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The Turkish Code of Obligations

The Civil Law Reform in Turkey continues: On July 1, 2012 a new Obligations' Law entered into force.

By Ceyda Akbal Schwimann

A. Introduction

After the founding of Turkey in 1923, law played a central role in modernizing the country. One of the most important steps of the modernization movement took place in 1926 in the Adaption of the Swiss Civil Code¹ and the inseparably linked Swiss Obligations' Law.²

As a result, the practical implementation of the new law in Turkey led to the development of a legal culture referred to as the "Turkish-Swiss Civil Code" and "Turkish-Swiss Obligations' Law." This process can be broken down into three phases.³ Phase One took place between 1926 and 1980. During this time no important changes occurred in the Civil Code⁴ and Obligations' Law,⁵ and only complimentary laws were passed. In Phase Two between 1980 and 2002, old regulations were falling behind the times and law makers and legal texts began to modernize the law. The necessity of a total legal reform became evident; which led to the beginning of the Phase Three with the coming into force of the new Turkish Civil Code in 2002.⁶ The entering into force of the new Obligations' Law⁷ and the Commercial Code⁸ followed on July 1, 2012.

¹Swiss Civil Code no 210, AS 24 233, dated 29 December 1907.

²Federal law regarding the addendum of the Swiss Civil Code (part V: Code of obligations), no 220, AS 27 317, dated 30 March 1911.

³*Atamer*, reception and the further development of the Swiss Civil Code in Turkey, *RabelsZ* 2008, 723-753.

⁴*Türk Kanunu Medenisi* (Turkish Civil Code), Nr 743, Resmi Gazete (further abbreviated as RG) 339 v 4.4.1926.

⁵*Borclar Kanunu* (Code of Obligations) no 818, RG 359, dated 22 April 1926.

⁶*Türk Medeni Kanunu* (Turkish Civil Code) Nr 4721, RG 24607, dated 8 December 2001.

⁷*Türk Borclar Kanunu* (Turkish Code of Obligations) no 6098, RG 27836, dated 4 February 2011.

⁸*Türk Ticaret Kanunu* (Turkish Commercial Law) no 6102, RG 27846, dated 14 February 2011.

⁹*Atamer*, Revize Edilmis Türk Borclar Kanunu Tasarisi'na Iliskin Degerlendirmelerve Teklifler [Analysis and suggestions regarding the revised Turkish Code of Obligations], *Hukuki Perspektifler Dergisi* 6/2006, 31.

Turkish Code of Obligations

This paper provides an overview of selected contractual aspects of the new Turkish Obligations' Law and compares these to the former law. The amendments largely follow the Swiss Obligations' Law⁹, and in some cases, decisions of the Turkish Supreme Court. The most obvious formal modification concerns simplified terminology. Changes in content occurred primarily in the General Terms and in provisions on tenancy and suretyship. Recent developments in the law of obligations of the German Civil Code, the Dutch Civil Code, and modification drafts of the Swiss Obligations' Law or research on the principles of European private law (for example the principles of European contract law and principles of European tort law) have not been taken into consideration.¹⁰

B. Sales Contract (§§ 207–281)

1. Passing of Risk

The sale's law contains several significant changes. One example is the transfer of risk (§ 208). Formerly, risk transferred at the conclusion of the contract. Now, however, risk is transferred when possession of movable property has been conveyed. For real estate, risk is transferred upon entry of the ownership change in the Land Register. If the buyer is in default of acceptance, the buyer still assumes the risk, as if the transfer of possession has occurred. In cases involving transportation of goods, buyer assumes the risk when goods are given to the carrier.

Surprisingly, unlike the former law, the new Obligations' Law does not tie the passing of risk of unspecified goods to the specification although the motives to the law refers for the sale of goods involving transportation to the United Nations Convention on Contracts for the International Sale of Goods (CISG) pursuant to which the seller assumes liability for the delivery of goods.¹¹

2. Event of Default (Delay) (§§ 212, 213 and 235, 236)

The provisions regarding default, in principle, did not change. In an event of default by the seller, the rights of the buyer follow the general rules regarding debtor's default (§§ 212, 213). Therefore, once the buyer has given written notice of default and set a deadline for the seller to fulfill the obligation, the buyer can then take the following possible steps. First, the buyer can insist on fulfillment of the contract and claim damages for the delay. Second, the buyer can withdraw from the contract and claim damages on the basis of invalidity of the contract. Third, the buyer can disregard the fulfillment of the seller's obligations (but not rescind the contract) and claim damages

¹⁰ Although the motives of the TRObLa refer to taking into consideration these documents, their effects are not to be seen in detail.

¹¹ Atamer, *Tasinir Satimi Sözleşmesi in Inceoglu (ed.), Türk Borçlar Kanunu Sempozyumu [Symposium on the Turkish Code of Obligations]* (2012) 187–221.

Turkish Code of Obligations

instead of fulfillment. In case the buyer makes no decision on the preferred course of action, the first option applies is assumed for the non-commercial purchases, and the third option for the commercial purchases.

Option two and three differ in the calculation of damage compensation. Whereas option three entitles the buyer to positive interest, option two only entitles the buyer to negative interest.

If the buyer defaults, §§ 235f. are applicable: If the buyer defaults on a payment but the object of purchase is not yet in the buyer's possession, then the seller can withdraw from the contract. Otherwise withdrawal is possible upon agreement (§ 235). Furthermore, the buyer must compensate the seller for any damages. Damage compensation is calculated as the difference between the agreed price and the cost of a replacement sale (§ 236).

3. Warranty

The seller is liable for the goods' guaranteed properties and for defects which compromise their value or usability, even if the seller is not aware of the defects (§ 219). An exclusion of warranty or its limitation is possible, but not in case of intent or gross negligence of the seller (§ 221). The seller is not liable for defects known to the buyer at the time of purchase. The seller is liable for defects the buyer should know upon detailed examination, only if the seller guaranteed the non-existence of such defects (§ 222); an appropriate examination of defects must be interpreted (in line with the Swiss Obligations' Law) as "customary attention" because pursuant to § 223, the buyer is obliged to give notice of defects only after the transfer of possession¹². Also in case of non-commercial purchases (entrepreneur – consumer; among private persons) the buyer is obliged to notify the seller of any defects within a reasonable time. However, in case of intent or gross negligence, the seller is held liable despite failure of notice; this provision also applies to commercial sellers whose main professional activity is selling (§ 225).

If there is a quality defect, the buyer can either, according to § 227, withdraw from the contract and return the purchased goods, or request a price reduction or repair or, if possible, a replacement. The seller can prevent the buyer from exercising his right of choice, by immediately replacing the good and compensate the buyer for damages. If the buyer withdraws from the contract, the seller can obtain a judicial decision for subsequent improvement or price reduction, as long as the circumstances presented do not justify a withdrawal. Furthermore, the buyer may claim withdrawal or replacement,

¹²Atamer, Tasinir Satimi Sözleşmesi, 202.

Turkish Code of Obligations

only if the requested reduced amount in value is comparable with the amount of the purchase price.

The new law (as well as the former one) provides for fault-based liability in case of breach of contract. Therefore, the buyer may claim damages caused by the seller. If the seller withdraws from the contract on the basis of warranty, the buyer may, however, claim for direct damages without seller fault.

The liability for defects of title is discussed separately in §§ 214–218. In case of a full lack of title¹³, the contract will be cancelled and the buyer can claim damages. In case of direct damages (purchase price, expenditures, procedural costs and other direct costs) the seller is responsible even without fault. If there is a partial lack of title¹⁴ the contract will continue to be valid. However, the buyer can request the rescission of contract by the court, if from the circumstances one can reasonably assume that the buyer would not have concluded the contract if buyer had known about the partial lack of title. Moreover, buyer can claim damages on the basis of fault.

C. General Terms and Conditions

Since 2003, the Turkish Consumer Protection Law¹⁵ provides rules for the general terms and conditions for B2C business only. Turkish Obligations' Law (§§ 20–25) regulates the examination of Terms and Conditions for all types of business.

The criteria for the definition of general terms and conditions are similar as in § 305 German Civil Code; however, they partly differ as a result of customary business practices in Turkey.¹⁶ For instance, terms which refer to the negotiation between parties regarding provisions in the general terms and conditions are not sufficient to prove that the parties have agreed to such provision after negotiations; therefore additional indications are required (for example, respective correspondence).

Three considerations determine the validity (§ 21 TRObLa) of the general terms and conditions of a contract. First, did the party explicitly indicate the general terms and conditions to the buyer (for example, through a written notice or a posting in the business premises) and offer the buyer the opportunity to take note of the content prior to signing the contract? Second, did the buyer, whether explicitly or tacitly, accept the

¹³ There is a total defect of title, if the buyer is totally deprived of the object of purchase (§ 217 TRObLa).

¹⁴ A partial defect of title occurs, if the buyer is deprived of one part of the object of purchase or if the object sold is aggrieved with an encumbrance (§ 218 TRObLa).

¹⁵ Tüketiciciyi Koruma Kanunu, no 4077, RG 22221, dated 8 March 1995.

¹⁶ Altop, Genel İşlem Kosullari, in: Inceoglu (ed.), Türk Borclar Kanunu Sempozyumu (2012) 28–48.

Turkish Code of Obligations

applicability of the general terms and conditions? Third, do the provisions contradict the circumstances of the deal or the nature of the contract?

A review of the interpretation of the contract (§ 23 TRObLa) verifies whether unclear provisions of the general terms and conditions, which have become part of the contract, can be interpreted in favor of the buyer, for example, clauses in credit agreements which permit banks to unilaterally cut-off a credit are void, if the credit is limited in time under the agreement. In addition, in § 23, the principle „in dubio contra stipulatorem“ (i.e., in case of doubt the agreement will be interpreted against the interests of the party who has drafted it) applies.

Finally, a review of the content (§ 25 trObLa) is conducted to identify provisions of the general terms and conditions which have become part of the contract and are invalid. Invalid provisions are those which potentially violate moral principles due to a lack of balance between the parties' interests. Thus, provisions which were not negotiated and deviate from dispositive law are held invalid, unless an appropriate compensation exists (for example, an insurance against an agreed exclusion of liability in case of slight negligence).

D. Tenancy Law

The tenancy law has been entirely revised through abolishment of the former tenancy law no. 6570 and adoption of its provisions into the Turkish Obligations' Law according to changes in Swiss law and the prevailing jurisdiction of the Turkish Supreme Court.¹⁷ While §§ 299–338 contain general tenancy law provisions, §§ 339–379 apply to the rent of private or business premises and, exceptionally, related movable goods; however, for the latter only when tenancy exceeds six months.

Article 340 has introduced a new provision prohibiting the connection of arrangements for the entry into and renewal of tenancy agreements. For example, it is prohibited to make the rental contract for an office space in a business center conditional upon procurement of accounting services from a certain company. However, supplemental agreements on direct ancillary services of the shopping centre, such as providing electricity in the corridor spaces, are not prohibited.

Provisions regarding the amount of deposit as well as its deposit in a bank account (§ 342) are in line with European examples. Agreements on the payment of other amounts, other than rental and ancillary costs (in particular penalties on default of rent payment or

¹⁷ The application of certain regulations (§§ 323, 325, 331, 340, 342, 343, 344, 346, 354) on the renting of business rooms are postponed by 8 (eight) years.

Turkish Code of Obligations

call for payment of future rents) are invalid (§ 346). Changes to the detriment of the tenant are only possible with regards to the rental amount (§ 343).

Changes to the rental amount are subject to mandatory law. Fixed term tenancy agreements are extended automatically (unless the tenant wishes to rescind the contract), and the landlord can first terminate the contract ten years after the tenancy period ends. In unlimited tenancy agreements, the landlord may terminate the contract only ten years after its conclusion (§ 347). For this reason, provisions on rental price adjustments have been included stipulating that rent can be annually increased pursuant to § 344; the Producer Price Index (PPI) is the maximum amount rate of increase. In the absence of an agreement between the parties, the court fixes such increases on a yearly basis. Every five years, the landlord can obtain, upon request, rent reviews from the court in an amount exceeding this limit; however, the court has to take into consideration all circumstances of the case. Rental agreements concluded in foreign currencies shall have a fixed rent for five years, only after which adjustments can be made by court decision. Rental agreements concluded in foreign currency can only be amended or cancelled prematurely in accordance to § 138 in reference to a disruption of the basis of the contract. Turkish Obligations' Law contains numerous detailed provisions on the cancellation of the rental contract.

E. Assignment of Receivables and Assumption of Contract

1. Assignment of Receivables

The creditor can assign the creditor's claim to another person, without the debtor's approval, so long as the law, agreement or nature of the commercial activity does not prevent such as assignment. As of the notification of the assignment to the debtor, the performance of the obligation to the assignor does release the debtor from his debt. The assignment itself will only be valid if made in writing; however, the promise of assignment can also be made informally (§ 183).

Turkish Obligations' Law improves the assignor's statutory liability. For assignments with a consideration, the assignor is liable for the existence of the claim and the solvency of the debtor; for assignments without any consideration he cannot be held liable (§ 193). Furthermore, the scope of liability has changed. The assignor is liable, regardless of fault, for the consideration received plus interest and costs of assignment and unsuccessful collection against the debtor. If the assignor fails to prove the lack of fault, the assignor is also liable for all other losses of the assignee.

2. Assumption of Debt

Turkish Code of Obligations

§§ 195 through 200 of Turkish Obligations' Law deal exclusively with the assumption of debt, referred to as "internal assumption of debt" between the debtor and the assumer of debt and the "agreement of assumption of debt" between the assumer of debt and the creditor. The agreement of assumption of debt, in principle, follows the internal assumption of debt; however, its validity is independent from it.

Until the conclusion of the agreement of the assumption of debt the creditor can demand performance from the debtor. However, if an internal assumption of debt exists, the assumer is obliged to release the debtor from the performance obligation.

The assumption of debt becomes effective upon signing of the agreement of assumption of debt. The offer of the assumer can be made through notification of the internal assumption of debt to the creditor. Acceptance can be made explicitly or understood and assumed from the circumstances.

In case of an assumption of debt, the ancillary rights of the creditor remain generally unaffected, unless they are intrinsically tied to the person of the former debtor. Important exceptions concern pledges granted by a third party and sureties: i.e., Pledgor and surety continue to be liable to the creditor only if they have consented in writing to the assumption of debt.

The participation in an existing debt as co-debtor is covered separately by § 201 as a contract between the creditor and the participant. The new and the former debtors are jointly liable.

3. Asset and Business Transfer

Transfer of assets and business is, in part, regulated separately in § 202. Pursuant to this provision, the transferor of assets or a business is obliged to notify of the transfer the creditors or to announce it in a national newspaper (or, for business transfers, in the Turkish trade journal Türkiye Ticaret Sicili Gazetesi). This provision is in line with § 11 par. 3 of the Turkish Commercial Code which requires business transfers to be recorded in the commercial register and an announcement to be made in the trade journal. The former debtor is jointly liable with the new debtor for two further years. Other consequences resulting from the transfer of assets or business are comparable to debt assignments.

Turkish Code of Obligations

4. Assumption of a Contract

Turkish Obligations' Law (§ 205) regulates the assumption of a contract as a tripartite relationship. Accordingly, all rights (including rights to alter a legal relationship)¹⁸ and obligations of the assignor (apart from those which are tied to the person of the assignor) are assumed. The consent of the party remaining in the contract can be given beforehand or afterwards. Provisions regarding assignment and assumption of debt apply analogously. The assumption of the contract should be in the same form as the original contract.

F. Suretyship

The law on suretyship has also been revised. The changes follow those of Swiss Obligations' Law after 1941 and concern the protection of surety. The secondary character of the suretyship is upheld, except in cases in which the obligation is invalid due to juridical incapacity of the main debtor or due to error. When this happens, the surety is still liable according to the principles of the suretyship, provided that the surety knew about the defect when accepting the obligation (§ 582 TRObLa).

The surety has to write with his own handwriting and sign the extent of the liability, the date of suretyship and a potential joint liability, in the suretyship agreement. The power of attorney for entering into a suretyship as well as the commitment grant a suretyship to the contracting party or a third party requires the same form as the suretyship (§ 583). Spousal approval (§ 584) is a new validity requirement. Pursuant to § 603, requirements for the validity of the suretyship also apply to all personal securities of a natural person (for example guarantee, assumption of debt). The different types of suretyship, for instance an ordinary surety, indemnity surety, joint surety, counter surety, are regulated in §§ 585–587. Pleas available to the surety against the creditor for challenging the liability and possibilities for recourse against the main debtor as well as against the joint and counter surety have been extended.

G. Conclusion

The new Turkish Obligations' Law has entered into force on 1 July 2012. What is most striking are some substantial changes mainly due to social reasons, in particular regarding legal relationships of the parties considered unequal (eg. rent, suretyship, general terms and conditions). The modifications of the Turkish Commercial Code are certainly much more far-reaching and, thus, will no doubt result in a deep transformation of Turkish business life.

¹⁸Tosun, *Sözleşmenin Devri* in: Inceoglu (ed.), *Türk Borçlar Kanunu Sempozyumu* (2012) 170–174.

Turkish Code of Obligations

GLOSSARY

General terms and conditions	<i>Genel işlem kořulları</i>
Sales contract	<i>Satıř sözleşmesi</i>
Tenancy agreement	<i>Kira sözleşmesi</i>
Assumption of liabilities	<i>Borcun üstlenilmesi</i>
Transfer of assets and business	<i>Malvarlığının veya işletmenin devralınması</i>
Assignment	<i>Alacağın devri</i>

USEFUL WEB LINKS

Information Site Turkish Commercial Code	www.yenittk.com
Turkish official gazette (journal)	www.resmigazete.gov.tr
Turkish Ministry of Justice	www.justice.gov.tr
Information Site Turkish Commercial Code	www.yenittk.com