değişiklikler, uzun süredir ihtiyaç duyulan, kapsamlı bir reform olarak değerlendirilebilir. Esaslı değişikliklerin söz konusu olduğu alanlardan biri de gemi alacaklısı hakkıdır. Bu reform ile gemi üzerinde ipotek hakkına sahip olan kişinin gemi alacaklısı hakkı sahibi karşısındaki konumu yeniden şekillendirilmiştir.

Çalışmanın konusu, gemi üzerinde ipotek hakkına sahip olan kişinin konumunu yeniden biçimlendiren ve gemi alacaklısı hakkını yeniden düzenleyen bu değişikliklerdir. Çalışmada öncelikle 6102 sayılı TTK'nın gemi ipoteğine ve gemi alacaklısı hakkına ilişkin temel hükümleri ele alınmıştır. Daha sonra getirilen değişiklikler vurgulanmış ve bunların uygulamadaki somut sonuçları üzerinde durulmuştur. Son olarak, bu alandaki reformun güncel gelişmelerle uyum sağlanması bakımından yeterli olup olmadığı değerlendirilmeye çalışılmıştır.

Anahtar Kelimeler

6102 Sayılı Türk Ticaret Kanunu, Deniz Ticareti Hukuku, Deniz Ticareti Hukukunda Reform, Gemi Ipoteği, Gemi Alacaklısı Hakkı, Gemi Üzerinde Ipotek Hakkına Sahip Kişi Lehine Getirilen Yenilikler, Gemi Alacaklısı Hakkının Yeniden Düzenlenmesi.

1 **Corresponding Author:** Kubra Yetis Samli (Asst. Prof. Dr), Istanbul University, Departmentof Maritime Law, Istanbul, Turkey.
Email: yetissam@istanbul.edu.tr

To cite this article: Yetis Samli, Kubra: "Ship Mortgage Vs. Maritime Lien What Are The Changes In Favour Of The Mortgagee Under Turkish Law?'', Annales de la Faculté de Droit d'Istanbul, 49(66), 2017, p.189-215. https://dx.doi.org/10.26650/annales.2017.49.66.0008

Introduction

Modern ships, whether bulk cargo ships, container ships, tankers or cruise ships, are high value assets, the construction or purchasing of which requiring a significant amount of liquid assets which is derived from both equity capital and debt capital in the shipping industry[2]. Debt capital associates with bank loans[3], which is the primary means of ship financing[4]. The ship mortgage is a common, preferred and therefore typical security for a loan granted for the financing of construction or purchasing of a ship[5]. Taking into consideration its role in ship financing, the importance of the value of ship mortgage as a credit tool becomes rather obvious. Germany, being aware of this importance almost 100 years ago, has enacted a statute[6] in 1933, which is the legal basis of special banks supplying loan for ship financing secured by a mortgage on the ship. This legislative move was intended to increase the trading volume and to boost the ship financing market[7].

In Turkey, particularly after 1980's, purchasing of ships from abroad by means of obtaining loan from foreign banks secured by a mortgage on ship became a common practice. Yet maritime lien, which is an ancient, global maritime concept having its roots in Roman law[8], is mostly considered as diminishing the value of the ship

2 For information regarding the main groups of sources in the financial markets covering the financial needs of the shipowners, see **Stefan Otto / Thilo Scholl,** "Legal Treatment of Ship Finance Loans: Analysis of the Ship Loan Contract", HSBA Handbook on Ship Finance, 2015, pp. 56-58; **Aslıhan Sevinç Kuyucu**, Gemi Finansmanı Sözleşmeleri, İstanbul 2016, pp. 7-17. For historical development of ship financing, see **Sevinç Kuyucu**, pp. 17-24. During the years of 2005-2007, a total amount of roughly 6,5 to 8 billion Euros per year was placed in new vessels in Germany. Out of this amount of funds, more than one third represented equity capital. On the other hand, approximately 5 billion Euros represented debt capital. See **Christoph Zarth,** "Ship Finance and Ship Mortgages", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 66. For effects of credit crisis and recession after 2008 on ship financing industry and for transition of the financing model, see **Otto / Scholl,** pp. 56, 57; **Sevinç Kuyucu**, pp. 23-24.

3 Bottomry, which may be deemed as the medieval alternative of the bank loan, is not a frequently preferred credit tool anymore. For information regarding the development of bottomry, see **S. Didem Algantürk,** "Türk Hukukunda ve İngiliz Hukukunda Gemi İpoteğinin Tesisine İlişkin Özellikler", İstanbul Barosu Dergisi, Vol. 73 Nr. 4-5-6 1999, p. 657 et seq.

4 For the reason and for special features distinguishing ship financing contracts as a bank loan agreement from credit contracts in general, see **Sevinç Kuyucu**, pp. 5-6.

5 See **Zarth,** p. 67; **Kemal Omağ,** "Gemi İpoteği ve Sigorta Tazminatı", Prof. Dr. Turhan Esener I. İş Hukuku Uluslararası Kongresi, İstanbul 2016, p. 352 et seq.; **Sevinç Kuyucu**, p. 140. It has to be added that there is an alternative to mortgage in German law, which is described as a much more subtle and flexible instrument for security purposes, namely land charge ("Grundschuld"). However, land charge is not available for registered ships. A market practice has been developed to eliminate this disadvantage by means of an additional contract, namely "abstract promise" which leads to satisfy flexibility and efficiency needed by the financing industry. For more information on this issue, see **Zarth,** pp. 69-71.

6 Gesetz über Schiffspfandbriefbanken (14.8.1933), RGBl. 1933 I, p. 583.

7 See **Kerim Atamer,** "Gemi İpoteği Hükümlerinin Yasama Tarihçesi, Kaynakları ve Bazı Uyum Sorunları", Prof. Dr. Rona Serozan'a Armağan, Vol. I, İstanbul 2010, pp. 261, 263.

8 **Kerim Atamer,** Gemi ve Uçak İpoteğinin Hukuksal Temelleri, İstanbul 2012, pp. 14-18; **M. Barış Günay**, Türk ve Anglo-Amerikan Hukukunda Gemi Alacaklısı Hakkı, Ankara 2009, p. 33 et seq.; **M. Barış Günay,** "Türk, İngiliz ve Amerikan Hukukunda Gemi Alacaklısı Hakkının Tarihçesi", Prof. Dr. Hüseyin Ülgen'e Armağan, Vol. I, İstanbul 2007, p. 928 et seq., p. 943; **Kerim Atamer / Duygu Damar / Feyzi Erçin / Dolunay Özbek / Burcu Çelikçapa Bilgin / Dilek Bektaşoğlu Şanlı / M. Barış Günay / Ecehan Yeşilova Aras / Cüneyt Süzel / Kübra Yetiş Şamlı,** Transport Law in Turkey, 2. edition, The Netherlands 2016, pp. 68-69; **Kerim Atamer,** "Gemi ve Yük Alacaklısı Haklarının Kullanılmasında Yargılama Usulü ve İcra", Ticaret Hukuku ve Yargıtay Kararları Sempozyumu XIV: Bildiriler – Tartışmalar, Ankara, 4-5 Nisan 1997, p. 218. For information regarding ratio legis of this concept, see **Tahir** Çağa, Deniz Ticareti Hukuku III: Gemi ve Yük Alacaklısı Hakları, Zamanaşımı, Deniz Hukukunda Cebri İcra, 4. edition by Rayegân Kender, İstanbul 2005, p. 1 et seq.; **Nuray Barlas,** Gemi Alacaklısı Hakkı Veren Alacaklar ve Gemi Alacalısı Hakkının Hukuki Niteliği, İstanbul 2000, p. 6 et seq.

mortgage as a credit tool[9]. Maritime lien is a statutory lien on the ship, arising from claims set out in legislations, taking priority over all statutory and contractual liens and charges and may be claimed against any person who is in possession of the ship. Maritime lien is neither a pledge nor a mortgage. In other words, the subject of the lien is not to be handed over to the claimant and its creation is not depending on registration. Consequently, its invisibility and absolute priority is a great danger for the mortgagee. Today's tendency grounding on this consideration is providing legal advantages to the ship mortgagee against the holder of the maritime lien in order to increase the value of ship mortgage. Reducing the number of claims secured by maritime liens may be deemed as the major advantage, however it is not the only one.

It has to be stated that the provisions of the old Turkish Commercial Code[10] (old-TCC) regarding maritime liens did not correspond with this tendency. In comparison with the recent international convention on this issue, old-TCC dropped behind this evolution. Considering that this legal policy is not pure legal but has also an economical aspect in relation of ship finance, especially having regard to the fact that the loan banks of Turkish shipowners are mostly foreign banks, this inconsistency appears to be a problem. Hence, it has been pointed out that there is an urgent need for reform in this respect[11].

The new Turkish Commercial Code (TCC)[12], which entered into force on 1 July 2012, contains a great number of necessary changes in maritime law, which may be considered as an extensive, long-awaited reform in this area of law. Maritime lien is one of the fields in which essential changes were made. Through this reform, the position of the mortgagee against the holder of the maritime lien has been re-designed.

The subject of this paper is these changes re-designing the position of the ship mortgagee and re-regulating the legal concept of maritime lien. Firstly, the basic rules of TCC regarding ship mortgage and maritime lien are summarized. After that, the changes are highlighted and their practical and concrete outcomes are studied. Lastly, it is examined whether this reform is sufficient to correspond with the recent developments in this area of law.

---

9 **Tahir Çağa/Rayegan Kender,** Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan, Kaptan, 16. edition, İstanbul 2010, p. 114 et seq.; **Sami Okay,** Deniz Ticareti Hukuku I, 3. edition, İstanbul 1970, p. 190; **Sami Akıncı**, Türk Hukukunda Gemi İpoteği, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 1958, p. 155; **Ergon Çetingil,** 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, 5-9 Aralık 1998, İstanbul 1998, p. 124; **Fehmi Ülgener,** "Gemi İpoteği Alacaklısının Sigortalanabilir Menfaati: Tekne, Sorumluluk ve IMIC Sigortaları", Sigorta Hukuku Dergisi, Vol. 1 1999, p. 39. See also **Akıncı,** p. 237. For information regarding clauses in ship financing contracts stipulating that the debtor shall take measures in case of the rise of maritime liens, see **Sevinç Kuyucu,** p. 202 et seq.

10 Act Nr.: 6762, Date: 29.6.1956; Official Reporter (OR) Date: 9.7.1956, OR Nr.: 9353.

11 Çağa, Gemi Alacaklısı Hakkı, pp. 49-50. For further information about the provisions of old-TCC regarding maritime liens, see Çağa, Gemi Alacaklısı Hakkı, pp. 8-49; **Fahiman Tekil**, Deniz Hukuku*,* 6. edition, İstanbul 2001, pp. 471-482. On the other hand, it has been rightfully submitted that the limitation of shipowner's liability system in the old-TCC was not convenient for an extensive reform on this issue. Therefore, the limitation of liability system according to which the assets other then the ship, freight and their surrogates are not available to the creditor for procedure of enforcement has to be revised primarily. See **Akıncı,** pp. 157-158. For further information regarding the limitation of shipowner's liability system in the old-TCC, see Çağa / Kender, pp. 153-162.

12 Act Nr.: 6102, Date: 13.1.2011; OR Date: 14.2.2011, OR Nr.: 27846.

II. International Conventions

It is stated in the Preamble of the TCC[13] that one of the aims of the reform is adapting to the recent international conventions in maritime law[14]. Considering this aim, it may be deemed as a necessity to summarize briefly[15] the international conventions regulating this issue before dealing with the provisions of the TCC.

The first one is International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages made in Brussels on 10 April 1926 (BrussCon of 1926). It entered into force on 2 June 1931. The current number of the contracting states to the convention is 24.

The BrussCon of 1926 has been only partially successful in achieving its objective of furthering uniformity in this area of law. One reason of this is that the common law countries have not accepted the BrussCon of 1926. Both this fact and the US proposal to strengthen the position of the ship mortgagee[16] led to a new international convention, namely International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, made in Brussels on 27 May 1967 (BrussCon of 1967). It has not entered into force yet.

Considering that the BrussCon of 1926 has not achieved a global acceptance and the BrussCon of 1967 has not entered into force, it was foreseeable that an attempt for a third international convention to be on the way. That is the International Convention on Maritime Liens and Mortgages[17], which was adopted in Geneva on 6 May 1993 and entered into force on 5 September 2004. The current number of contracting states to the GeneCon is 18. Some of them are Albania, Nigeria, Russian Federation, Ukraine and as of 2014 Congo. It seems that the major maritime nations did not accept the GeneCon.

III. Sources and Scope of Application of TCC

The source of the provisions of the TCC regarding the maritime liens is the GeneCon. As explained in the general preamble of the TCC, the reason for that is, to adapt to the recent international conventions in maritime law, which is one of the aims of the reform[18].

13 http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf p. 52.

14 For motives of this preference and for the method chosen, see **Samim Ünan**, "Some Aspects of Maritime Law in the New Turkish Commercial Code", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 9 et seq.

15 For elaborate information about the international conventions, see **Turgut Kalpsüz**, Gemi Rehni, 4. edition, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 2001, pp. 47-54; **Cüneyt Süzel,** Gemi Alacaklısı Hakkı ve Gemi İpoteği Hakkında 1993 Cenevre Sözleşmesi ve Yeni Türk Ticaret Kanunu, İstanbul 2012, pp. 10-18.

16 **Süzel,** p. 12.

17 For information regarding the proposals during the negotiations of the GeneCon, espacially for discussions about registration of maritime liens and even abolishing the concept, see **Barlas,** p, 77 et seq.

18 http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf p. 52.

But Turkey is still a party to the BrussCon of 1926[19]. In the preamble of the TCC, it has been pointed out that the re-regulation of the maritime liens is based on the principles of the GeneCon and therefore, Turkey has to denounce the BrussCon of 1926 when the bill becomes the law[20]. The bill became the law and entered into force on 1 July 2012. However, Turkey has not denounced the BrussCon of 1926 yet and has not acceded to the GeneCon either[21]. The Turkish Government has sent the bill on Turkey's accession to the GeneCon to the Parliament on 13 October 2014, although nothing has happened since. It seems that the legislative intent of acceding the GeneCon and denouncing the BrussCon of 1926 came to nothing for now.

As to the provisions of the TCC on the ship mortgage, the principles are originated basically from German law, namely "Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken vom 15.11.1940" (GeReSch)[22]. However, considering that the relevant provisions of the Turkish Civil Code are coming from the Swiss Civil Code, it can be said that Swiss law has also a limited influence. Accordingly, it has been pointed out that, "Turkish ship mortgage is a German security mortgage with a flavour of Swiss real estate mortgage"[23].

Before going into detail regarding the content of the provisions of the TCC, its scope of application has to be mentioned.

According to Art. 14 of the BrussCon of 1926, the provisions of the convention shall be applied in each Contracting State in cases in which the vessel to which the claim relates flies the flag of a Contracting State. In other words, such cases are out of the scope of application of the TCC[24].

In cases relating to the ships flying the flags of non-contracting states, the applicable law shall be determined according to the rules of conflict of laws.

19 http://www.comitemaritime.org/Uploads/Publications/CMI_YBK_Part_III.pdf p. 477.

20 http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf p. 392.

21 For information regarding the legal situation after Turkey's accession to the GeneCon, see **Atamer,** Gemi ve Uçak İpoteği, pp. 110-113.

22 For general information regarding the basic features of this act, see **Zarth**, pp. 67-68.

23 **Kerim Atamer,** "New Turkish Law of Ship Mortgages and Enforcement", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 79. For further information about security mortgage (Sicherungshypothek), circulation mortgage (Verkehrshypothek) and the relation between these types and the principle of mortgage being accessory to the debt, see **Hans Wüstendörfer,** Neuzeitliches Seehandelsrecht*,* 2. Auflage, Tübingen 1950, p. 85 et seq.; **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, p. 279. See also **M. Kemal Oğuzman / Özer Seliçi / Saibe Oktay-Özdemir,** Eşya Hukuku: Zilyetlik-Tapu Sicili, Taşınmaz ve Taşınır Mülkiyeti, Kat Mülkiyeti, Sınırlı Ayni Haklar, 19. edition, İstanbul 2016, pp. 897 Nr. 3185 et seq.; **Haluk Nami Nomer / Mehmet Serkan Ergüne,** Eşya Hukuku: Zilyetlik, Tapu Sicili, Rehin Hakları, 3. edition, İstanbul 2016, p. 167 Nr. 527, p. 202 Nr. 641; **Aydın Aybay / Hüseyin Hatemi,** Eşya Hukuku, 4. edition, İstanbul 2014, p. 271 Nr. 5 et seq. For the security mortgage character of ship mortgage in Turkish law, see also **Kalpsüz,** p. 58 et seq.; **Akıncı,** p. 19; **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, p. 281. For the advantage of security mortgage character of ship mortgage in German and Turkish law in regard to its role in ship financing, see **Atamer**, Gemi ve Uçak İpoteği, p. 55 et seq.; **Sevinç Kuyucu,** p. 144.

24 There are two options set out in Article 14/1 and 14/2 of the BrussCon of 1926. Accordingly, if provided for by national laws, the provisions shall be applied in any other case. The Contracting States have the right of not to apply the provisions of this Convention in favour of the nationals of a non-contracting State. Turkey has not made use of these options.

According to Art. 22 of the Turkish Code of International Private and Procedural Law[25], the rights in rem on the sea carriage vehicles are subject to the law of the country of origin. The country of origin of the sea carriage vehicles is the place where the rights in rem on these vehicles are registered. If there is not such a registration place, it is the port of commission. Accordingly, under Turkish law, the applicable law related to a registered ship mortgage is the law of the registration place.

As to the maritime liens, Art. 1350/3 TCC states that, if judicial proceeding regarding the claim is instituted in Turkey, the question whether or not the claim is secured by a maritime lien on the ship shall be determined by Turkish law[26].

IV. Basic Rules on Ship Mortgage

1. Definition of the ship mortgage

Despite the fact that ship is a movable property in respect of civil law, the only form of creating a contractual charge on a registered ship is the ship mortgage (Art. 1014/1 TCC)[27]. The reason for that is, dead pledge is not advantageous for neither of the parties, considering the debtor would not be able to operate the ship on one hand and the creditor would bear the costs of the maintenance of the ship on the other hand[28]. Therefore, ship mortgage responds the needs of the parties in ship financing[29]. As a consequence of that, it is definite for the mortgagee that, there is no other charge on the ship except the registered ship mortgages and the maritime liens[30].

Article 1014 TCC describes the ship mortgage as a right created to secure a claim which entitles the mortgagee to satisfy its claim with priority over the proceeds of the forced sale. It has to be emphasized that the ship mortgage is accessory to the claim (Art. 1014/2 TCC)[31]. As a consequence of that, the assignment of the claim entails the simultaneous passing of the mortgage on to the assignee (Art. 1038/1 TCC). The

25 Act Nr.: 5718, Date: 27.11.2007; OR Date: 12.12.2007, OR Nr.: 26728.

26 For considerations on the application of this provision, see **Süzel,** p. 169 et seq. For discussions regarding the most favourable applicable law to maritime liens, see **Süzel,** p. 162 et seq.; **Günay,** Gemi Alacaklısı Hakkı, p. 174 et seq.

27 For information about Roman law background and middle age period development of dead pledge and mortgage, see **Atamer**, Gemi İpoteği Hükümlerinin Yasama Tarihçesi, pp. 250-253; **Atamer**, Gemi ve Uçak İpoteği, pp. 7-19. For information about historical evolution of German and Turkish regulations regarding the ship mortgage, see **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, pp. 253-278; **Atamer,** Gemi ve Uçak İpoteği, pp. 29-83, pp. 89-107.

28 See **Wüstendörfer,** p. 83; Çağa / Kender, p. 113 et seq.; **Rayegân Kender / Ergon Çetingil / Emine Yazıcıoğlu,** Deniz Ticareti Hukuku I: Temel Bilgiler, 14. edition, İstanbul 2014, p. 78 et seq.; **Akıncı,** p. 6 et seq.; **Okay,** p. 189; **Adil İzveren / Nisim Franko / Ahmet Çalık,** Deniz Ticaret Hukuku, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayın No. 294, Ankara 1994, p. 73; **Kalpsüz,** p. 40; **Omağ,** p. 356; **Bülent Sözer,** Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan ve Navlun Sözleşmeleri, 3. edition, İstanbul 2014, p. 120; **M. Murat İnceoğlu**, "Gemi İpoteğinde Alacaklının Alacak Muaccel Olmadan Önceki Hakları (TTK m. 909-910)", Prof. Dr. Tahir Çağa'nın Anısına Armağan, İstanbul 2000, p. 261.

29 See **Sevinç Kuyucu,** p. 141.

30 **Atamer**, Gemi ve Uçak İpoteği, p. 283.

31 The source of this provision is §8 I GeReSch which was not adopted to the former TCC. See **Akıncı**, p. 36. About the principle of mortgage being accessory to debt, see **Oğuzman / Seliçi / Oktay-Özdemir,** p. 962 Nr. 3401 et seq.; **Nomer / Ergüne,** p. 203 Nr. 644 et seq.; **Aybay / Hatemi,** p. 271 Nr. 4.

validity of such an assignment is subject to the rules on creating the ship mortgage (Art. 1038/3 TCC).

It is clarified in Art. 1014/1 TCC that future or conditional claims[32] or claims embodied in negotiable instruments may also be secured by a ship mortgage.

But when it comes to the ship mortgage on the share of a ship, there are two restrictions. Firstly, where all shares in the ship are owned by one person, separate mortgages on several shares are not admitted (Art. 1014/4 TCC). Secondly, where the share of each owner is not identified, mortgage on shares is not admitted (Art. 1014/3 TCC). As different from its source on this matter, namely § 8 III GeReSch, the former TCC did not contain a restriction for cases where all shares in the ship are owned by one person[33]. Nevertheless, it has been pointed out that the same conclusion has to be applied[34]. Considering that the former TCC refers only to "shares of a ship" (Art. 897 old-TCC) and having regard to the technical meaning of it, which is an "identified share"[35], and especially in the light of Art. 688/3 and Art. 702/3 and Art. 857/3 TCivCo, the same conclusion is also to be applied for the second restriction. Anyhow, the preference of stating these restrictions expressly may be seen as rightful[36]. However, it has to be noted that, mortgage on share is rarely accepted by finance institutions in practice because of the problems related with the judicial sale of such a share[37].

2. Creation of the ship mortgage

As to the creation of the ship mortgage, there are three formal requirements. First of all, the owner of the ship and the creditor have to conclude a contract in writing (Art. 1015/2 TCC). But if the claim is embodied in a negotiable instrument issued to a bearer, a declaration of the shipowner is sufficient (Art. 1015/6 TCC).

Secondly, the signatures of the parties must be certified by a notary public[38] (Art. 1015/2 TCC). It ought to be noted that under the new law, the mortgage deed may also be concluded at the register (Art. 1015/2 TCC). If so, the certification of the signatures by the notary public is not required. It has been suggested that the role of the register officer regarding the conclusion of the mortgage deed ought to be

32 The opportunity given by law that future or conditional claims or variable claims may also be secured by a mortgage may be seen peculiar considering the principle of mortgage being accessory to the claim. See **Bülent Davran,** Rehin Hukuku Dersleri, İstanbul 1972, p. 23. See also İzveren / Franko / Çalık, p. 91; **Okay,** p. 197; **Wüstendörfer,** p. 103; **Kalpsüz,** p. 57.

33 For information about legislative history of old-TCC on this matter, see **Atamer,** Gemi ve Uçak İpoteği, pp. 223-227.

34 **Akıncı,** p. 80; **Okay,** p. 194 et seq.; **Kalpsüz,** p. 88; **Ergon A. Çetingil / Rayegan Kender / A. Samim Ünan / Emine Yazıcıoğlu**, "TTK Tasarısı'nın 'Deniz Ticareti' Başlıklı 5. Kitabında Yer Alan Hükümler Hakkında", Türk Ticaret Kanunu Tasarısı Hakkında Değerlendirmeler, Deniz Hukuku Dergisi Özel Sayı, Ocak 2006, p. 62.

35 **Okay,** p. 195; **Kalpsüz,** p. 88; **Akıncı,** p. 81.

36 For critics about the provisions regarding these restrictions, see Çetingil / **Kender /Ünan /Yazıcıoğlu,** p. 61 et seq. For an alteration proposal, see **Atamer,** Gemi ve Uçak İpoteği, p. 228.

37 **Atamer / Damar et al.**, Transport Law, p. 82; **Atamer,** Gemi ve Uçak İpoteği, p. 318.

38 In German law, the validity of the mortgage deed is not subject to any formal requirement (**§3 II GeReSch, to which referred by §8 II GeReSch)**. But in English law, the situation is different. For english law, see **Algantürk,** p. 660 et seq.

clarified by stating expressly that the signatures of the written contract may also be certified by the register officer[39]. It has to be added that the regulation is interpreted in this way as suggested[40].

Finally, the ship mortgage must be registered[41] at the National Ship Register or at the Turkish International Ship Register[42], whichever is the register of the ship in question (Art. 1015/1 TCC).

Regarding to registration of the mortgage, it is worth to mention that, according to Art. 1014/2 TCC, only the claim itself is determinant for the ship mortgage. What here meant is not crystal clear. However, it has been suggested[43] in accordance with the German sources, that it means the registration of a ship mortgage does not create any assumption relating the claim secured thereby.

Another issue which has to be pointed out in relation with the registration of the mortgage is the regulation of Art. 1015/3 TCC, which is criticized as an exception to the fundamental rule of "registration requirement" for the creation of the ship mortgage[44]. Accordingly, in cases where the contract is concluded pursuant to the requirements mentioned, or an approval of registration to the creditor or a letter of application to the Register is given by the owner according to the provisions of the Ship Register Regulation (ShiReRe)[45], the relevant persons cannot avoid registering the ship mortgage. It is not crystal clear who the "relevant persons" are. The parties of the ship mortgage deed as well as the officers of the register may be considered as the relevant persons[46].

It has to be mentioned that, there is a similar regulation in GeReSch. Pursuant to § 8 II GeReSch, § 3 II GeReSch (regarding the transition of the ownership of inland water ships) shall also be applied to creation of the ship mortgage. Accordingly, before the registration, the mortgage deed is binding only in cases where the declaration is documented by court

39 Çetingil / Kender / Ünan / Yazıcıoğlu, p. 62 et seq. According to Sözer, this regulation has to be understood in that way. In other words, the role of the register is limited to the certification of the signatures. The mortgage deed does not need to be drew up by register officer.

40 **Sözer,** p. 124 fn (11). According to Sözer, the role of the register officer is not to draw up the mortgage deed, but merely to certificate the signatures on it.

41 This regulation is in accordance with its German source, namely, pursuant to **§ 3 II GeReSch (to which, referred by § 8 II GeReSch),** the registration of the mortgage is necessary for creation of the mortgage. In English law, on the other hand, the situation is different. For English law, see **Algantürk,** p. 664 et. seq.

42 For information about the constitution of Turkish International Ship Register, see **Zehra Şeker Öğüz,** "Üzerinde İpotek Tesis Edilmiş Gemilerin Türk Gemi Sicilinden Terkin Edilerek Türk Uluslararası Gemi Siciline Kaydedilmesi Sorunu", Deniz Hukuku Dergisi, Vol. 4 Nr. 3-4, pp. 83-84; **Kender / Çetingil / Yazıcıoğlu,** p. 65 et seq. For information about Turkish International Ship Register in relation with the ship mortgage, see **Kalpsüz,** pp. 43-46. For detailed information regarding the problems which may occur in respect of ships encumbered with mortgage in course of deletion from National Ship Register and registration to Turkish International Ship Register, see Şeker Öğüz, İpotekli Geminin TUGS'a Kaydedilmesi Sorunu, pp. 88-90.

43 **Atamer,** Ship Mortgage and Enforcement, p. 79. See also **Atamer,** Gemi ve Uçak İpoteği, p. 168 et seq.

44 **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, pp. 289-290. For further critics, see also Çetingil / Kender / Ünan / Yazıcıoğlu, p. 63, **Sözer,** p. 124 et seq.

45 Date of Cabinet Desicion: 31.12.1956, Nr: 4/8520; OR Date: 4.2.1957, OR Nr : 9526.

46 For consequences of these two possibilities, see **Atamer,** Gemi ve Uçak İpoteği, pp. 245-246.

or by a notary public, or where the declaration is made in the presence of the court, or where the declaration is submitted to the court, or where the owner gives a permission of registration to the creditor according to the provisions of the Ship Register Regulation. The Turkish legislator found this regulation objectionable[47] and did not adapt to the old-TCC. Furthermore, unlike their German source, according to both former and current TCC, aforesaid formal requirements have to be fulfilled for the validity of the mortgage deed. In the light of this regulation and non-regulation of old-TCC, it has been argued that, if not registered, the mortgage deed is not valid even as a preliminary agreement considering Art. 29/2 of Code of Obligations[48]. On the other hand, according to an opposite view, considering the mortgage deed being an act of disposal, it is not possible in Turkish law to make a preliminary agreement regarding to the creation of ship mortgage[49]. According to Art. 21 and 25 ShiReRe, the owner has to give approval or letter of application for registration after concluding the mortgage deed pursuant to the formal requirements provided for in TCC. Otherwise, the creditor may claim in court for a decision of registration and the decision of the court shall replace the approval or letter of application[50].

If Art. 1015/3 TCC is considered in the light of these explanations, it will be seen that, its effect is to skip the step of claiming in court for a decision of registration and replace it with the decision of register officers. To bring an action against such a decision is, for sure, possible. In this way, it may be said that the function of Art. 1015/3 TCC is to reverse the procedure in comparison to the old-TCC. In other words, not the result but the way to reach at it has been changed by the new law.

As to the creation of the ship mortgage, it has to be mentioned that, in cases where the ship is purchased from abroad and is not registered yet, an entry into the flag certificate is sufficient[51]. Upon registration of the ship in Turkey, the ship mortgage will be transferred to the register ex-officio (Art. 1015/5 TCC).

When it comes to the mandatory contents of the register, Turkish law is in conformity with Art. 1 of the GeneCon. According to Art. 1016 TCC, the register must include the name or the title of the mortgagee, the amount of the claim in Turkish Lira[52] (TL), the rate of interest and the rank of the mortgage.

47 **Okay,** p. 198; **Kalpsüz,** p. 67.

48 **Okay,** p. 198 et seq. On this issue, see **Oğuzman / Seliçi / Oktay-Özdemir,** p. 912 Nr. 3232a.

49 **Kalpsüz,** p. 67 fn. (108), p. 69. Akıncı has also pointed out that the formal requirements provided for in TCC are related to the act of disposal. According to him, the promissory transaction is not subject to any formal requirement. See **Akıncı,** pp. 59-60. For an opposite view, see **Sözer,** p. 123-124. For the view that due to the notarization requirement there is no room for application of preliminary agreement, see **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, p. 289. On the other hand, a contract term which sets forth that credit is to be provided in exchange of concluding a mortgage contract is valid and breach of that must be subject to a sanction. It has to be emphasized that this breach of contract constitutes a default of the creditor. See **Atamer,** Gemi ve Uçak İpoteği, p. 238.

50 Yargıtay 11. HD. 8.12.1987, 1987/6007, 1987/6843. See http://www.kazanci.com/kho2/ibb/giris.htm.

51 For the need underlying behind this solution and for critic of this provision, see **Akıncı**, pp. 213-214. For historical background of this provision, see **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, pp. 291-292.

52 If it is a non-pecuniary claim, the equivalent of such claim in Turkish Lira has to be registered. For information regarding mortgage securing non-pecuniary claims in Turkish law, see **Atamer,** Gemi ve Uçak İpoteği, pp. 169-171.

Speaking of the amount of the claim, it has to be clarified that to create a ship mortgage for a claim of which amount is variable, is admitted (Art. 1016/3 TCC).

Moreover, according to Art. 1016/4 TCC, to create a ship mortgage for claims in foreign currencies is possible providing that the relevant foreign currency is admitted by the Treasury. According to Art. 851/1 of the Turkish Civil Code (TCivCo), this kind of mortgage is only admitted if it is established in favour of the credit institutions. But the above-mentioned provision of the TCC regarding the ship mortgage does not contain such a restriction. Therefore, claims in foreign currencies may be secured by a ship mortgage, even if it is not created in favour of a credit institution.

Finally, it has to be pointed out that to fix a TL-denominated claim in a foreign currency is also possible (Art. 1016/2 TCC).

3. Scope of the ship mortgage

Regarding the subject of the security, Art. 1020/1 TCC refers to the relevant provisions of the Turkish Civil Code[53]. Accordingly, ship mortgage encumbers the entire ship including all its appurtenances and accessories (Art. 862/1 TCivCo). However, accessories not being owned by the shipowner are excluded (Art. 862/3 TCivCo)[54]. Examples for that are cargo, leased containers or time charterer's fuel[55]. The mortgage attaches also to hire payable under a bareboat charter to the shipowner which accrued between the date on which foreclosure proceedings are commenced or the date on which the debtor is declared bankrupt and the date of judicial sale of the ship (Art. 863(1) TCivCo).

Apart from these general rules of Turkish Civil Code, there are some explicit provisions of TCC on this matter. Firstly, as different from the former law[56], according to Art. 1020/4 TCC the ship mortgage attaches to compensation payable by third parties to the shipowner for loss of or damage to the ship. Equally, ship mortgage attaches to confiscation price of the ship[57]. Secondly, Art. 1022/1 TCC explicitly states that in cases where the owner's interest[58] in items which are subject to the ship mortgage, are

53 For elaborate information regarding the scope of the mortgage in respect of Turkish Civil Code, see **Oğuzman / Seliçi / Oktay-Özdemir,** p. 938 Nr. 3321 et seq.; **Nomer / Ergüne**, p. 167 Nr. 528 et seq.; **Aybay / Hatemi**, p. 277 Nr. 31 et seq.

54 For detailed information, see **Akıncı,** p. 84 et seq.; **Sözer,** pp. 133-138.

55 **Atamer / Damar et al**., Transport Law, p. 82.

56 Akıncı criticized the position of former law in this regard and suggested that compensation payable by third parties to the shipowner for loss of or damage to the ship has to be included. See **Akıncı,** pp. 94, 239 et seq.

57 Akıncı criticized the position of former law in this regard too and suggested that confiscation price of the ship has also to be included. See **Akıncı,** pp. 95, 240.

58 Beside the owner's interest, the interest of mortgagee's regarding the security may be insured too. Co-existence of these two insurance contracts does not mean that there is a double insurance, since the insured interests are not the same. See **Omağ,** p. 360; **Emine Yazıcıoğlu,** Tekne Sigortası Sözleşmesi, İstanbul 2003, p. 91. For an opposite view, see Ülgener, "p. 37. For information about "Institute Mortgagees Interest Clauses-Hulls", see Ülgener, p. 45 et seq.
For information about the provisions of TCC regarding multiple insurance, see **Zehra** Şeker Öğüz / **Aslıhan Sevinç Kuyucu,** Yeni Türk Ticaret Kanununda Sigorta Hukuku, İstanbul 2011, pp. 94-97; **Kerim Atamer**, "Yeni Türk Ticaret Kanunu Uyarınca Zarar Sigortalarına Giriş", Batider Vol. XXVII Nr. 1 2011, pp. 68-70.

insured, the ship mortgage covers the insurance indemnity too[59]. The principal example for insurance contracts covered by this provision is the Hull & Machinery insurance[60]. Considering that the purpose of a Hull & Machinery insurance is to protect the shipowner's investment in the vessel, it is logical and legitimate to extend this protection to the mortgagee to whom the object of the investment serves as security[61]. In German law, it is argued that P&I insurance is also attached to the ship mortgage[62]. It has to be emphasized that under Turkish law, indemnities payable under liability insurances are not available to the mortgagee[63]. Anyhow, apart from these discussions based upon the wording and aim of the related statutory provisions such as Art. 1022/1 TCC and § 32 I GeReSch, the international ship financing markets have developed contractual clauses, namely "loss payable clauses", giving the mortgagee access to the insurance contracts taken for the vessel, most frequently including also the P&I insurance[64].

As different from the former law[65], the freight is, out of the scope of the ship mortgage. As explained in the preamble, the reason for that is the freight being a claim arising from the contract of carriage, not from the operation of the ship[66]. Although this choice is in harmony with GeneCon, the reason for that as expressed in the preamble is arguable, considering that contracts of carriage are directly connected with the operation of the ship. Consequently, if the mortgage is intended to cover the freight, an explicit agreement is required. The position in respect of the time charter hire is uncertain. Therefore an explicit agreement is necessary as well[67]. Old-TCC differed from its source in this sense, for in German law, freight is out of scope of the

59 TCC includes very detailed rules regarding the relationship between the insurer and the mortgagee most of which are strenghtening the position of the mortgagee in comparison with the insured (Art. 1024-1029 TCC). There are also regulations specifying the issue that in which cases the insurance indemnity is to be paid to the insured (Art. 1022/3, 1023 TCC). These provisions have been hardly changed. For elaborate informations about them, see **Kalpsüz,** pp. 103-120; **Akıncı,** pp. 100-110; **Omağ,** pp. 361-363, 364; Ülgener, pp. 40-45; **Kender / Çetingil / Yazıcıoğlu**, p. 82 et seq.; **Sözer,** pp. 140-146. For information about reflections of these regulations on ship financing, see **Sevinç Kuyucu,** pp. 173-193. For detailed information regarding provisions in relation to ship mortgage covering the insurance indemnity both in German and Turkish law, see **Atamer,** Gemi ve Uçak İpoteği, pp. 322-386.
TCC includes a provision which generally states that if the owner's interest over a property charged with a restricted real right is insured, the right of the restricted real right's holder shall extend to the insurance indemnity too (Art. 1456 TCC). The rules stipulated in Art. 1456 TCC regarding the relationship between the insurer and the restricted real right's holder don't overlap completely with above mentioned rules regarding the relationship between the insurer and the mortgagee. They may be qualified rather as a summary. For information about this general rule regarding insurance indemnity being a surrogate for the rights of restricted real right's holder, see Şeker Öğüz / Sevinç Kuyucu, pp. 82-83; **Atamer**, Zarar Sigortaları, pp. 61.

60 For detailed information regarding the creation of the Hull & Machinery insurance contract, see **Yazıcıoğlu,** pp. 31-52. For elements of interest and risk in the Hull & Machinery insurance contract, see **Yazıcıoğlu,** pp. 76-81, 91-101; 122 et seq. See also **Omağ,** pp. 358-360. For general information about provisions of TCC in relation to interest and risk elements in property insurance contracts, see Şeker Öğüz / Sevinç Kuyucu, pp. 10, 77-80; **Atamer**, Zarar Sigortaları, pp. 47-57, pp. 62-64.

61 **Zarth,** p. 72.

62 **Zarth,** p. 73.

63 **Atamer / Damar et al.,** Transport Law, p. 84; **Atamer,** Gemi ve Uçak İpoteği, pp. 335-336.

64 See **Zarth,** p. 73.

65 For former law see, **Akıncı,** pp. 90-91; Çağa / Kender, p. 118 et seq.; **Okay,** p, 202 et seq.; İzveren / Franko / Çalık, p. 81; **Kalpsüz,** pp. 93-95.

66 https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf p. 331. For critics regarding this rationale, see **Atamer,** Gemi İpoteği Hükümlerinin Yasama Tarihçesi, p. 310; **Atamer,** Gemi ve Uçak İpoteği, p. 315.

67 See **Atamer,** Ship Mortgage and Enforcement, p. 80; **Atamer / Damar et al.,** Transport Law, p. 83.

ship mortgage since the real credit of ship mortgage is based on the capital assets of the owner, not on the circulating operational incomes and drawing the line precisely is seen as fit for purpose[68].

4. Contents of the secured claim

Regarding the contents of the secured claim, Art. 1018/1 TCC refers to the relevant provisions (Art. 875/1, 876) of the Turkish Civil Code[69].

According to Art. 875 TCivCo, the mortgage secures the principal claim, the costs of enforcement proceedings and default interest and three-year interest which is due and payable as at the date on which foreclosure of the mortgage has been requested or bankruptcy proceedings have been initiated and interest running as of the same date[70].

According to Art. 876 TCivCo, if a creditor incurs expenses necessary for the maintenance of the property, in particular by paying insurance premiums owed by the owner, such expenses are secured by a charge over the property. This charge does not require to be registered and takes the same precedence of the mortgage.

5. Ranking of the ship mortgage

As to the ranking, Art. 1017 TCC, once again, refers to the provisions of the Turkish Civil Code relating to the ranking of mortgages on real estate. Accordingly, the priority between several mortgages will be determined by their rank. Each mortgage is registered in the rank, which is chosen by the parties. The date of registration is irrelevant. The shipowner is entitled to reserve free ranks for subsequent registrations provided that the maximal amount secured under such free rank is registered (Art. 870 TCivCo).

If a mortgage is deleted, the subsequent mortgages will not automatically move up (Art. 871/1 TCivCo). In other words, Turkish law follows the principle of the constant ranks instead of the sliding ranks[71]. But the parties may agree otherwise. For real estate mortgage, it has been pointed out that, in practice the exception has became the rule because of both the sliding ranks agreements and the statutory exception to the rule of constant ranks in foreclosure procedure (Art. 872 TCivCo)[72].

A sliding ranks agreement is only valid if the form requirement is fulfilled. For the validity against third persons, the registration of the agreement is necessary (Art. 871/3 TCivCo).

68 **Wüstendörfer,** p. 90.

69 For information regarding to the content of the mortgage in general, see **Oğuzman / Seliçi / Oktay-Özdemir,** p. 951 Nr. 3360 et seq.; **Nomer / Ergüne,** p. 176 Nr. 553 et sec.

70 For further information, see **Atamer,** Gemi ve Uçak İpoteği, pp. 302-307; **Omağ,** p. 357; **Sözer,** pp. 146-147.

71 For further information about these principles and for the advantages of "constant ranks" principle see **Davran**, pp. 35-36. See also **Kalpsüz,** p. 129 et seq.; **Akıncı,** pp. 143-148; **Oğuzman / Seliçi / Oktay-Özdemir,** p. 922 Nr. 3260 et seq.; Nomer/ Ergüne, p. 196 Nr. 622 et seq.; **Aybay / Hatem**i, p. 275 Nr. 22 et seq. For German law, see **Wüstendörfer**, p. 91.

72 See **Davran,** p. 37, 38.

It has to be mentioned that it is not prohibited to make a conditional sliding ranks agreement or an agreement depending on fulfillment of another performance. An example for the first case is an agreement under which a subsequent mortgage will move up only if the owner does not create instantly another mortgage in place of the deleted one. An example of the second case is a sliding rank agreement depending on postponement of the debt or on reduction of rate of interest[73].

In cases where several mortgages have been created within the same rank, they will share pro rata[74] (Art. 874/2 TCivCo). Creating priorities within a rank is only possible if the consent of all the creditors that are entered in the same rank is registered[75].

6. Assignation of Ship Mortgage

It is stipulated in Art. 1038/1 TCC that if the claim secured by the ship mortgage is assigned to another person, the ship mortgage shall be assigned with the claim automatically. The assignation of the ship mortgage or of the claim separately and independently is not possible (Art. 1038/2 TCC). Accordingly, the former and current creditors have to conclude a written contract regarding the transfer of the claim and the assignation has to be registered at the ship register (Art. 1038/3 TCC).

The only exception to this rule is regulated in Art. 1038/4 TCC in relation to the maximal mortgage, namely, the claim may be assigned according to the general rules of Code of Obligations regarding the assignation of claim and if so, maximal mortgage shall not be transferred with the claim[76]. On the other hand, if the claim is assigned according to Art. 1038/3 TCC instead of following the procedure of the general rules, the mortgage shall be assigned with the claim automatically[77]. In other words, to reserve the mortgage and to transfer the claim separately is not possible in scope of application of Art. 1038/3 TCC.

7. Time bar of the claim

According to the general rule stipulated in Art. 984/1 TCC, claims arising from registered real rights, including registered oppositions (Art. 984/2 TCC) are not subject to any statutory limitation period over the course of registration. Accrued deeds which should be fulfilled on a specific time and claims with regard to payment of a compensation are excepted. The registration of the ship mortgage prevents the running of prescription of the claim (Art. 984/3 TCC). Accordingly, neither the ship

73 See **Davran,** p. 37.

74 For information regarding the use, validity and problems of contract terms creating grades in a rank, see **Atamer,** Gemi ve Uçak İpoteği, pp. 287-289.

75 **Atamer / Damar et al.,** Transport Law, p. 88.

76 For the reason of this exception see **Kalpsüz,** p. 163; **Atamer**, Gemi ve Uçak İpoteği, p. 462.

77 **Akıncı,** p. 164. For information about consequences of the transfer in both cases in relation to the features of maximal mortgage, see ibid.

mortgage nor the claim secured thereby is subject to any statutory limitation period in Turkish law. Art. 1048/2 TCC sets forth that in case of deletion of a registered ship mortgage, whether wrongfully or not, the prescription period of the claim secured thereby commences to run again. Hereunder, it has to be pointed out that the prescription of the claim is to be suspended, not to be interrupted in case of registration of a mortgage[78].

8. Procedure of enforcement and list of priorities

The procedure of enforcement is an important and comprehensive subject on its own. Here, only some provisions which are relevant to the topic of this paper and which are worth to mention in this context are pointed out.

According to Art. 1350/1 TCC, the issues relating to the procedure of enforcement, such as arrest, foreclosure and judicial sale are governed by the law of the place where the ship is subject to these remedies. This rule is in accordance with Art. 2 of the GeneCon.

Another rule worth to mention here, is that, the ship mortgage and maritime lien shall not be subject to proceeding or enforcement separately from the claim secured (Art. 1377/1 TCC). In other words, they are accessory to the claim. This rule is provided in order to bring an end to the long term –wrong- practice relating the court decisions establishing liens[79] and therefore qualified as being "fundamental" [80].

According to Art. 1381 TCC, irrespective of the flag, or registration of the ship, the mortgagee may proceed by way of foreclosure of the mortgage.

Pursuant to Art. 45/1 of the Turkish Code of Enforcement and Bankruptcy (TCEB), other means of enforcement are not available to the mortgagee[81]. But this general rule had been amended by Art. 1378 TCC in relation to the ship mortgage. Accordingly, the ship mortgagee is entitled to commence bankruptcy proceedings. This is an important remedy considering that it has been proposed 19 years ago. Namely, it has been argued that arrestment and bankruptcy proceedings must be available to the mortgagee in able to increase the value of the ship mortgage as a credit tool[82].

It has to be highlighted here, provided that both the mortgage and the claim secured by mortgage are determined in a court decision, or a document having the same value or in the *official* mortgage deed, in other words, mortgage deed concluded at the register, the

78 See **Atamer**, Gemi ve Uçak İpoteği, p. 269 et seq.

79 Ünan, p. 13. For elaborate information regarding this practice, see **Atamer,** Gemi ve Yük Alacaklısı Hakları, pp. 224-228. For critics in relation to this practice, see **Atamer,** Gemi ve Yük Alacaklısı Hakları, pp. 231-239.

80 See Ünan, p. 12.

81 For information in relation to the problems arising from the regulations of TCEB, see **Atamer,** Ship Mortgage and Enforcement, p. 81.

82 Çetingil in 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, p. 124.

mortgagee will be entitled to serve an enforcement order (Art. 1377/2 TCC). Accordingly, the enforcement proceeding with judgment shall be available for the mortgagee[83]. On the other hand, a mortgage deed certified by the notary public is not covered by Art. 38 TCEB, for not being *issued* by notary, but only *certified*. Since it has not been mentioned in Art. 1377/2 TCC either, such a contract is not a ground for an enforcement order. Consequently, concluding the mortgage deed at register is more favourable for the mortagee.

As to the level of priority of ship mortgages against other claims, there are eight classes of priorities and the sixth rank in the list of priorities is reserved to ship mortgages and other rights in rem (Art. 1395/1 TCC).

V. Basic Rules on Maritime Lien

1. Claims secured by a maritime lien

Maritime lien is a lien on the ship, whether registered or not, securing claims set out in Art. 1320/1 TCC, taking priority over all statutory and contractual liens and charges.

According to Art. 1320/1 TCC, the following claims[84] against the owner, demise charterer, manager or operator[85] of the ship shall be secured by a maritime lien on the ship:

- Claims for wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship[86];
- Claims for reward for the salvage of the ship (with the exception of the claim of the special compensation payable under Art. 14 of the International Convention on Salvage of 1989[87])
- Claims for port, canal, and other waterway dues, quarantine and pilotage dues;
- Claims based on tort, arising out of physical loss or damage, caused by the operation of the ship, other than loss of or damage to cargo, containers and passengers' effects carried on the ship;
- and, finally, claims for general average distributions.

83 For the former situation according to the old- TCC see **Kalpsüz**, p. 144 et seq.

84 For elaborate information about these claims, see **Süzel,** p. 207 et seq.

85 For detailed information in relation to the debtors of the claim secured by maritime lien, see **Süzel,** pp. 178-191.

86 In cases where the passenger claims damages from the carrier as the opposite party of the carriage of passengers contract who is time or voyage charterer, but not demise charterer, the claim shall not be secured by a maritime lien, since time or voyage charterer is not mentioned as one of the debtors. Anyhow, through Art. 1257 TCC, the shipowner as the actual carrier shall be liable and the claim against him shall be secured by a maritime lien according to Art. 1320 TCC. See **Süzel,** pp. 182-184.

87 For the reason of this exception see Çetingil / Kender / Ünan / Yazıcıoğlu, p. 252. See also **Atamer / Damar et al.**, Transport Law, p. 71.

It has to be indicated that, as to the exceptions regulated in Art. 4/2 of the GeneCon regarding (1) the damage in connection with the carriage of oil or other hazardous or noxious substances by sea, for which, compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance, or other means of securing the claims and (2) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste, the situation is the same in Turkish law. No maritime lien shall attach to a ship to secure claims as set out in Art. 1320/1 (b) and (c) TCC, if they arise out of, or result from these exceptions stated.

As a matter of fact, a general exclusion clause might have been drafted to the effect that a maritime lien will not arise in cases where the claim is covered under compulsory liability insurance combined with the right to apply directly to the insurer, which is the case according to TCC for claims for loss of life or personal injury and claims in tort. However, for the purpose of maintaining strict conformity with the GeneCon, such a provision was not included in TCC[88].

It has to be mentioned that both the expression and the enumeration of the first 5 claims are identical with the regulation of the GeneCon[89]. In this respect, TCC is in an unexceptional harmony with the GeneCon unlike the German Commercial Code (§ 596 GCC)[90] as amended by the Reform Act of 2013 (Gesetz zur Reform des Seehandelsrechts vom 20.4.2013– BGBl. I S. 831) which entered into force on 25.4.2013. The German legislator made a deliberate decision to structure the concept of maritime liens by taking BrussCon of 1967 as model considering "the relatively limited impact of the international conventions on this issue" and concluded that "adapting the German law on maritime liens to GeneCon is premature"[91]. When it comes to international conventions regulating issues regarding conflict of interests of various parties, there are many examples of the fact that being the most recent one does not necessarily mean being also the most effective and preferred one. Therefore, this choice of the German legislator may be evaluated as a diligent move. But from another point of view, it may also criticized as a conservative decision. Indeed, the strategy of German Government regarding the reform has been described as "walking the German way on its own" and criticized as "counter-productive" to the aim of increasing the international acceptance

88 **Atamer / Damar et al.** Transport Law, p. 71. See also **Atamer,** Gemi ve Uçak İpoteği, p. 292 et seq.

89 For information regarding the regulations of BrussCon of 1926, BrussCon of 1967 and GeneCon on claims secured by a maritime lien, see **Pınar Akan,** Deniz Hukuku'nda Geminin Enkaz Haline Gelmesinin Hukuki Niteliği ve Sonuçları, İstanbul 2005, pp. 38-43.

90 For general information about the grounds, preparatory works, legislative process, structure and systematic of the Reform Act see **Beate Czerwenka,** Das Gesetz zur Reform des Seehandelsrechts, Köln 2014, Nr. A 1-82 pp. 15-32.; **Carsten Grau,** "Highlights of the German Government's Draft Legislation on Maritime Law", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, pp. 60-61.

91 **Czerwenka,** Nr. A 94-95 pp. 35-36.

of German law[92]. In conclusion, the regulations of GCC on maritime liens remained substantially untouched by the reform[93]. Consequently, in German law, the following claims against the owner, demise charterer, manager or operator of the ship shall be secured by a maritime lien on the ship[94]:

- Claims for wages due to the master and other members of the ship's complement
- Claims for ship, voyage and port dues and pilotage dues
- Claims in respect of loss of life or personal injury and claims arising out of physical loss or damage, both occurring in connection with the operation of the ship, except the claims arising out of physical loss or damage based or may be based on a contract
- Claims for reward for the salvage of the ship, claims of the special compensation and salvage costs, claims against the owner of the ship and the creditor of the freight for general average distributions, claims for costs of removal of wrecks
- Claims of the bearer of social insurance including unemployment insurance against the owner of the ship.

2. Scope of the maritime lien

According to Art. 1321 TCC, the maritime lien encumbers the entire ship, except the accessories owned by a person other than the owner of the ship. The shipowner's claim for compensation for loss of or damage to the ship is also specified. As different from the former law[95], the freight is out of the scope of the maritime lien. This change is in accordance with the GeneCon and in line with the system of limitation of shipowner's liability[96].

Insofar, the content of the maritime lien[97] is the same as the content of the ship mortgage. But from this point on, there are three differences. Firstly, the confiscation price of the ship is not mentioned here. Secondly, the compensation payable to the owner of the ship under an insurance contract is explicitly excluded[98]. Lastly, the general

92 **Grau,** p. 64.

93 **Czerwenka,** Nr. A 160 p. 51.

94 For further information see **Czerwenka,** Nr. B § 596 1-10 pp. 323-326.

95 For former law, see Çağa, Gemi Alacaklısı Hakkı, p. 14 et seq.; **Barlas,** p. 13 et seq.

96 See **Süzel,** p. 194.

97 For a comparison regarding the content of the maritime lien between English, American and Turkish law, see **Günay,** Gemi Alacaklısı Hakkı, p. 53.

98 The situation was slightly different in the former law. Compensation payable to the owner of the ship under an insurance contract was not explicitly excluded in the old-TCC but not mentioned as in the scope of maritime liens either. Therefore, it has been accepted that it is not in the content of the maritime lien. See: **Çağa,** Gemi Alacaklısı Hakkı, p. 22; **Tekil,** p. 472. Tekil argues that insurance indemnity should be included in the scope of maritime lien provided that ship mortgage shall take priority over maritime lien in respect to insurance indemnity. For opposite view see: **Çağa,** Gemi Alacaklısı Hakkı, p. 22. It has been suggested that, the wording of Art. 1321/2 TCC ought to be restricted to insurance indemnities paid for hull damages and herewith payments of the insurer in respect of liability assurances ought to be in the scope of maritime liens. See **Çetingil / Kender / Ünan / Yazıcıoğlu,** p. 253 et seq.

average contributions shall substitute for the lost or damaged items which are subject to the maritime lien. German law is parallel to Turkish law in this manner, namely, § 598 GCC regulates the scope of the maritime lien the same as Art. 1321 TCC.

3. Contents of the secured claim

According to Art. 1322 TCC, the maritime lien equally secures the principal claim, interest thereon and the cost of the enforcement proceedings.

4. Legal nature and characteristics of maritime lien

Maritime lien is a statutory lien[99], which, as a concept, is shaped by three characteristics. First of all it has to be emphasized that maritime lien is accessory to the claim[100]. Consequently and as mentioned before, both the ship mortgage and maritime lien shall not be subject to proceeding or enforcement separately from the claim secured (Art. 1377/1 TCC). Accordingly, Art. 1325 TCC states that, the assignment of, or subrogation to a claim secured by a maritime lien entails the simultaneous assignment of, or subrogation to such a maritime lien. Hereunder, the holder of the maritime lien is always the claimant. This rule is in accordance with the regulation in Art. 10/1 of the GeneCon.

Another basic feature of the maritime lien is that, it may be claimed against any person who is in possession of the ship (Art. 1321 of the TCC). In other words, it follows the ship, not the debtor[101].

The last characteristic is the hallmark of the maritime lien. That is, the maritime lien arising from the claims set out in Art. 1320 (a) to (e) shall take priority over all statutory and contractual liens and charges, whether registered or not.

There are two exceptions to that rule. Firstly, the maritime liens arising from the general average contributions shall rank after the all statutory and contractual liens and charges, whether registered or not. Secondly, according to Art. 1323/3 TCC, in the event of the removal of a stranded or sunken ship by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out before all other claims, secured by a maritime lien[102].

99 See Çağa, Gemi Alacaklısı Hakkı, p. 4; **Barlas,** p. 125 et sec. For detailed information about other views and the critics thereon regarding the legal nature of the maritime lien, see Çağa, Gemi Alacaklısı Hakkı, p. 2 et seq.; **Barlas,** p. 82 et seq.

100 See **Süzel,** p. 155.

101 For information regarding this feature, see Çağa, Gemi Alacaklısı Hakkı, p. 6; **Barlas,** p. 9 et seq. The "Personification Theory", which had been put forward in American law, may be the logic behind this characteristic. For information about this theory which is no longer valid but had been partially effective in the evolution of maritime liens in American law, see **Günay,** Tarihçe, p. 932 et seq.; **Günay,** Gemi Alacaklısı Hakkı, p. 37 et seq.

102 It has been rightfully pointed out that this regulation is vital considering the problems which occur espacially in Turkey in connection with wrecks of ships and removal of them. See **Akan,** p. 36. For detailed information regarding this issue and for the question whether maritime lien ceases or not if the ship becomes a wreck, see **Akan,** pp. 34-38.

It ought to be emphasized that, both these exceptions are in accordance with the relevant regulations in Art. 6/1 (c) and Art. 12/3 of the GeneCon.

5. Ranking of maritime liens

As to the ranking of the maritime liens, there are two principles. According to Art. 1324/1 TCC, the maritime liens shall rank in the order listed in Art. 1320 TCC. But there are two exceptions to this principle. First one is the maritime lien arising from the general average distributions, mentioned shortly before. It shall rank as the very last one, after all other liens and charges, whether statutory or contractual, registered or not (Art. 1323/2 TCC). In German law, maritime liens securing claims for contribution in general average take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed (§ 603 II GCC)[103]. Consequently, they take priority over ship mortgages too. In that sense, the mortgagee has a more advantageous position in Turkish law in comparison with the German law.

The second exception is the maritime lien securing a claim for reward for the salvage of the ship. This exception is in accordance with the regulation in Art. 5/2 of the GeneCon. Hereunder, the maritime liens arising from said claims shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed (Art. 1324/2 TCC).

The second principle is that, the maritime liens shall rank pari passu as between themselves (Art. 1324/3 TCC). But there is an exception to this principle too. Namely, the maritime liens securing claims for reward for the salvage. They shall rank in the inverse order of the time, when the claims secured thereby accrued (Art. 1324/2 TCC). In other words, the "last in time, first in line" principle applies. Such claims shall be deemed to have accrued on the date on which salvage operation was terminated (Art. 1324/2 TCC).

6. Extinction of maritime lien by lapse of time

Considering its invisibility and its negative effect on ship finance, it is understandable why maritime lien is subject to a peremption period unlike other liens regulated in Turkish Civil Code[104].

When it comes to the extinction of maritime liens by lapse of time, again, there is the rule and its exception. According to Art. 1326 TCC, the principle is that, the maritime liens shall be extinguished after a period of one year unless, prior to the expiry of such period, the ship has been arrested, such arrest leading to a forced sale. As is seen, the legal concept of this period is peremption, not prescription.

103 For further information regarding to ranking of maritime liens in German law, see **Czerwenka,** B § 603, Nr. 1-6 pp. 332-333, § 604 Nr. 1-6 p. 334.

104 For information about the rationale of the regulation, see **Süzel,** p. 292 et seq.

This provision significantly aggravates the situation of the lienholder by forcing him to claim his right in one year and only by way of arrest of the ship. But on the other hand, herewith it is assured that maritime liens securing claims older then one year are only valid if they have been made visible by arresting the ship[105]. By this way, the disadvantage of lack of publicity of maritime lien shall be eliminated.

With respect to maritime liens securing the claims of the crew for wages and other sums, this one-year period shall commence upon the claimant's discharge from the ship. With respect to other maritime liens, the one-year period shall commence when the claims secured thereby arise.

The exception regarding the maritime liens securing the claim of general average contributions regulated in Art. 1326 TCC is in accordance with the regulation in Art. 6/1 (b) of the GeneCon. Accordingly, the said maritime lien shall be extinguished after a period of 6 months, commencing on the date on which the ship arrived at the port of destination, and if this place could not be reached, at the port where the voyage ceased, unless, prior to the expiry of such period, the ship has been arrested, such arrest leading to a forced sale. In the event of a sale to a bona fide purchaser of the ship, the said maritime lien shall be extinguished at the end of a period of 60 days, commencing on the date on which the ship is registered under the purchaser's name in accordance with the law of the registration place. If both of the periods have commenced to run, the said maritime lien shall be extinguished after the period which expires first.

It is explicitly stated in Art. 1326/3 TCC[106] that the time period shall not be subject to suspension or interruption. However, the time shall not run during the period that the arrest of the ship is not permitted by law (Art. 1326/3 TCC).

According to Art. 1327 TCC, the personal claims are subject to a limitation period of the same duration unless provided otherwise in the respective law.

German law also contains an extinction period[107] in § 600 I GCC. But Art. 1326/2 TCC has no equivalent in § 600 GCC, hence the international sources of both provisions are not identical.

7. Procedure of enforcement and list of priorities

According to Art. 1380 TCC, the holder of the maritime lien may enforce its lien by foreclosing, irrespective of the flag or registration of the ship.

However, the lienholder may choose to take other routes too. Such that, according to Art. 1378 TCC, the lienholder may also commence the bankruptcy proceedings.

105 See **Czerwenka,** B § 600 Nr. 5 p. 330.

106 For the rationale of the parallel regulation of GeneCon, see **Süzel**, p. 303 et seq.

107 For the legal nature of this time period, see **Czerwenka,** B § 600 Nr. 3 p. 329.

Moreover, seizure or bill of exchange proceedings are available to the lienholder too (Art. 1379 TCC). But if the holder of the maritime lien chooses one of these last two ways, it shall be deemed that the lienholder has waived the maritime lien.

As to the class of maritime liens in the list of priorities, the third rank is dedicated to the maritime liens except the one arising from the general average distributions (Art. 1392 TCC). This additional maritime lien is covered under the sixth rank but after all of the registered ship mortgages (Art. 1323/2 and Art. 1395 TCC).

VI. Changes in favour of the mortgagee

After summarizing the main features of ship mortgage and maritime lien in Turkish law, now we can highlight the changes in favour of the mortgagee, which is the core of this paper.

1. One of the most important changes in favour of the mortgagee is that, the number of maritime liens has been significantly reduced in comparison with the former[108] TCC. Accordingly, far less claims will get ahead of the mortgagee. The lacking of claims arising from contract of carriage of goods may be deemed as crucial.

2. As mentioned before, maritime liens are subject to Turkish law if proceedings are brought in Turkey (Art. 1320/3 TCC). This provision is vital. Because in that way, the maritime liens which might arise under a foreign law will not be recognised by Turkish courts[109].

3. Claims arising from the ship mortgage are recognised as maritime claims (Art. 1352/1 (v) TCC) with the result that they are protected by the right to arrest the ship. It is an exception to the general rule of Art. 257/1 TCEB, that arrest is exclusive to the claims that are not secured by a lien. In former law, this exception was granted solely to the holder of maritime lien[110].

Furthermore, Art. 1378 TCC states that, not only the holder of the maritime lien but also the ship mortgagee is entitled to commence bankruptcy proceedings. Former TCC granted this remedy solely to the holder of the maritime lien[111].

4. Insurance indemnity is explicitly excluded from the scope of maritime lien.

5. The shipowner's claim for compensation for loss of or damage to the ship and confiscation price of the ship are included in the scope of the mortgage (Art. 1020/4 TCC).

---

108 For information regarding former law, see Çağa, Gemi Alacaklısı Hakkı, p. 26 et seq.; **Barlas,** p. 28 et seq.; **Günay,** Gemi Alacaklısı Hakkı, p. 107 et seq.

109 See **Atamer,** Gemi ve Uçak İpoteği, p. 293.

110 For critic regarding the exception in the former TCC (Art. 1242 old-TCC) not covering the mortgagee, see **Akıncı,** p. 140; **Kalpsüz,** p. 151.

111 For critic of missing out the mortgage in this exception (Art. 1242 old-TCC), see **Akıncı,** pp. 140-141.

6. If the owner's interest over the ship is insured, the ship mortgage covers the insurance indemnity too. It was, and still is so. However, this rule has been slightly changed. While specifying the scope of the ship mortgage regarding the insurance indemnity, it has been mentioned not only the insurance regarding the "ship", but all the "items" included in the ship mortgage (Art. 1022/1 TCC)[112].

7. As to the ranking, maritime lien arising from claim for general average distribution has fallen behind the ship mortgage (Art. 1323/2 TCC). According to the former TCC, the third rank was dedicated to this maritime lien.

8. It is stated explicitly, that maritime liens shall be extinguished after a period of one year (Art. 1326/1 TCC). According to the former law, this one-year period was a time limitation.

9. There is an important remedy granted to the ship mortgagee for the protection of the mortgage, in cases where the claim secured by mortgage has not yet fallen due[113]. This provision is not new, but some important changes have been made thereto.

According to Art. 1030/1 TCC, if the security provided by the mortgage was put in danger as a result of the deterioration of the ship or its equipment[114], the mortgagee is granted the right to set a reasonable time limit for the owner to remove the danger.

It has to be mentioned that, the decrease of the value of the ship alone[115] is not enough. The security provided by the mortgage should be put in danger as a result of the decrease. In other words, if the current value of the ship covers the claim secured by the ship mortgage, it can not be argued that the security is put in danger[116]. Furthermore, the decrease of the value as the result of the normal use of the ship is not covered here[117]. On the other hand, in cases where according to current circumstances the future proceeds of the forced sale will not cover the claim secured by the ship mortgage as the date of creation of the mortgage, it means that the security is put in danger[118].

There is no formal requirement for setting the time limit. It shall be evaluated in each case whether the time limit set by the mortgagee is appropriate and sufficient to remove the danger in question.

112 Despite the above mentioned difference between the regulations of the former and current TCC, this conclusion has been argued regarding the old-TCC. See **Kalpsüz,** p. 101; **Akıncı,** p. 99.

113 This kind of remedies have their historical roots in Corpus Juris Civilis. See İnceoğlu, p. 262. See for the information about the origin of these provisions in Turkish law: İbid.

114 The word "equipment" here has to be understood as the "appurtenance" as in line with its German source. See **Atamer,** Gemi ve Uçak İpoteği, pp. 416-420.

115 Examples for acts or omissions decreasing the value of the ship, see İzveren / Franko / Çalık, p. 83; **Okay,** p. 205; **Wüstendörfer,** p. 93; **Kalpsüz,** p. 136.

116 See **Kalpsüz,** p. 137; **Akıncı,** p. 124; İnceoğlu, p. 263.

117 **Akıncı,** p. 124; **Kalpsüz,** p. 137; İnceoğlu, p. 263 et seq. See for the situations covered by this provision: İnceoğlu, p. 263 et seq.

118 **Kalpsüz,** p. 135.

Removing the danger means re-establishing the situation of the ship and its equipment as of the date of creation of the mortgage[119]. Giving another guarantee to the mortgagee securing his rights, such as another mortgage on a ship or on a real estate, or a pledge on a movable may also be deemed as removing the danger[120]. Despite Art. 1030 TCC does not explicitly refer to such an option, there is not an explicit restriction either. But whatever the new guarantee is, it should be as reliable as the ship mortgage[121]. Unlike the real estate mortgage (Art. 866/1 TCivCo), the choice between the restitution and the new guarantee is not left to the mortgagee. But in cases where the restitution is not in favour of the mortgagee, for example because the repair works will be completed after the due date, the mortgagee should have the right of requesting another guarantee instead of restitution[122].

If the shipowner fails to remove the danger within this time limit, the mortgagee will be entitled to commence the foreclosure proceedings immediately.

In cases where the security is not yet put in danger, but there is a concern about the deterioration of the ship or its equipment or about the mortgagee's rights being imperilled otherwise, both of which are entailing the security being put in danger[123], the mortgagee should appeal to the court for precautionary measures to be taken.

The former TCC leaves the choice of appropriate precautions at the discretion of the court. This preference created conflict of opinions in the practice whether the court is authorized to arrest the ship[124]. However, Art. 1030/2 TCC explicitly states them as follows:

- The court will order to arrest of the ship
- If necessary, the court may assign an independent custodian for the ship
- The court will grant the owner one-month time limit to take necessary precautions.

If the precautions have not been taken in that time or if they were insufficient, the court will grant the mortgagee of one-month time limit to commence the foreclosure proceedings (Art. 1030/2 TCC).

It is irrelevant whether the concern has occurred as a consequence of the owner's way of operation of the ship[125], or as a consequence of owner's non-performance

119 **Akıncı**, p. 127; **Kalpsüz**, p. 138.

120 **Akıncı**, p. 127; İnceoğlu, p. 269.

121 İnceoğlu, p. 269.

122 İnceoğlu, p. 269.

123 See for the situations covered by this provision: **Wüstendörf**er, p. 94; **Akıncı**, p. 125; İnceoğlu, p. 266.

124 See the preamble of Art. 1030 in http://www2.tbmm.gov.tr/d22/1/1-1138.pdf p. 293. See also **Atamer,** Gemi ve Uçak İpoteği, p. 430.

125 For examples, see Çağa / Kender, p. 124; İzveren / Franko / Çalık, p. 83.

of precautions against third parties' actions (Art. 1030/2 TCC). But if the reason for concern about danger is third parties' action[126], the only remedy granted to the mortgagee is the demand for prevention of this action (Art. 1031 TCC).

For a more comprehensive protection for the mortgagee in cases where there is a concern about danger, parties may agree in the mortgage deed that the ship mortgage shall fall due immediately[127].

As mentioned before, the cases where the concern is not about the physical deterioration of the ship or its equipment, but about mortgagee's rights to be put in danger otherwise, are explicitly included by Art. 1030/2 TCC. This situation was also explicitly included by the former TCC (Art. 909). That (was and still) is an important difference between the (old- and the current) TCC and its source on this matter, namely §39 II GeReSch[128]. Some examples for that are raising the risk of embargo by carrying contraband in the ship or raising the risk of arising maritime liens having priority over the ship mortgage by hiring the ship to a financially weak party[129].

Whether the owner is negligent or not, does not make any difference in respect of rights granted to the mortgagee by Art. 1030 TCC. It has to be mentioned that this is peculiar to the ship mortgage. In real estate mortgage, the mortgagee is protected in this manner only in cases where the owner is negligent (Art. 865, 866, 867 TCivCo)[130].

In process of putting the security in danger, in other words, during the course of danger being continuing it has been suggested that both of the ways are open to the mortgagee. Clearly speaking, the mortgagee is entitled to rely upon Art. 1030/1 and/or 1030/2 TCC[131].

The deterioration of the fixtures in scope of the mortgage or removing them from the ship against the requirements of ordinary run of business[132] are explicitly included in respect of remedies granted to the mortgagee (Art. 1030/3 TCC).

10. As mentioned before, in cases where the ship mortgage contract was concluded at the register, the mortgagee will be entitled to serve an enforcement order (Art. 1377/2 TCC). Accordingly, the enforcement proceeding with judgment shall be

126 For examples, see Wüstendörfer, p. 94; Çağa / Kender, p. 125; İzveren / Franko / Çalık, p. 84.

127 Çağa / Kender, p. 125.

128 For the reason of this supplementation in the old-TCC, see: Official Report of Commission of Justice p. 400 et seq. See also Çetingil in 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, p. 124; **Akıncı,** p. 126; **Atamer,** Gemi ve Uçak İpoteği, p. 427 et seq. For German law, see **Wüstendörfer,** p. 93 et seq.

129 See Official Report of Commission of Justice p. 400. For other examples, see **Kalpsüz,** p. 136.

130 See **Davran,** pp. 19-21; **Akıncı,** pp. 121-122, 124; İnceoğlu, p. 267; **Oğuzman / Seliçi / Oktay-Özdemir,** p. 947 Nr. 3345 et seq.; **Nomer / Ergüne,** p. 174 Nr. 549 et seq.

131 İnceoğlu, p. 273 et seq.

132 For examples of removing the fixtures from the ship against the requirements of an ordinary run of business, see **Atamer,** Gemi ve Uçak İpoteği, p. 434.

available for the mortgagee. The situation was different in relation to the old-TCC, for old-TCC does not contain an analogous regulation. In this respect, only if the mortgage deed containing an acknowledgement of debt has been issued by a notary public as stated in Art. 38 TCEB, the enforcement proceeding with judgment was available for the mortgagee[133].

VII. Conclusion

At the beginning of this paper, I quoted from the preamble of the TCC that one of the aims of the reform is adapting to the recent international conventions in maritime law. At the end of the paper, I want to return to that point and ask whether the regulation of the TCC regarding ship mortgages and –especially- maritime liens are fit to this purpose.

In my opinion, the provisions of the TCC on this issue are considerably in accordance with the principles laid down by the GeneCon. I can say that, Turkish legislator is deemed to succeed in achieving its objective of bringing the rules on maritime liens and ship mortgages into harmony with the GeneCon.

However, there are some minor differences between the provisions of the TCC and their sources[134]. I just want to remark one of them as an example. According to Art. 1350 TCC in respect of the notice of forced sale of a Turkish flagged ship abroad, the press announcement is not an additional way unlike the regulation in Art. 11/3 of the GeneCon. If the forced sale is announced by press, there is no need for any other notice. That applies to forced sale of a foreign flagged ship in Turkey as well (Art. 1384/2 TCC).

Apart from these minor differences and in conclusion, I can say that Turkish law is in harmony with the recent international convention on this issue and corresponds with today's tendency of strengthening the position of the ship mortgagee. Yet more, it is submitted that ship mortgages have never been better protected under Turkish law[135].

Bibliography

Akan, Pınar: Deniz Hukuku'nda Geminin Enkaz Haline Gelmesinin Hukuki Niteliği Ve Sonuçları, İstanbul 2005.

Akinci, Sami: Türk Hukukunda Gemi İpoteği, Banka Ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 1958.

Algantürk, S. Didem: "Türk Hukukunda Ve İngiliz Hukukunda Gemi İpoteğinin Tesisine İlişkin Özellikler", İstanbul Barosu Dergisi Vol. 73 Nr. 4-5-6 1999, Pp. 657-666.

133 For former situation regarding proceeding with and without judgement and "special" proceeding with judgement (Art. 149 TCEB), see **Kalpsüz,** pp. 144-150.

134 For the list of differences, see Süzel, p. 369 et seq.

135 **Atamer**, Ship Mortgage and Enforcement, p. 93.

Atamer, Kerim: "Gemi İpoteği Hükümlerinin Yasama Tarihçesi, Kaynakları Ve Bazı Uyum Sorunları", Prof. Dr. Rona Serozan'a Armağan, Vol. 1, İstanbul 2010, Pp. 249-315. (Gemi İpoteği Hükümlerinin Yasama Tarihçesi)

Atamer, Kerim: Gemi Ve Uçak İpoteğinin Hukuksal Temelleri, İstanbul 2012. (Gemi Ve Uçak İpoteği)

Atamer, Kerim: "Gemi Ve Yük Alacaklısı Haklarının Kullanılmasında Yargılama Usulü Ve İcra", Ticaret Hukuku Ve Yargıtay Kararları Sempozyumu Xıv: Bildiriler – Tartışmalar, Ankara, 4-5 Nisan 1997, Pp. 205-299. (Gemi Ve Yük Alacaklısı Hakları)

Atamer, Kerim: "New Turkish Law Of Ship Mortgages And Enforcement", Recent Developments İn Maritime Law, Papers Submitted To The Joint Seminars Of The German And Turkish Maritime Law Associations Held İn Hamburg On 25 August 2011 And İn Istanbul On 6 October 2011, Turkish Maritime Law Association And German Maritime Law Association, Pp. 75-93. (Ship Mortgage And Enforcement)

Atamer, Kerim: "Yeni Türk Ticaret Kanunu Uyarınca Zarar Sigortalarına Giriş", Batider Vol. Xxvıı Nr. 1 2011, Pp. 21-106. (Zarar Sigortaları)

Atamer, Kerim / Damar, Duygu / Erçin, Feyzi / Özbek, Dolunay / Çelikçapa Bilgin, Burcu / Bektaşoğlu Şanlı, Dilek / Günay, M. Barış / Yeşilova Aras, Ecehan / Süzel, Cüneyt / Yetiş Şamlı, Kübra: Transport Law İn Turkey, Second Edition, The Netherlands 2016. (Transport Law)

Aybay, Aydın / Hatemi, Hüseyin: Eşya Hukuku, 4. Edition, İstanbul 2014.

Barlas, Nuray: Gemi Alacaklısı Hakkı Veren Alacaklar Ve Gemi Alacalısı Hakkının Hukuki Niteliği, İstanbul 2000.

Czerwenka, Beate: Das Gesetz Zur Reform Des Seehandelsrechts, Bundesanzeiger Verlag, Köln 2014.

Çağa, Tahir: Deniz Ticareti Hukuku Iıı: Gemi Ve Yük Alacaklısı Hakları, Zamanaşımı, Deniz Hukukunda Cebri İcra, 4. Edition By Rayegân Kender, İstanbul 2005 (Gemi Alacaklısı Hakkı).

Çağa, Tahir / Kender, Rayegân: Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan Ve Kaptan, 16. Edition, İstanbul 2010.

Çetingil, Ergon A. / Kender, Rayegân / Ünan, A. Samim / Yazıcıoğlu, Emine: "Ttk Tasarısı'nın 'Deniz Ticareti' Başlıklı 5. Kitabında Yer Alan Hükümler Hakkında", Türk Ticaret Kanunu Tasarısı Hakkında Değerlendirmeler, Deniz Hukuku Dergisi Özel Sayı, Ocak 2006, Pp. 1-297.

Davran, Bülent: Rehin Hukuku Dersleri, İstanbul 1972.

Grau, Carsten: "Highlights Of The German Government's Draft Legislation On Maritime Law", Recent Developments İn Maritime Law, Papers Submitted To The Joint Seminars Of The German And Turkish Maritime Law Associations Held İn Hamburg On 25 August 2011 And İn Istanbul On 6 October 2011, Turkish Maritime Law Association And German Maritime Law Association, Pp. 60-64.

Günay, Barış: Türk Ve Anglo-Amerikan Hukukunda Gemi Alacaklısı Hakkı, Ankara 2009 (Gemi Alacaklısı Hakkı).

Günay, Barış: "Türk İngiliz Ve Amerikan Hukukunda Gemi Alacaklısı Hakkının Tarihçesi", Prof. Dr. Hüseyin Ülgen'e Armağan, Vol. I, İstanbul 2007, Pp. 927-944. (Tarihçe).

İnceoğlu, M. Murat: "Gemi İpoteğinde Alacaklının Alacak Muaccel Olmadan Önceki Hakları", Prof. Dr. Tahir Çağa'nın Anısına Armağan, İstanbul 2000, Pp. 261-277. +

İzveren, Adil / Franko, Nisim / Çalik Ahmet: Deniz Ticaret Hukuku, Banka Ve Ticaret Hukuku Araştırma Enstitüsü Yayın No. 294, Ankara 1994.

Kalpsüz, Turgut: Gemi Rehni, 4. Edition, Banka Ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 2001.

Kender, Rayegân / Çetingil, Ergon / Yazicioğlu, Emine: Deniz Ticareti Hukuku I: Temel Bilgiler, 14. Edition, İstanbul 2014.

Nomer, Haluk Nami / Ergüne, Mehmet Serkan: Eşya Hukuku: Zilyetlik, Tapu Sicili, Rehin Hakları, 3. Edition, İstanbul 2016.

Oğuzman, M. Kemal / Seliçi, Özer / Oktay-Özdemir, Saibe: Eşya Hukuku: Zilyetlik-Tapu Sicili, Taşınmaz Ve Taşınır Mülkiyeti, Kat Mülkiyeti, Sınırlı Ayni Haklar, 19. Edition, İstanbul 2016.

Okay, Sami: Deniz Ticareti Hukuku I, 3. Edition, İstanbul 1970.

Omağ, Merih Kemal: "Gemi İpoteği Ve Sigorta Tazminatı", Prof. Dr. Turhan Esener I. İş Hukuku Uluslararası Kongresi, İstanbul 2016, Pp. 351-365.

Otto, Stefan / Scholl, Thilo: "Legal Treatment Of Ship Finance Loans: Analysis Of The Ship Loan Contract", Hsba Handbook On Ship Finance, 2015, Pp. 55-67.

Sevinç Kuyucu, Aslıhan: Gemi Finansmanı Sözleşmeleri, İstanbul 2016.

Süzel, Cüneyt: Gemi Alacaklısı Hakkı Ve Gemi İpoteği Hakkında 1993 Cenevre Sözleşmesi Ve Yeni Türk Ticaret Kanunu, İstanbul 2012.

Sözer, Bülent: Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan Ve Navlun Sözleşmeleri, 3. Edition, İstanbul 2014.

Şeker Öğüz, Zehra**:** "Üzerinde İpotek Tesis Edilmiş Gemilerin Türk Gemi Sicilinden Terkin Edilerek Türk Uluslararası Gemi Siciline Kaydedilmesi Sorunu", Deniz Hukuku Dergisi, Vol. 4 Nr. 3-4 1999, Pp. 83-92.

Şeker Öğüz, Zehra / **Sevinç Kuyucu, Aslıhan:** Yeni Türk Ticaret Kanunu'nda Sigorta Hukuku, İstanbul 2011.

Tekil, Fahiman: Deniz Hukuku, 6. Edition, İstanbul 2001.

Ülgener, Fehmi: "Gemi İpoteği Alacaklısının Sigortalanabilir Menfaati: Tekne, Sorumluluk Ve Imıc Sigortaları", Sigorta Hukuku Dergisi, Vol. 1 1999, Pp. 37-49.

Ünan, Samim: "Some Aspects Of Maritime Law In The New Turkish Commercial Code", Recent Developments In Maritime Law, Papers Submitted To The Joint Seminars Of The German And Turkish Maritime Law Associations Held In Hamburg On 25 August 2011 And In Istanbul On 6 October 2011, Turkish Maritime Law Association And German Maritime Law Association, Pp. 9-17.

Wüstendörfer, Hans: Neuzeitliches Seehandelsrecht, 2. Auflage, Tübingen 1950.

Yazicioğlu, Emine: Tekne Sigortası Sözleşmesi, İstanbul 2003.

Zarth, Christoph: "Ship Finance And Ship Mortgages", Recent Developments İn Maritime Law, Papers Submitted To The Joint Seminars Of The German And Turkish Maritime Law Associations Held İn Hamburg On 25 August 2011 And İn Istanbul On 6 October 2011, Turkish Maritime Law Association And German Maritime Law Association, Pp. 65-74.

40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, 5-9 Aralık 1998, İstanbul 1998.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 217–225

DOI: 10.26650/annales.2017, *49*(66).0009

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Die Charismatische Herrschaft, Recht Und Gewalt: Eine Vergleichende Annäherung

Assist. Prof. .Dr. Tolga Candan[1] **Ress. Assist. Hüsnü Yavuz Aytekin**[2]

Özet

Sosyolojiye önemli katkılar sağlamış, bir bilim olarak sosyolojinin genel kavramsal çerçevesini çizmiş ve tutarlı bir sosyal bilimler felsefesi geliştirmiş olan MaxWebertoplum ve çağların nasıl farklı toplumsal otorite biçimleriyle belirlendiğini tespit etmek için bir otorite tipi geliştirmiştir. Bunlar içerisinden liderin kutsallık, kahramanlık gibi üstün nitelikleri sonucu ortaya çıkan ve daha çok istikrarsızlık ve kriz dönemlerinde halkın bu lidere tam bir teslimiyet içinde bağlanmaları sonucunu doğuran karizmatik otorite tipi bu çalışma açısından özellikle ön plana çıkmaktadır.

HannahArendt ile Walter Benjamin ise birbirlerine paralel düşünceler geliştirmiş olmamakla birlikte 20. Yüzyılın en üretken politik felsefe düşünürleri arasında yer almaktadırlar. MaxWeber'in karizmatik otorite tipi ve onun hukuk ortaya koyma biçiminin Arendt ile Benjamin'in şiddet eleştirisi üzerinden bir okunmasının ve değerlendirilmesinin yapılması bu çalışmanın konusunu teşkil etmektedir.

Anahtar Kelimeler

Max Weber, karizmatik otorite, HannahArendt, iktidar, şiddet, Walter Benjamin, tanrısal şiddet, hukuk.

Abstract

Max Weber, who has contributed significantly to sociology, who established a broad conceptual frame in sociology and who developed a consistent social sciences philosophy, has brought on an authority type in order to identify how society and epochs are determined by various social authority styles. In this study, among different leadership styles, charismatic authority is prominent, that is arose through superior qualifications such as sacredness and heroism; and that causes society to submissively bind to him in a situation of crisis.

Hannah Arendt and Walter Benjamin, in spite of not having developed parallel thoughts, are among the most productive politic philosophers of the 20th century. The subject of this paper is a reading of the charismatic type of leadership of Max Weber and his way of executing laws in terms of Arendt and Benjamin's criticism on violence.

Keywords

Max Weber, charismatic authority, Hannah Arendt, power, violence, Walter Benjamin, divine violence, law.

1 Assistenz-Professor, Türkisch-Deutsche Universität Fakultät für Rechtswissenschaft, candan@tau.ed.tr

2 Wiss. Mitarbeiter, Türkisch-DeutscheUniversität, Fakultät für Kultur- und Kommunikationswissenschaften, aytekin@tau.edu.tr

To cite this article: Candan, Tolga: "Die Charismatische Herrschaft, Recht Und Gewalt: Eine Vergleichende Annäherung'', Annales de la Faculté de Droit d'Istanbul, 49(66), 2018, p.217-225. https://dx.doi.org/10.26650/annales.2017.49.66.0009

I. Die Unterscheidung MACHT – HERRSCHAFT – GEWALT

Hannah Arendt wirft Intellektuellen ihrer Zeit „*theoretische Sterilität*"[3] vor und kritisiert vor allem die deutschen Intellektuelle, weil sie mit den veralteten, aus dem 19. Jahrhundert stammenden Begriffen und Kategorien denken. Ebenso sehr steril sind die theoretischen Ansätze, die mit den Begriffen der klassischen (politischen) Philosophie hantieren und suchen Phänomene im zeitgenössischen Sinne wie Macht, Stärke, Politik und Gewalt auf diesem Wege zu erklären. Auf der anderen Seite sind die Bindungen der Sozialwissenschaftler an die Vergangenheit ihres Faches unabdingbar und im Kontrast zwischen verschiedenen Ansätzen können fruchtbare Ergebnisse liefern.

Zahlreiche Ansätze, die mit Begriffen der klassischen politischen Philosophie arbeiten, berufen sich auf Clausewitz›schen Satz: „*Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln*". Laut diesem Verständnis werden alle politischen Phänomene als ein Problem des Regierens eingestuft und verschiedene Phänomene wie Gewalt, Recht und Demokratie als eine Manifestation von Macht angesehen.

Max Weber als ein Mitbegründer der Soziologie und bahnbrechender Denker unterscheidet zwischen Begriffen Macht und Herrschaft und ist damit seiner Zeit voraus. Den Faktor der Übereinstimmung behält er bei dieser Problematik im Auge. Jedoch sieht er Macht und Gewalt nicht als eigenständige politische Phänomene wie bei Arendt der Fall ist. Deshalb müsste man hier anmerken, dass Webers Begriff von Herrschaft eine Parallele zum Machtbegriff von Arendt bildet, weil beide Denker den Faktor der Übereinstimmung betonen.

Zunächst sollen einige Erwägungen zum Machtbegriff von Weber aufgeführt werden. Weber geht in seiner Abhandlung mit der Unterscheidung von Macht und Herrschaft vor. „*Macht"* bedeutet für Weber „*jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen auch gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht*"[4]. Nach dieser Definition Webers ist Macht also eine nicht unbedingt dauerhafte soziale Beziehung, die jeder Mensch unter beliebigen Situationen in beiden Richtungen, d.h. als Ausübenden oder Ausgeübten, betreffen kann. Ferner geht aus der Definition auch hervor, dass Macht nicht spezifisch an eine oder mehrere Personen gebunden ist, bzw. gebunden sein muss.

Die „*Herrschaft* soll" hingegen „*die Chance für einen Befehl bestimmten Inhalts bei angebbaren Personen Gehorsam zu finden*"[5] heißen. Hier wird schon ein Unterscheidungsmerkmal zwischen der Macht und der Herrschaft erkennbar. Während die

3 Hannah Arendt, Macht und Gewalt, Leck, Piper, 1993, s. 111.

4 Max Weber, Wirtschaft und Gesellschaft, Tübingen, Mohr Siebeck, 2013, s. 28.

5 Ibid., s. 29.

Macht nicht unbedingt von Dauer sein muss, setzt die Definition der Herrschaft eine nicht kurzfristige Dauer voraus, seinen Willen aktuell durchzusetzen, sondern vielmehr von einem anderen Individuum oder einer Gruppe für diesen Willen „Fügsamkeit" bzw. „Gehorsam" entgegengebracht zu bekommen.

Ein weiteres Unterscheidungsmerkmal zwischen der Macht und der Herrschaft ist die Bindung der Herrschaft eines erfolgreich Befehlenden und oftmals der Existenz eines Verwaltungsstabes oder Verbandes, um die Herrschaft zu legitimieren und für die Einhaltung der besonderen Anordnungen und Regeln zu sorgen.

Arendt avanciert diesen kritischen Blick zu einem Begriffsnetz, indem sie zwischen Macht, Stärke, Kraft, Autorität und Gewalt unterscheidet. Dennoch distanziert sich ihr Ansatz von dem Webers wenn es um die Rolle der Gewalt bei der Begründung eines Staates geht. Weber führt ein Zitat von Trotzki, nämlich „*jeder Staat wird auf Gewalt gegründet*"[6] und äußert sich dazu: „*Das ist in der Tat richtig*." Arend findet diese Äußerung „*merkwürdig*", weil sie Gewalt nur in Anlehnung auf Marx' Staatsmodell, den Staat „*als ein Instrument der Unterdrückung in der Hand der herrschenden Klasse*"[7] bewertet. Diese Gleichsetzung von Macht und Gewalt ist ein Produkt von einem Missverständnis. Nämlich, weil man den „*eigentlichen Bereich des Politischen, den Staat*"[8] als nur ein bloßer Überbau sieht. Um den Kontrast mit Hannah Arendt und Walter Benjamin veranschaulichter und -den von Weber entwickelten- Begriff der charismatischen Herrschaft verständlicher zu machen ist man genötigt eine Erläuterung über Webers Herrschaftsformen zu geben.

II. Herrschaftsformen nach Weber

1. Die traditionale Herrschaft

In einer traditional begründeten Herrschaft gilt der Gehorsam einer persönlichen Autorität, welche aus gewohnter Sitte oder aus sich durchgesetzter Konvention die Befehls- und Führungsgewalt innehat. Zeitlich gewohnte oder ethisch oder religiös begründete Weltbilder sind typische Charakteristika dieser traditional begründeten Herrschaft.

Eine Mehrzahl der Herrschaftsformen dürfte wohl auf diesem Konzept der traditionalen Herrschaft beruhen, da die Wurzeln der rationalen Herrschaft nicht sehr weit zurückreichen und die charismatische Herrschaft als eine außeralltägliche Herrschaft eine seltene Ausprägung darstellt.

Die traditionale Herrschaftsbildung und –Ausübung wird zunächst insbesondere am Patriarchalismus, dessen Keim in der Autorität des Hausherrn innerhalb

6 Hannah Arendt, Ibid. s. 36.

7 Ibid.

8 Ibid.

einer familialen Hausgemeinschaft liegt[9] und des Weiteren am Patrimonialismus verdeutlicht, dessen Keim in der Treue an einen Herrn vor einer dezentralisierten Besitzlage zu sehen ist. Bei beiden Herrschaftsgebilden besteht das Gehorsams- und Abhängigkeitsverhältnis aufgrund eines Pietäts- und Treueverhältnisses[10].

2. Die rationale Herrschaft

Die rational begründete Herrschaft unterscheidet sich von der traditional begründeten Herrschaft dadurch, dass bei ihr der Gehorsam nicht einer bestimmten Person, sondern einer Institution bzw. Organisation, die aufgrund meist schriftlich fixierten Satzungen und Regeln ihren Herrschaftsanspruch geltend machen, entgegengebracht wird.

Der Kontrollmechanismus zur Sicherstellung der Einhaltung der Satzungen und Regeln greift wiederum auf Menschen zurück, so dass die Überprüfung vom Vorgesetzten durchgeführt wird. Anzutreffen ist diese rational strukturierte und ausgeübte Herrschaftsform vor allem in bürokratisch organisierten Verwaltungen bzw. Verwaltungsapparaten, wie etwa einer politisch institutionalisierten Behörde im konkreten oder dem modernen Beamtentum im Allgemeinen.

3. Die charismatische Herrschaft

Es wird angenommen, dass Charismaträger übernatürliche Kräfte oder außeralltägliche Eigenschaften besitzen, und sich durch diese Eigenschaften deutlich von der Masse unterscheiden. Das können z.B Offenbarungen sein, die ihm zuteilwurden, magische Fähigkeiten, aber auch die Weisheit oder besondere rednerische Fähigkeiten, die zum Anlass genommen werden, diese Person als von Gott gesandt, als vorbildlich und dadurch als Führer anzusehen. In seine „reinsten" Typen differenziert Weber die charismatischen Herrscher noch einmal in Propheten, Kriegshelden und Demagogen[11].

Die Anhänger, die auch als Jünger bezeichnet werden, gehorchen nicht aufgrund gesatzter Stellung einem Gesetzeswerk, wie bei der legalen Herrschaft oder wegen Traditionen, sondern aus persönlichem Vertrauen in die charismatischen Eigenschaften des Herrschers.

Nach Weber beruht die Legitimitätsgeltung der charismatischen Herrschaft „auf der außeralltäglichen Hingabe an die Heiligkeit oder Heldenkraft oder die Vorbildlichkeit einer Person und der durch sie offenbarten oder geschaffenen Ordnungen"[12]. Das heißt, dass die Fügsamkeit der Beherrschten rein affektuell ist.

9 Weber, Ibid., s. 580.

10 Dirk Käsler, Klassiker des soziologischen Denkens, c. 2: Von Weber bis Mannheim, München, Beck, 1978, s. 135.

11 Weber, Ibid., s. 124 ve 215.

12 Ibid., s.159.

Das typische Herrschaftsverhältnis konstelliert sich hierbei zwischen einem Führer und seiner Gemeinde. Die sich hieraus ergebende Frage, die für Weber entscheidend ist, lautet, wie das Charisma von den Massen anerkannt werden könnte. Ob einmaliges Wunder oder Offenbarung ausreicht, dass der Herrscher als Führer akzeptiert und anerkannt wird? Bewährung ist dafür Grundvoraussetzung. Er muss seine charismatischen Qualitäten seinen Anhängern von Zeit zu Zeit durch Wunder, Erfolge und Wohlergehen der Gefolgschaft beweisen, um damit weiterhin die Anerkennung von den Beherrschten zu erlangen. Wenn ihm der Erfolg versagt wird, wankt seine Herrschaft. In diesem Zusammenhang spricht Weber von dem Begriff des Gottesgnadentums: der Charismaträger muss beweisen, dass er sich in der Gnade seines Gottes befindet, sonst wankt seine Herrschaft. Als Beispiel hat Weber den chinesischen Monarchen genannt: er ist durch Natur-Ereignisse, wie Dürre, Überschwemmung, Misserfolg im Feld bedroht und seine Herrschaft ist fraglich geworden. Es wird somit angenommen, dass er die Gnadengabe des Gottes verloren hätte und seine Führung nicht mehr zum Wohlergehen führen würde[13].

Äquivalent zur Besonderheit der Person stellt auch die Besonderheit der raumzeitlichen sozialen Umstände eine wesentliche Voraussetzung des Aufkommens und der Anerkennung eines charismatischen Führers dar. Besonders in Situationen der Not und Krise, der politischen Unordnung oder der emotionalen Erregung, heftet sich die Hoffnung auf Besserung und Ordnung der Zustände an Revolutionäre, Helden, Schamanen, Propheten und ähnliche Führergrößen, also an eine Person, die auftritt und die Krise zu überwinden verspricht und somit Glaubwürdigkeit und Vertrauen seitens der Gemeinde erlangt[14].

Gemeinsam ist allen charismatischen Führern, dass sie sich auf Werte, wie auf das Überleben, die Rettung vor dem Untergang, die Ehre, Gerechtigkeit beziehen und nicht auf die Implementation spezifischer Maßnahmen.

Wie bereits oben erwähnt, muss sich jede Herrschaftsform, so auch die charismatische Herrschaft, legitimieren, um die eigene Stabilität zu gewährleisten. Hier sind das interne Legitimitätsverständnis und die objektiven Gegebenheiten nicht kongruent. Während objektiv die charismatische Legitimität anerkannt und somit die Legitimität des Charismatikers begründet und bestätigt wird, funktioniert diese Kausalität im Verständnis der Beherrschten gerade umgekehrt: Das Charisma wird in seiner Beziehung zu den Beherrschten als souverän empfunden. Der Anspruch des Charismaträgers auf bedingungslosen Legitimitätsglauben als Bewährung wird ausschließlich gefühlsbegründet geleistet und ist nicht intellekuell hinterfragbar. Der charismatische Legitimitätsglaube geprägt durch das Umfeld und beruht auf persönlichen Emotionen

13 Johannes Winckelmann, Legitimität und Legalität in Max Webers Herrschaftssoziologie, Tübingen, Mohr, 1952, s. 116.

14 Stefan Breuer, Bürokratie und Charisma. Zur politischen Soziologie Max Webers, Darmstadt, Wissenschaftliche Buchgesellschaft, 1994, s. 35.

bzw. Werten. Dieser Legitimitätsglaube motiviert den Einzelnen, die äußeren Gegebenheiten nach seinem revolutionären Wollen zu gestalten[15].

Schließlich ist anzumerken, daß diese Herrschaftsform, die überwiegend in allgemeinen Notsituationen entsteht und sich auf Emotionen stützt, für eine stabile, kontinuierliche und dauerhafte Herrschaftsausübung ungeeignet ist.

Jede Herrschaftsform besitzt unterschiedliche soziologische Strukturen in seinem Verwaltungsapparat. Weber setzt seiner idealtypischen Herrschaftsbeschreibung daher die spezielle Art des Verwaltungsstabes hinzu[16].

Der Verwaltungsstab der charismatischen Herrschaft besteht nicht aus fachlich qualifizierten Beamten wie die bürokratische Verwaltung der legalen Herrschaft. Er ist einzig und allein nach der charismatischen Eigenschaft des Charismarträgers und der persönlichen Hingabe der Jünger angenommen und der Mission des Charismaträgersangepaßt[17]. Weber charakterisiert die charismatische Herrschaft daher als eine emotionale Vergemeinschaftung.

Es gibt keine Anstellung, keine Absetzung und keine Laufbahn im Sinne einer Beamtenlaufbahn. Man wird nur vom Führer wegen der eigenen charismatischen Eigenschaften und der persönlichen Hingabe an die Mission des Charismaträgers zu einer Aufgabe ohne eine spezielle bzw. wissenschaftlich verallgemeinbare Gesetzmäßigkeit berufen. Bei dem charismatischen Verwaltungsstab können die Begriffe „Kompetenz" und „Privileg" nicht verwendet werden, da die Besetzung des Verwaltungsstabes nur nach dem subjektiven Ermessen des Charismaträgers erfolgt[18].

Es besteht kein Gehalt, keine Behörden und keine formalen Regeln. Die charismatische Herrschaft finanziert sich ausschließlich aus den Einnahmen des Herrn[19].

III. Verhältnis der charismatischen Herrschaft zum Recht bei Weber

Das irrationale und regelfremde Charakter der charismatischen Herrschaft gilt auch für das Verhältnis zum Recht. Es existiert keine formale Rechtsgrundlage. Sie beruht weder auf einer rationalen Rechtsgrundlage, die auf einem Gesetz aufbaut, noch auf einer Grundlage, die auf vergangene Beispielfälle oder Weisheiten anknüpft, sondern fundiert nur auf einer aktuellen Rechtsprechung oder Rechtsschöpfung, die von Fall zu Fall unterschiedlich sein kann.

15 Weber, Ibid., S. 657.

16 Hermann Korte, Einführung in die Geschichte der Soziologie, Meppel, VS Verlag für Sozialwissenschaften, 2011, s. 113.

17 Weber, Ibid.,s. 659.

18 Winckelmann, Ibid., s. 114.

19 Weber, Ibid., s. 660.

„Es steht geschrieben, -ich aber sage euch“[20] durch diesen Satz wird die charismatische Herrschaft charakterisiert. Dieses kann sowohl als Abkehr von Traditionen als auch von legalen Herrschaftssystemen verstanden werden. Der Prophet beruft sich auf seine Gottesschrift bzw. legt sie nach seinem Belieben aus, der Kriegsheld schafft neue Ordnungen durch Gewalt und Macht und der Demagoge richtet durch sein Redetalent. Der charismatische Herrscher kann ganz willkürlich nach Belieben und spezifischen Nutzen neue Gebote und Richtlinien verkünden, schaffen und fordern. Von den Anhängern müssen diese ebenso selbst anerkannt werden.

Anhand dieser letzten zwei Gesichtspunkte, dem Verwaltungsstab und dem Verhältnis zum Recht, zeigt sich der Gegensatz zwischen der charismatischen Herrschaft, als einer außeralltäglichen Herrschaftsform, und der legalen bzw. traditionalen Herrschaft, als Alltagsformen, sehr deutlich.

Die legale Herrschaft ist durch Rationalität charakterisiert und an Regeln gebunden. An diesem Maßstab ist die charismatische Herrschaft dagegen irrational, weil ihr Regeln fremd sind. Die traditionale Herrschaft ist an Tradition und Beispielfälle gebunden und auch gewissermaßen an Regeln orientiert. Bei der charismatischen Herrschaft verhält es sich im Gegensatz zu den genannten Rechtsnormen bei der Rechtsprechung äußerst Spontan und Situationsabhängig.

IV. Arendt und Benjamin im Kontrast zu Weber

Kritik der Gewalt in ihrem Verhältnis zum Recht lässt sich in zwei gegensätzlichen Positionen vertreten: Arendt’s Kritik der Gewalt steht die metaphysische Kritik der Gewalt von Walter Benjamin gegenüber. Laut etwas radikaler wirkender Position von Benjamin sind sogar der politische Wille, der einen Staat aufgrund der Übereinstimmung zusammenhält und jede beliebige Rechtsordnung nicht gewaltfrei. Benjamin stellt der Rechtsordnung und allen außerrechtlichen Instrumenten, die direkte Gewaltausübung befürworten die reinen Mittel gegenüber. Die Tugenden „Herzenshöflichkeit, Neigung, Friedensliebe“[21] und „Vertrauen“ sind Mittel, um aus der Gewaltordnung hinauszuschleichen. Dementsprechend kann man feststellen, dass Arendt eine Position vertritt, die der tagespolitischen Realität nah ist und Benjamın hingegen eine präzise, metaphysische Kritik ausübt. Im Kontrast zu Weber unterscheiden Arendt und Benjamin zwischen dem Begriff der Politik und dem des Politischen. Jedoch wird eine reibungslos funktionierende Rechtsordnung, die Menschen Freiheit gewährleistet von Arendt nicht unter der Gewalt subsumiert.

Dass Gewalt nicht als ein eigenständiges Thema berücksichtigt wird kommt nach Arendt davon, dass „von links bis rechts der einhelligen Meinung ist, daß Macht

20 Weber, Ibid., s. 657.

21 Benjamin, Zur Kritik der Gewalt, İn: GesammelteSchriften, B. II.1, Frankfurt, Suhrkamp, 1999, s. 191.

und Gewalt dasselbe sind, beziehungsweise daß Gewalt nichts weiter ist als die eklatanteste Manifestation von Macht“[22]. Nach dieser Vorstellung wird Gewalt als eine Garantie und Mittel für die Aufrechterhaltung der Ordnung und des Rechts verstanden, denn sie unterscheidet nicht zwischen Gewalt und Macht. „Macht und Gewalt [...] sind nur in extremen Fällen in ihrer reinen Gestalt anzutreffen“[23] Obwohl Macht und Gewalt meistens gemeinsam treten sieht Arendt sogar in den Monarchien als Gipfel der Macht eine Übereinstimmung zwischen dem, der Gewalt ausübt und dem, gegen den Gewalt ausgeübt wird. .

Ähnliche Feststellungen, dass Macht auf Übereinstimmung ruht, findet man bei Byung-Chul Han auch. “Es ist eine weit verbreitete Annahme”[24] schreibt er, “dass die Rechtsordnung ihre Wirksamkeit verliere, wenn sie zur Durchsetzung ihrer Zwecke über kein Gewaltmittel verfüge“. Die Betonung beider Denker liegt auf diesen Satz: Eine Rechtsordnung oder Macht kann nicht allein durch Gewaltmittel aufrechterhalten werden.

Benjamins Gewaltkritik fokussiert sich auf die reine Gewalt und gewaltlose Beseitigung der Konflikte. Als Beispiel für eine gewaltlose Konfliktbeseitigung gibt er als Beispiel die Entwicklung der Diplomatie, bei der Parteien die Konfliktlösung sich gleich am Beginn zum Zweck setzen. Die diplomatischen Verhandlungen, so Benjamin, finden außerhalb des Rechts, denn der Betrug und Lüge werden nicht unter Strafe gestellt. Gerade aus diesem Grund gilt diplomatische Lösung für Benjamin gewaltlos.[25] Ein rechtlicher Vertrag oder eine durch gerichtliche Entscheidung bedeutet für Benjamin keineswegs Gewaltlosigkeit, weil eine Seite beim Vertragsbruch ein Anrecht auf Gewalt hat. Gewalt ist laut Benjamin sowohl mit Recht als auch mit der mythischen Macht in enger Verbindung zu denken. Die Gewalt in seiner politischen und gesellschaftlichen Form entstand durch die Bestrafung der unbewussten Übertretung des Gesetzes. Deshalb ist jede Rechtsgründung hat einen gewalttätigen Charakter. Benjamins Gewaltkritik sieht Überwindung der Gewalt durch Prinzipien des positiven Rechts unmöglich. So ist die Antwort auf die Frage „warum soll ich nicht töten?“, „du wirst nicht töten!“ kein positiv rechtlicher Spruch, sondern besitzt göttlichen Charakter. Für Arendt aber alle Kategorien der Gewaltlosigkeit müssen auf der politischen Ebene produziert werden.

V. Schlussbemerkung

Die Menschheit setzte in der zweiten Hälfte des zwanzigsten und dem angehenden einundzwanzigsten Jahrhundert mit ihren Errungenschaften, vor allem der Erbe der

22 Arendt, Ibid., S. 36.

23 Arendt, Ibid., S. 48.

24 Byung-Chul Han, Topologie der Gewalt, Berlin, Matthes Seitz, 2017, s. 66.

25 Benjamin, Gesammelte Schriften, Band II. 1, S. 119.

Aufklärung auseinander. Eines der wichtigsten Beispiele ist im Bereich des Rechts anzutreffen. Die Gründe für Verfassung der Radbruchs Prinzipien hatte eine lang anhaltende Diskussion über begriffliche Distinktionen wie zwischen Legalität und Legitimität. So ernten alle nicht bewertende Ansatzformen wie die verstehende Soziologie von Weber Kritik. Themen positives Recht[26] und Verfassung sind bis heute nicht ausgeschöpft.

Die Diskussionen über eine Verfassung[27] für Europa und den rasanten Aufstieg der extremen Rechtsorganisationen in europäischen Ländern gaben einen Anstoß um nochmals über instrumentelle Vernunft und eine neue weltweite Rechtsordnung nachzudenken.

Aus diesem Grund bietet der Kontrast „Weber versus Arendt-Benjamin" –obwohl Arendt und Benjamin unterschiedliche Positionen vertreten) neue Blickwinkeln zu gewinnen.

Quellen- und Literaturverzeichnis

Hannah Arendt, "Macht und Gewalt", München, Piper, 1993.

Walter Benjamin, "Gesammelte Schriften", B. II. 1, Frankfurt, Suhrkamp, 1999.

Stefan Breuer, "Bürokratie und Charisma. Zur politischen Soziologie Max Webers, Darmstad, Wissenschaftliche Buchgesellschaft, 1994.

Jürgen Habermas, BölünmüşBatı, Çev. DilmanMuradoğlu, İstanbul, YapıKrediYayınları, 2016.

Byung-Chul Han, Topologie der Gewalt, Berlin,Matthes&Seitz, 2017.

Dirk Käsler, Klassiker des soziologischen Denkens, Bd. 2: Von Weber bis Mannheim, München, Beck, 1978.

Herrmann Korte, Einführung in die Geschichte der Soziologie, Meppel, VS Verlag für Sozialwissenschaften, 2011.

Deniz Kundakçı, Max Weber, İstanbul, Say Yayınları, 2016.

Max Weber, Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie, Tübingen, MohrSiebeck, 1985.

Johannes Winckelmann, Legitimität und Legalität in Max Webers Herrschaftsoziologie, Tübingen, Mohr, 1952.

26 Siehedazu: Deniz Kundakçı, MaxWeber, İstanbul, Say Yayınları, 2016, s.62.

27 JürgenHabermas, "Uluslararası Hukukun Anayasalaştırılması İçin Bir Şans Daha Var mı?", in: Bölünmüş Batı, İstanbul, Yapı Kredi Yayınları, 2016, s. 107.

İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 49(66): 227–233

DOI: 10.26650/annales.2017, *49*(66).0010

http://dergipark.gov.tr/iuafdi

Annales de la Faculté de Droit d'Istanbul

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Das Problem der Pfändbarkeit von Nutzerrechten in den Zollfreigebieten

Prof. Dr. Oğuz Atalay[1]

Einführung

Es ist unumstritten, ob Zwangsvollstreckungsmaßnahmen gegen Unternehmen, die in Zollfreigebieten tätig sind, alle Sachen und Rechte, die sich in deren Vermögen befinden, umfassen. Gemäß Art. 52 Abs. 1 der Verordnung über Zollfreigebiete[2] (Verordnung) unterliegen Zwangsvollstreckungsmaßnahmen in den Zollfreigebieten den Zwangsvollstreckungsgesetzen. Bewegliches Vermögen des Schuldners im Zollfreigebiet kann gepfändet werden, doch nicht außerhalb des Zollfreigebiets in Beschlag genommen werden. Jene Güter, die von der Zwangsvollstreckungsbehörde gepfändet wurden, können lediglich einem anderen Unternehmen im Zollfreigebiet als Treuhänder übergeben werden. Ist ein solches nicht vorhanden, so können sie dem Betreiberunternehmen des Zollfreigebiets übergeben werden. Der Verkauf dieser Güter erfolgt nach den allgemeinen Vorschriften. Doch die verkauften Güter können nicht ohne Verzollung außerhalb des Zollfreigebiets gebracht werden.

Der folgende Beitrag behandelt nicht die Frage der Pfändung beweglicher Sachen von Schuldnern, die in Zollfreigebieten tätig sind, sondern ob deren Überbaurecht auf den dem Staat gehörenden Immobilien und die damit zusammenhängenden Rechte einer Pfändung unterliegen können oder nicht.

A. Rechtliche Einordnung des Überbaurechts in den Zollfreigebieten

Zunächst muss das Verhältnis zwischen den natürlichen oder juristischen Personen, die in den Zollfreigebieten, die sich im Eigentum des Staates befinden, und den Betreibern der Zollfreizonen und die rechtliche Natur des Überbaurechts[3], die aus diesem Verhältnis resultiert, näher bestimmt werden. Hierfür müssen die Voraussetzungen für eine Tätigkeit in einem Zollfreigebiet kurz

1 **Corresponding Author:** Oğuz Atalay (Prof. Dr.), Dokuz Eylül University, Institute of Social Science, Izmir, Turkey. Email: oguz.atalay@deu.edu.tr **Cite this article: Atalay, Oguz:** "Das Problem der Pfändbarkeit von Nutzerrechten in den Zollfreigebieten",

2 Resmi Gazete vom 10.3.1993, Nr. 21520.

3 In der Praxis wird auch der Begriff "Überbaunutzungsrecht" verwendet.

erläutert werden. Dieses Verfahren wird in der „Anwendungsverordnung über die Zollfreigebiete" (Verordnung) festgelegt.

Zunächst muss klargestellt werden, dass eine Investition und der Aufbau einer Anlage in einem Zollfreigebiet ohne eine Tätigkeitsbescheinigung unmöglich sind. Jene natürlichen oder juristischen Personen, die in Zollfreigebieten tätig werden wollen, wenden sich zunächst an die Zentralbehörde für Zollfreigebiete und beantragen die Erteilung einer Tätigkeitsbescheinigung (Verordnung Art. 11 Abs. 1).

Wird der Antrag auf Erteilung einer Tätigkeitsbescheinigung positiv verbescheidet, so wird dies dem Antragsteller schriftlich mitgeteilt. In dem betreffenden Schreiben wird dem Antragsteller außerdem eine Frist von 30 Tagen gewährt, um einen Miet- bzw. Kaufvertrag abzuschließen. Der Antragsteller, der innerhalb dieser Frist einen Miet- bzw. Kaufvertrag abschließt, lässt diese von der Regionalverwaltungsbehörde genehmigen und schickt sie der Zentralbehörde zu. Dem folgt die Ausstellung der Tätigkeitsbescheinigung durch die Zentralbehörde (Verordnung Art. 11 Abs. 2).

Erfolgreiche Antragsteller schließen sodann Miet- bzw. Kaufverträge mit dem Betreiber bzw. „Gebietsgründer und -betreiber". Nach dem diese von der Regionalbehörde genehmigt werden und die Zentralbehörde die Tätigkeitsbescheinigung erstellt hat, kann der Antragsteller mit der Investition im betreffenden Gebiet beginnen (Verordnung Art. 8 Abs. 4).

Gebäude und Anlagen in den Zollfreigebieten können sowohl durch den Gebietsgründer und –betreiber, als auch durch den jeweiligen Betreiber errichtet und an die „Nutzer" vermietet werden, oder aber durch den jeweiligen Nutzer errichtet werden (Verordnung Art. 8 Abs. 2).

Ist das für das Zollfreigebiet vorgesehene **Grundstück im Eigentum des Staats** oder einer anderen staatlichen Behörde, so wird es **durch die Zentralbehörde** dem Betreiber oder dem Gebietsgründer und –betreiber teilweise bzw. vollständig vermietet, **um darauf ein Überbau zu errichten** oder aber **einem erfolgreichen Antragsteller als natürliche oder juristische Person durch ein Vertrag vermietet** (Verordnung Art. 8 Abs. 1).

Zusammenfassend können erfolgreiche Antragsteller eine unbewegliche Sache (ein Überbau), deren Eigentümer der Staat ist, vom Betreiber (oder dem Gebietsgründer und –betreiber) mieten oder von der Zentralbehörde für die Zollfreigebiete mieten, um darauf selber ein Überbau zu errichten. Damit erlangt derjenige, der ein Überbau auf einem Grundstück, der sich im Eigentum des Staats befindet, errichtet, den Status eines „Nutzers". Nutzer wird definiert als diejenige natürliche oder juristische Person, die eine Tätigkeitsbescheinigung besitzt und im betreffenden Gebiet eine bestimmte Betriebsstatt hat (Gesetz über Zollfreigebiete Art. 3 lit. b)[4].

4 06.06.1985 tarih ve 3218 sayılı Serbest Bölgeler Kanunu (RG:15.06.1985 Sayı: 18785) (Gesetz über Zollfreigebiete). Vgl.

Diese Ausführungen zeigen deutlich, dass zwischen dem Nutzer, dem ein Nutzungsrecht für ein Überbau gewährt wird, das Eigentum des Grundstücks jedoch dem Staat gehört, und dem Staat (der Zentralbehörde für Zollfreigebiete) im rechtlichen Sinne ein Mietverhältnis entsteht (Art. 299 tOR)[5]. Zweifellos unterliegt dieses Mietverhältnis entsprechend der öffentlich-rechtlichen Natur besonderen Regelungen.

Dieses Recht, das dem Nutzer in diesem Zusammenhang gewährt wird, ist kein „Überbaurecht“ [6] im Sinne des Art. 826 des Türkischen Zivilgesetzbuchs. Das Überbaurecht kann Gegenstand einer Hypothekenbestellung sein oder auch gepfändet werden[7]. Daher muss das „Überbaurecht“ in den Zollfreigebieten vom Überbaurecht im Sinne des Zivilgesetzbuchs auseinandergehalten werden. Schließlich wird in Art. 3 lit. b) ausdrücklich geregelt, dass es sich bei dem Verhältnis zwischen dem Nutzer und dem Staat um ein Mietverhältnis handelt.

Derjenige Nutzer mit einer Tätigkeitsbescheinigung, der im Zollfreigebiet ein im Eigentum des Staates befindliches Grundstück gemietet hat, um darauf ein Bau (Gebäude) zu errichten, wird im Rahmen des Mietverhältnisses als „Mieter“ bezeichnet. „Nutzer“ bedeutet nichts anderes als die gesetzliche Bezeichnung derjenigen Mieter, die mit einer Tätigkeitsbescheinigung im Zollfreigebiet Investitionen tätigen und dort ihre Tätigkeiten ausüben.

Läuft die Gültigkeitsdauer der Tätigkeitsbescheinigung des jeweiligen Nutzers ab und wird sie nicht erneuert oder wegen eines der in der Verordnung bezeichneten Gründe für nichtig erklärt, so endet die Nutzereigenschaft und das errichtete Überbau geht in das Eigentum des Staats über, das auch der Eigentümer des Grundstücks ist. Der Erbauer kann diesbezüglich keine dinglichen Ansprüche geltend machen[8]. Im Ergebnis handelt es sich also beim Überbaurecht um ein persönliches Recht im Gewand eines Anspruchs auf Überlassung des Mietgegenstands.

---

auch Verordnung Art. 4 lit. n).

5 Zum Mietvertrag allgemein sh. **Eren, F**., Borçlar Hukuku Özel Hükümler, Ankara 2014, S. 332; **Zevkliler, A./Gökyayla**, Borçlar Hukuku Özel Borç İlişkileri, 13. Bası, Ankara 2013, S. 183; **Gümüş, M. Alper,** Yeni 6098 sayılı Türk Borçlar Kanununa Göre Kira Sözleşmesi, İstanbul 2011, S. 22; **Acar, F.**, Kira hukuku Şerhi, 2. Bası, Ankara 2015, S. 64; İnceoğlu, M., Kira Hukuku, C.I, İstanbul 2014, S. 7.

6 **Art. 826 tZGB:** Ein Grundstück kann mit der Dienstbarkeit belastet werden, dass jemand das Recht erhält, auf oder unter der Bodenfläche ein Bauwerk zu errichten oder beizubehalten.
Dieses Recht ist, wenn es nicht anders vereinbart wird, übertragbar und vererblich.

7 Sh. zum Überbaurecht im Sinne des Zivilgesetzbuchs Oğuzman, K., /Seliçi, Ö., Eşya Hukuku, 9. Bası, İstanbul 2002, S. 638 ff.; Esener,T./Güven, K., Eşya Huuku, 6. Bası, Ankara 2015, S. 428 ff.; Sirmen, L., Eşya Hukuku, 3. Bası, Ankara 2015, S. 527 ff.

8 Vgl. die Verwaltungsvorschrift vom 07.06.2012 und Nr. 2012/3 betreffend die Zuweisung, Übertragung, Verkauf und über die Unzulässigkeit von Überbauten in den Zollfreigebieten, Art. 4 (http://www.ekonomi.gov.tr/portal/content/conn/UCM/uuid/dDocName:EK-020448).

B. Können die Rechte der Nutzer in den Zollfreigebieten Gepfändet Werden?

1. Überbaurecht

Ob die Pfändung einer Sache oder eines Rechts möglich ist, hängt von zwei Grundvoraussetzungen ab. Die erste davon betrifft die Frage, ob die Übertragung (der Sache oder des Rechts) möglich ist oder nicht; die zweite hingegen, ob es einen wirtschaftlichen Wert besitzt. Sind diese beiden Voraussetzungen nicht erfüllt, so ist die Pfändung nicht zulässig[9].

In unserem Vollstreckungsrecht wird der Gläubiger aus dem Erlös, der durch den Verkauf der Ware des Schuldners erzielt wird, befriedigt. Da bei wirtschaftlich wertlosen Sachen ein monetärer Wert nicht vorhanden ist, können diese nicht Gegenstand einer Pfändung sein. Andererseits unterliegt nicht das gesamte Vermögen des Schuldners, das einen wirtschaftlichen Wert besitzt, der Zwangsvollstreckung. Jene Gegenstände und Rechte, deren Übertragung nach materiellem Recht unzulässig sind, können nicht gepfändet werden. Der Grund hierfür liegt im materiellen Recht[10]. Auch jene Rechte, die besonderen Bestimmungen unterliegen und nicht durch ein zweiseitiges Rechtsgeschäft übertragen werden können, sind der Pfändung entzogen. Das Recht auf Überlassung des Mietgegenstands aus dem Mietvertrag kann nicht durch Vereinbarung zwischen dem Mieter und einem Dritten auf Letzteren übertragen werden. Vielmehr muss der Vermieter zustimmen (Art. 323 Abs. 1). Die Übertragung des Mietrechts in Zollfreigebieten ist ebenfalls nicht möglich ohne die Zustimmung der Zentralbehörde für Zollfreigebiete. Die Behörde entscheidet darüber, ob die Übernehmende Person geeignet ist (Art. 8 Abs. 11 der Verordnung).

Die Nichtpfändbarkeit von Gegenständen und Forderungen, die keinen eigenständigen Wert haben, hängt damit zusammen, dass sie nicht isoliert einer dritten Person übereignet und aus dem Erlös ein Gewinn erzielt werden können.

Angesichts der Tatsache, dass es sich bei den Rechten der Baunutzer in den Zollfreigebieten um ein Mietverhältnis handelt, stellt sich automatisch heraus, dass dieses Recht einen wirtschaftlich eigenständigen Wert (einen materiellen Wert) hat und deswegen der Pfändung entzogen ist. Da der Mietanspruch gegenüber dem Grundstückseigentümer, dem Staat, keinen eigenständigen wirtschaftlichen Wert besitzt, kann dieser auch nicht im Wege der Zwangsversteigerung der höchst bietenden Person zugeteilt werden. Daher wird sie als eine der Pfändung entzogene Forderung bewertet.

Hält man andererseits das Verfahren bezüglich der Erlangung des Nutzer-Status im oben beschriebenen Sinne, so ist die zwangsweise Gewährung eines Nutzungsrechts im

9 HGK 06.12.2006, 12-765/765.

10 **Kuru, B**., İcra ve İflas Hukuku, C.I, İstanbul 1988, S. 779 ff.; Üstündağ, S., İcra Hukukunun Esasları, 8. Bası, İstanbul 2004, S. 173 ff.; **Pekcanıtez/Atalay/Özkan/Özekes**, İcra ve İflas Hukuku Ders Kitabı, 4. Bası, İstanbul 2017 S. 150; HGK 06.12.2006, 12-765/765.

Wege einer Vorerlaubnis oder einer Tätigkeitsbescheinigung nicht möglich, da der Erhalt einer Tätigkeitsbescheinigung ohne die Erfüllung der gesetzlichen Voraussetzungen nicht möglich ist (Art. 8 Abs. 11 der Verordnung). Es ist mithin undenkbar, einen Gegenstand zu pfänden, dessen zwangsweise Verkauf nicht möglich ist.

Kurz gefasst ist das Überbaurecht in den Zollfreigebieten nicht der Pfändung unterworfen, so wie der Mietanspruch ebenfalls nicht gepfändet werden kann.

Auch der 12. Senat des Türkischen Kassationshofs ist im Übrigen der Ansicht, dass das Überbaurecht nicht gepfändet werden kann[11].

2. Übertragungsanspruch des Überbaurechts

Es muss klargestellt werden, dass der in der Praxis verwendete Begriff „Übertragungsanspruch des Überbaurechts" kein technischer ist und im Sinne eines unabhängigen Anspruchs keine Bedeutung hat.

Dass ein Anspruch übertragen werden kann, stellt kein unabhängiges Recht dar; hier kann lediglich von einer Übertragungsbefugnis die Rede sein. Eine Befugnis hingegen besitzt keinen monetären Wert. Während das Eigentum an einer Mobilie bzw. Immobilie gepfändet werden kann, ist es unmöglich, von der isolierten Pfändbarkeit der Übertragungsbefugnis dieses Rechts zu sprechen. Die Übertragungsbefugnis ist Teil des Eigentumsrechts und stellt keinen unabhängigen Pfandgegenstand dar. Der Anspruch des Mieters aus einem Mietvertrag unterliegt ebenfalls keiner Pfändung, so dass der Übertragungsanspruch des Mietanspruchs ebenfalls nicht gepfändet werden kann.

In einem Urteil führt der Türkische Kassationshof aus: "…auch wenn das Überbaurecht bei Beendigung der Tätigkeit an den Staat zurückfällt und daher der Pfändung nicht unterliegt, ist zu bedenken, dass die Übertragung gegen ein wirtschaftlichen Entgelt nach der Verordnung möglich ist und damit die Pfändung der Übertragungsbefugnis. Daher muss das Gericht überprüfen, ob eine Übertragung gegen Entgelt möglich ist oder nicht[12]". Doch die Übertragung des Überbaurechts ist im Sinne der Übertragung des Mietanspruchs möglich[13]; allerdings ist die Pfändung dieses Rechts nicht möglich, da es keinen selbstständigen Anspruch darstellt und nicht isoliert zum Gegenstand eines Rechtsgeschäfts gemacht werden kann. Daher ist es nicht möglich, die Ansicht des Kassationshofs zu teilen.

11 12. HD, 17.11.2011; 10941/22640. Diese Rechtsprechung des 12. Senats kann man als beständig ansehen; 19.03.2013 tarih, 2013/472E, 2013/10149 K.; 19.03.2013 tarihli, 2013/464E, 2013/10152K.;19.03.2013 tarih, 2013/470E, 2013/10150K.; 01.11.2013 tarih, 2013/24634E, 2013/34372K.

12 12. HD, 22.12.2016, 7982/25873

13 In Art. 322 tOR ist die Übertragung des Nutzungsrechts durch den Mieter geregelt. Die Überragung des Nutzungsrechts ändert nichts an der Mietereigenschaft der bisherigen Vertragspartei (sh. Inceoglu, S. 496-497). Da in den Zollfreigebieten das Überbaurecht unmittelbar mit dem Nutzungsrecht verbunden ist, erlischt die Berechtigung mit der Übertragung des Nutzungsrechts. Daher kann die Übertragung des Nutzungsrechts in Zollfreigebieten nicht als eine Übertragung des Nutzungsrechts im mietvertraglichen Sinne bezeichnet werden. Es kann sich um eine Übertragung des Mietrechts im Sinne von Art. 323 tOR handeln, die allerdings der schriftlichen Genehmigung des Vermieters bedarf.

3. Entgelt für die Übertragung des Überbaus

Das Entgelt für die Übertragung des Überbaus wird in Art. 5 der Verordnung definiert und umfasst ausschließlich den Entgelt, den ein Nutzer für die Zurverfügungstellung eines Überbaus an den Staat, der Eigentümer dieser Bauten ist, bezahlen muss. Bei dem Entgelt handelt es sich nicht um das, was der Übertragende vom Übernehmer verlangen kann, genauso wenig um das Entgelt, das der Übertragende vom Staat verlangen kann. Folglich ist es unmöglich zu beschließen, dass das Entgelt für die Übertragung des Überbaus an die Vollstreckungsbehörde gezahlt wird. Gibt es keinen Betrag, der an den Schuldner zu bezahlen ist, so gibt es auch keinen Betrag, der einer Pfändung unterliegt. Es hat keinen Sinn, an Schreiben an eine Behörde zu schicken, die nicht Schuldnerin im Sinne eines Übertragungsentgelts derjenigen Person ist, gegen die die Zwangsvollstreckung betrieben wird.

Sobald mit der Pfändung des Entgelts für die Übertragung des Überbaus die Pfändung der Geldforderung desjenigen gemeint ist, der den Überbau errichtet und seine Betriebsstätte an eine andere Person übertragen hat, so handelt es sich um nichts anderes als die Pfändung einer Forderung und kann sich an den Schuldner des Pfändungsschuldners richten. Die Pfändung einer Forderung wiederum richtet sich nach den in Art. 89 des Zwangsvollstreckungsgesetzes festgelegten Voraussetzungen. Damit eine solche Forderung bei einem Dritten (dem Übernehmer) gepfändet werden kann, muss der Antrag auf Erteilung einer Tätigkeitsbescheinigung genehmigt worden und die Übertragung erfolgreich abgeschlossen sein (Vgl. für die einzelnen Stufen der Übertragung Art. 13 ff. der Verordnung). Da vor dem Abschluss dieses Verfahrens die Erlangung einer Schuldnerstellung gegenüber dem Übertragenden unmöglich ist, gibt es auch keine Forderung, deren Pfändung möglich wäre.

Ist mit der Pfändung die Forderung des Übertragenden gegenüber dem Übernehmer im Falle einer Übertragung, so gilt die Zollfreigebietsbehörde nicht als diejenige dritte Person, die die Forderung des Schuldners aus dem Übertragungsgeschäft innehat. Daher macht es keinen Sinn, dass dieser ein Pfändungsbeschluss übermittelt wird. Da es auch kein Register für Forderungen bei den Zollfreigebietsbehörden existiert, ist eine Vormerkung unmöglich und die Aufforderung, Die Zahlung an die Zwangsvollstreckungsbehörde anstelle des Schuldners zu tätigen, entfaltet keine rechtlichen Wirkungen. Denn das einzige Register, das gemäß Art. 12 Abs. 1 der Anwendungsverordnung bei den Regionalbehörden gehalten wird, ist über die wirtschaftlichen Aktivitäten der Nutzer und begründet insbesondere keine Rechte. Daher ist es unmöglich, in einem Register, das lediglich zur Beobachtung der Tätigkeiten dient, eine Vormerkung vorzunehmen; eine solche Eintragung entfaltet jedenfalls keine rechtlichen Wirkungen.

ERGEBNIS

Bei dem Überbaurecht, das den als Nutzer bezeichneten Investoren im Rahmen des Gesetzes für Zollfreigebiete gewährt wird, handelt es sich rechtlich um einen Anspruch auf Überlassung der Mietsache.

Nach dem türkischen materiellen Recht ist das Überbaurecht kein „Überbaurecht" im Sinne des Art. 826 tZGB, das ein unabhängiges dingliches Recht darstellt; es hat keinen unabhängigen wirtschaftlichen Wert und kann nicht Gegenstand einer Pfändung sein.

Da die Übertragungsbefugnis des Überbaus kein unabhängiges Recht darstellt, sondern dem Anspruch des Mieters auf Überlassung der Mietsache ähnelt, ist deren Pfändung ausgeschlossen.

Auch die Pfändung des Übertragungsentgelts eines Pfändungsschuldners bei der Regionalbehörde des Zollfreigebiets ist unmöglich. Denn bei Übertragung des Rechts wird das Entgelt nicht an die Regionalbehörde bezahlt und es existiert auch kein Register, in das die Pfändung eingetragen werden könnte.

Annales De La Faculte De Droıt d'İstanbul Yayın İlkeleri

1. Annales de la Faculté de Droit d'İstanbul, ULAKBİM tarafından taranan "Hakemli Dergi" statüsünde yılda bir sayı (Mart)olarak yayımlanır.Dergide yapılan yayınlar uluslararası yayın kategorisindedir.

2. Dergiye gönderilen yazılar, başka bir yerde yayımlanmamış ve yayımlanmak üzere gönderilmemiş olmalıdır.Bu hususta yazarlardan ayrıca taahhütname talep edilecektir. Yazılar elektronik ortamda, tercihen elektronik posta ile iletilmelidir.

3. Yayın Kurulu tarafından ilk değerlendirilmesi yapılan ve yayın ilkelerine uygun olmadığı saptanan yazılar, hakeme gönderilmeden önce, yayın ilkeleri doğrultusunda düzeltilmesi için yazara iade edilir. Yazım yanlışlarının olağanın dışında bulunması, bilimsellik ölçütlerine uyulmaması, yazının Yayın Kurulu tarafından geri çevrilmesi için yeterlidir. İlk değerlendirmede uygun bulunan yazılar yazar adları metinden çıkarılarak en az üç hakeme gönderilir.Yazarlara yazının hangi hakemlere gönderildiği ile ilgili bilgi verilmez. Hakemlerden gelen raporlar doğrultusunda yazının yayımlanmasına, düzeltilmesine ya da geri çevrilmesine karar verilir. Yayın kurulu yazının dördüncü bir hakeme gönderilme hakkını saklı tutar.

4. Yazarlar, unvanlarını, görev yaptıkları kurumları, iletişim adresleri ile telefonlarını ve e-posta adreslerini bildirmelidirler.

5. Derginin yazı dili İngilizce, Fransızca ve Almanca'dır. Yazının başlığının İngilizce ve Türkçe çevirisi ile en az 150, en çok 200 sözcükten oluşan özetinin ve beş anahtar kelimenin de İngilizce ve Türkçe olarak yazıya eklenmesi gerekmektedir.

6. Makale metni, Times New Roman yazı tipinde, 1,5 satır aralığı ve 12 punto, dipnotları ise tek satır aralığı ve 10 punto olarak hazırlanmalıdır. Dipnotlar sayfa altında gösterilir.

7. Yazar isimleri Türkçe ve İngilizce konu başlığının altında ve sağ tarafında yer almalı ve soyadının bitiminde yıldız konulmalıdır. Yıldızlı dipnotta yazarın unvanı, çalıştığı kurum, alanı ve e-posta adresi bildirilmelidir.

8. Makalenin sonunda, makalede kullanılan kaynakların, yazarların soyadlarına göre sıralandığı bir kaynakça bulunmalıdır.

9. Metin içerisindeki kısaltmalarda, kısaltılacak isim veya başlık metinde ilk defa kullanıldığında kısaltılmadan ve parantez içinde kısaltması belirtilerek kullanılmalı veya kısaltılmış isim ya da başlık karşılıkları ile makalenin sonunda kaynakçadan önce yer alan kısaltmalar cetvelinde gösterilmeli; dipnotlarda kullanılan kısaltmalara ise, sadece kısaltmalar cetvelinde yer verilmelidir.

10. Dipnotlarda kitaplar [Yazarın Adı Soyadı, Kitabın Başlığı, Basım Yeri, Yıl, sayfa numarası (p.) veya paragraf/kenar numarası (N.)] şeklinde yer almalıdır. Kaynakçada yazarın soyadına adından önce yer verilmelidir. [Yazarın Soyadı Adı, Kitabın Başlığı, Basım Yeri, Yıl]

Örnek **(dipnotlarda):** Peter Forstmoser, Gemeinwohl und Interesse in Wirtschaft, Recht und Politik, Zürich, 2008, p. 17.

Dipnotlarda makaleler [Yazarın Adı Soyadı, "Makalenin Başlığı", Derginin İsmi, Cilt numarası, Sayı numarası, Yılı, sayfa numarası (p.) veya paragraf/kenar numarası (N.)] şeklinde yer almalıdır. Kaynakçada yazarın soyadına adından önce yer verilmelidir. [Yazarın Soyadı Adı, "Makalenin Başlığı", Derginin İsmi, Cilt numarası, Sayı numarası, Yılı]

Örnek **(dipnotlarda):** Nicolas Petit, "Injunctions for Frand-Pledged Standart Essential Patents: The Quest for an Appropriate Test of Abuse under Article 102 TFEU", European Competition Journal, Vol. 9, Iss. 3, p. 32.

Birden fazla yazarlı eserlere [Yazarın Adı Soyadı/Adı Soyadı] şeklinde atıf yapılmalıdır.

Örnek: Richard Whish/David Bailey, Competition Law, Oxford, 2015, p. 212.

Sonraki dipnotlarında ise [Yazarın Soyadı, sayfa numarası (p.)] şeklinde atıf yapılmalıdır.

Örnek: Petit, p. 32

Whish/Bailey, p. 65

Aynı yazarın birden fazla eserine yapılacak atıflarda yazarın soyadı, eserin başlığı, sayfa numarası verilmelidir. Eser başlığı kısaltılabilir.

Örnek: Petit, Injunctions, p. 32

Yargı kararlarına yapılan atıflarda ise aşağıdaki örneğe uyulması gerekmektedir:

Mahkeme adı kısaltması, Dairesi, Karar Tarihi, Esas numarası/Karar numarası (Kararın Yayım Yeri)

Yargıtay 4. HD., 10.11.2008, 1699/13767 (Yargıtay Kararları Dergisi, Vol. 35, Iss. 3, 2009, p. 438)

İsimle anılan kararlarda karar isminin italik olarak aşağıdaki örneklerde olduğu şekilde gösterilmesi gerekir:

Defrenne v. Sabena

Watson & Belmann case

Rutili judgment

Golder case

11. Metinde kullanılan başlıkların derecelendirmesi ve sıralaması ile italik/kalın vurgulamaları aşağıdaki şekilde olmalıdır:

I) Part One

A) First Subheading

1. Second Subheading

a) Third subheading

i) Fourth subheading

12. Fakülte tarafından yayımlanan nüshalarla sınırlı kalmak üzere; yayıma kabul edilen makalenin çoğaltma, yayma, umuma iletim, işleme ve çeviri konusundaki malî hakları, basılı, görsel, işitsel, sayısal vb. ortamlarda yurt içinde ve yurt dışında kullanılmak üzere Fakülte'ye devredilmiştir. Telif ücreti dahil herhangi bir ücret ödenmeyeceği yazarlar tarafından kabul edilmiştir.

13. Dergide, makalelerin yanı sıra dergiye yayın kabul edilen dillerden birine yapılmış çeviriler de yayımlanabilir. Bu nitelikteki yazılar Yayın kurulunca kabul edilebilir veya geri çevrilebilir. Çeviri metni ile birlikte asıl metin ve hak sahiplerinin muvafakatı da iletilmelidir. Çeviriler de hakem değerlendirilmesine tabi tutulur.

14. Annales de la Faculté de Droit d'İstanbul'da yayımlanması istenen yazıların hukuk_dekan@istanbul.edu.tr veya iuhfdergiler@istanbul.edu.tr e-posta adreslerine Microsoft Word yazılımı formatında (*.doc, *.docx) gönderilmesi gerekmektedir.

Publication Principles of Annales de la Faculté de Droit D'Istanbul

1. Annales de la Faculté de Droit D'Istanbul is a peer reviewed Journal which is published annually (in March) and indexed ULAKBİM as a "Refereed Journal". Publications in this Journal are considered as international publications.

2. The articles sent to be published in our journal should not be published elsewhere, nor be submitted to other journals simultaneously even with the purpose of evaluation. In this purpose, the authors shall also be required to provide a letter of undertaking. Manuscripts should be submitted in electronic format, preferably by email.

3. Articles that are considered as unsuitable with the publication guidelines by the editorial board are sent back to the author without review. Extraordinary spelling errors and not being eligible with the scientific standards are sufficient for a paper to be rejected by the editorial board. Papers that are approved by the editorial board are submitted to at least three referees in line with blind peer review principle. Authors are not informed about the identity of the referees. According to the assessments of the referees, the paper may be approved for publication, required to resubmission with amendments or rejected on the basis of inadequate quality. Editors reserve the right to send manuscripts to a fourth referee for another review.

4. Authors, must provide their titles, institutions, correspondence address, phone number and e-mail address.

5. The Journal accepts and publishes articles written in English, French and/or German. Title, abstract which consists of 150 to 200 words and five key words must be added to the paper in English and Turkish languages.

6. The main text and footnotes must be written in Times New Roman font. Font size for the main text should be 12 with 1,5 line spacing while footnotes are written in font size 10 with 1 line spacing. Footnotes are to be shown at the bottom of the page.

7. Author's name should be written bottom right of the Turkish and English title of the paper and should end with a star symbol. Star footnote should consist of title, institution and e- mail address of the author.

8. A bibliography shall be provided at the end of the article and references need to be arranged in alphabetical order according to surnames of authors.

9. To use abbreviations: If the name or title, which will be abbreviated, is to be used for the first time in the text, the name or title should be used as the original form with the abbreviation in brackets or the original forms of the abbreviations should

be given place at the end of the paper before the bibliography; original form of the abbreviations used in footnotes may only take place in the abbreviation list.

10. In footnotes a book, that is referred, should take place as: [Full Name of the author, Title of the Book, Place of Publication, Year, Page number (p.) or paragraph number (N.)] In bibliography, the last name of the author of the referred book should be indicated first [Last name and first name of the author, Title of the Book, Place of Publication, Year of Publication].

Example (for footnotes): Peter Forstmoser, Gemeinwohl und Interesse in Wirtschaft, Recht und Politik, Zürich, 2008, p. 17.

In footnotes the articles should take place as: [Full Name of the author, Title of the article, Name of the Journal, Volume Number, Issue Number, Publication Year, Page number (p.) or paragraph number (N.)] In bibliography, the last name of the author of the referred article should be indicated first [Last name and first name of the author, Title of the Article, Name of the Journal, Volume Number, Issue Number, Publication Year].

Example (for footnotes): Nicolas Petit, "Injunctions for Frand-Pledged Standart Essential Patents: The Quest for an Appropriate Test of Abuse under Article 102 TFEU", European Competition Journal, Vol. 9, Iss. 3, p. 32.

In the footnotes and bibliography books/articles with several authors should be cited as: [Full Name of the author / Full Name of the author]

Example: Richard Whish/David Bailey, Competition Law, Oxford, 2015, p. 212.

In the following footnotes the citations should be made as:

[Last name of the author, page number (p.)].

Example: Petit, p. 32.

Whish/Bailey, p. 65.

When citing more than one book/article of the same author; surname of the author, title of the book/article and the page number should be given. The title of the book/article may be abbreviated.

Example: Petit, Injunctions, p. 32.

When citing a case law, the author should comply with the example below.

Abbreviation of the Court Name, Number of the Court, Date of Decision, Number of the Case/Decision (Source of Decision)

Yargıtay 4. HD., 10.11.2008, 1699/13767 (Yargıtay Kararları Dergisi, Vol. 35, Iss. 3, 2009, p. 438)

When cases are adressed by name, name of the case should be italic and comply with the example below:

Defrenne v. Sabena

Watson & Belmann case

Rutili judgment

Golder case

11. The following style should be used when headings are graded-sorted and emphasised with italic/bold:

I) Part One

A) First Subheading

1. Second Subheading

a) Third subheading

i) Fourth subheading

12. To be limited with the copies published by the Faculty; financial rights regarding reproduction, distribution, public performance, derivative works and translation of the papers which are approved for publication are to be transferred to the faculty to be used on the print, auditory, digital etc. media, nationwide and worldwide. Authors accept not to receive any payment including royalty.

13. Besides articles, also translations may be published in the accepted languages. These papers, might be approved or rejected by the editorial board.
Original text of the translation and consent of the rightful owner are also should be enclosed with the translation. Translations are also subject to the assessment of reviewers.

14. Papers should be sent to hukuk_dekan@istanbul.edu.tr or iuhfdergiler@istanbul.edu.tr in Microsoft Word (*.doc,*.docx) formatting.