JUSTICE
ACADEMY OF TÜRKİYE

LAW & JUSTICE REVIEW

Year: 13 · Issue: 24 · July 2022

24

ISSN 1309-9485

lawandjustice.taa.gov.tr

JUSTICE ACADEMY OF TÜRKİYE

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ISSN 1309-9485

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THE DEFINITION AND SCOPE OF THE SAFE PORT OBLIGATION UNDER CHARTERPARTY AGREEMENTS IN THE LIGHT OF ENGLISH COMMON LAW[*]

Çarter Sözleşmeleri Bakımından Cari olan Güvenli Liman Yükümlülüğünün İngiliz Mahkeme Kararları Işığında Tanımı ve Kapsamı

Burak DOĞAN[**] - Hasan Tahsin AZİZAĞAOĞLU[***]

L&JR
Year: 13, Issue: 24
July 2022
pp.1-18

Article Information

Submitted	*:06.12.2021*
Revision Requested	*:07.01.2022*
Last Version Received	*:08.01.2022*
Accepted	*:09.03.2022*

Article Type

Research Article

ABSTRACT

Due to the increasing volume of trade, the world of shipping is changing faster than ever. Bigger, safer and smarter ships are built to carry more goods to remote corners of the Earth. However, challenging weather factors, poor physical conditions of some ports and changing political dynamics of the world raise safety concerns for ships. Thus, understanding the scope of the safe port obligation is important to allocate the risk between the owner and charterer when a ship sustains damage while entering, using or leaving a nominated port. Therefore, under a charterparty, the charterers have an obligation to order the ship to safe ports and places. Although safety is a question of fact, whether a port is safe for a particular vessel at a relevant time is a subjective test. Thus, the meaning of safety might change from time to time and ship to ship due to different factors. After reviewing the existing judicial literature on safe port obligation, this paper will explore its scope and how far it extends. Later, the limits and the nature of the safe port obligation will be covered to understand when the risk shifts from the charterer to the shipowner. Finally, the paper will cover the remedies available for the parties.

Keywords: Safe Port Obligation, Definition of Safety, Charterer's obligation

ÖZET

Dünyada hızla artmakta olan ticaret hacmi dolayısıyla, deniz taşımacılığına ilişkin kural ve uygulamalar her geçen gün değişmektedir. Dünyanın bir ucundan öteki ucuna taşınan ticari malların hacim ve kapasitesini artırabilmek adına daha büyük, daha güvenli ve daha teknolojik gemiler inşa edilmektedir. Buna karşılık, zorlu iklim koşulları, fiziksel koşullar anlamda yetersiz limanlar ve dünyada değişen politik dinamikler gemiler için güvenlik sorunlarını da beraberinde getirmektedir. Bu itibarla, çarter sözleşmeleri bakımından karşımıza çıkan güvenli liman yükümlülüğüne riayet, geminin limana girdiği, limanı kullandığı ve terk ettiği esnada uğradığı zararlara ilişkin sorumluluğun kime ait olduğunun tespiti bakımından son derece mühimdir. Bir limanın muayyen bir gemi ve zaman aralığı için güvenli olup olmadığı, somut olayın şartları

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[*] We hereby declare that this article is not among the studies that require ethics committee approval.

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kapsamında, yani sübjektif olarak değerlendirilmesi gereken bir husustur. Çalışmamızda evvela güvenli liman yükümlülüğüne dair mevcut mevzuat hükümleri değerlendirildikten sonra, söz konusu yükümlülüğün kapsamı üzerinde durulacaktır. Daha sonra, sorumluluğun hangi andan itibaren çartererdan gemi sahibine intikal ettiğinin daha iyi anlaşılabilmesi adına güvenli liman yükümlülüğünün hukuki mahiyeti ve sınırları ele alınacaktır. Son olarak, bu yükümlülüğe riayet edilmemesine bağlanan sonuçlar ortaya konulacaktır.

Anahtar Kelimeler: Güvenli Liman Yükümlülüğü, Güvenliğin Tanımı, Çartererın Yükümlülüğü

INTRODUCTION

As demand for international trade increases, the volume of sea trade is expanding. As a result, the safety of ports has become a lot more crucial than ever. Although ports are getting more efficient and safer with the new technical developments, not all ports have the means to eliminate potential risks in the sea trade. From the shipowners' perspective, it is understandable that they may require their ships to be ordered only to safe ports. Therefore, under a time or voyage charterparty, a charterer is likely to be under an express or implied obligation to order the ship to safe ports or places. Some standard time and voyage charter forms contain an express clause on the trading limits, such as the New York Produce Exchange Form (NYPE) or Asbatankvoy.[1] If there is no such an express clause, the courts may imply one, depending on the contractual nature of that particular charter. Nonetheless, the meaning of safety in relation to the safe port obligation is still evolving and under discussion due to its ambiguous and subjective nature. Recent political, economic, technological, or global health crises make the maritime industry reconsider the definition of safety once again after each news before sailing into the unknown. In fact, the consequences of ordering a ship to an unsafe port might be catastrophic. When such unfortunate incidences occur, parties are going to try to avoid liability for the loss suffered. Understanding the safe port obligation and the meaning of safety will enable the parties to allocate the risk or prevent it in the first place. Therefore, the purpose of this article is to examine the meaning of safety and the criteria used to evaluate the safety of a port while addressing the general exceptions and remedies available under a charterparty for the breach of the safe port obligation.

First and foremost, there is no doubt that the English Common Law has a dominant position in international trade and maritime law in general. It would not be an overstatement to say that the English courts set the course of the shipping industry. As a result, English law is used as the governing law in most maritime contracts. Thus, the judgments of the English courts lead the way and influence other courts and legislators both in common and civil law jurisdictions. It is not surprising that the safe port obligation is not frequently

[1] Clause 1(b) and clause 1(c) of NYPE 2015 and Clause 1 and clause 9 of Asbatankvoy.

reviewed in other jurisdictions. As a result, other jurisdictions did not develop as sophisticated definitions as the English common law in this area. For example, even in Norway, where the shipping business is well developed, the law has not evolved as much as English law. As a civil law jurisdiction with an extensive maritime background, the rules relating to the safe port obligation under the Norwegian Maritime Code looks insufficient and limited.[2] Therefore, the definition and scope of the safe port obligation will be examined under English law in this paper since most shipowners worldwide, including Turkey, continue to rely on English courts to make a decision on their issues.[3]

The rationale behind the requirement of safe port obligation is to ensure that the charterers order the ship only to safe ports. Inevitably the courts had to evaluate these charterparties to determine the meaning of safe port obligation under different circumstances and facts. It should be noted that the Honourable judges of England and Wales underlined the fact that the judicial decisions on the safe port obligation are applicable to all charterparties. In other words, while reviewing the safe port obligation, the courts used the same principles for both time and voyage charterparties. This is the reason why the article will do the same and evaluate the obligation under the time charterparty concept but occasionally reference cases on voyage charters as the English courts. In fact, the traditional definition of the obligation comes from a case on a voyage charter party, which will be discussed below.

The only difference is that the courts are more likely to imply such duty in the absence of an express clause due to the commercial realities under which both contracts are used. The nature of a time charterparty is such that the time charterer has the vessel placed at his disposal by the owner.[4] It is a contract for services, which requires the shipowner to act in accordance with the orders given by the charterer as to where the ship is going to load or discharge the cargo. As a result, the charterer is entitled to order the ship anywhere around the world subject to the contractual limits in the time charterparty. Therefore, in the time charterparty context, it is natural to imply such a safe port obligation in the absence of an express clause. On the other hand, the shipowner agrees to carry the charterer's cargo from the loading port to the discharge port under a

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2 The Norwegian Maritime Code (Act No. 39 of 1994) (https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88374)

3 Prof. Dr. M. Fehmi Ülgener, 'Zaman Çartererlerin Gemiyi Kullanma Yetkisi ve Bunun Sınırları' (Marmara Üniversitesi Hukuk Fakültesi, 1996) (https://www.ulgener.com/dosya/09.Guvenli_Liman_Ve_Rihtim.pdf).

4 Terence Coghlin, Terrence Coghlin, Andrew Baker, Andrew Baker, Julian Kenny, Julian Kenny, John Kimball, John Kimball, Tom Belknap, *Time Charters* (7th edn Informa Law from Routledge 2014), 7.2; See also Skibsaktieselskapet Snefonn, Skibaksjeselskapet Bergehus and Sig Bergesen D.Y. & Company v Kawasaki Kisen Kaisha Ltd (*The Berge Tasta*) [1975] 1 Lloyd's Rep 422 (Q.B.), 424.

voyage charterparty. Implying such obligation might be difficult with voyage charters because a voyage charter already specifies a loading and a discharge port. Hence, the charterer cannot order the ship to any other ports. When the voyage charterparty provides a range of named ports, implying safe port obligation might be unnecessary. If the owner agreed the named ports and did not require an express clause in the charterparty, it is reasonable to assume that the owner accepted the risk of unsafety.[5]

In *The APJ Priti*,[6] for example, the charter allowed the charterer to carry urea from Damman, a port in the Saudia Arabian, to one of three ports in the Persian Gulf at the time of war between Iran and Iraq. The charter provided an express obligation to nominate a safe berth at one of the three named ports. However, there was no such clause for the safe port obligation. The vessel was hit by a missile on the approach to Bandar Khomeini, the nominated port. As a result, the Court had to decide whether the charterer had an obligation to nominate a safe port. In the Court of Appeal, Lord Justice Bingham underlined the difference between time and voyage charters.[7] In time charters, the owner could not know where the vessel might go during the period of the charter. Therefore, it makes good commercial sense for the charterers to promise that they would not order the vessel to any port that was prospectively unsafe when the order was given. However, in this case, the voyage charter allowed the charterer to nominate one of three ports in the Persian Gulf, which was already in a hostile area. Thus, the court held that there is no ground for implying a safe port obligation because the omission of the express clause might well have been deliberate and because such an implied term was not necessary for the business efficacy of the charter.[8] On the other hand, when a charter provides a range of unnamed ports, implying such obligation is possible depending on the terms of the charter in any particular case.[9]

Since the courts are trying the understand the scope of a contractual obligation, it is understandable that they look at the factual matrix with business common sense rather than illustrating the obligation as a distinct

5 Julian Cooke, Tim Young, Michael Ashcroft, Andrew Taylor, John Kimball, David Martowski, LeRoy Lambert, Michael Sturley, *Voyage Charters* (4th edn. Informa Law from Routledge 2014), 5.36; See also Ward Chris, "*Unsafe berths and implied terms reborn*" (2010) LMCLQ 489.

6 Atkins International H.A. v. Islamic Republic of Iran Shipping Lines (*The A.P.J. Priti*) [1987] 2 Lloyd's Rep. 37 (C.A.).

7 The A.P.J. Priti [1987] 2 Lloyd's Rep. 37 (C.A.), p. 41.

8 *Ibid*, p. 42; For further discussions on contractual interpretation and implied term: Wood v Capita Insurance Services Ltd [2017] UKSC 24, Arnold v Britton [2015] UKSC 36, and Marks & Spencer v BNP Paribas [2015] UKSC 72. The English courts are likely to imply a term if it gives business efficacy to that contract and makes commercial sense.

9 Cooke, paragraph 5.38; See also Aegean Sea Traders Corp v Repsol Petroleo SA (*The Aegean Sea*) [1998] 2 Lloyd's Rep. 39 (QB), p. 68.

and formal one for time and voyage charterparty. The only purpose of safe port clauses is to ensure that the ship is only ordered to safe places. In other words, the meaning of safe port obligation is the same for every charterparty agreement, provided that either it is expressly stated within the contract, or it can be implied to make commercial sense.

1. Meaning of Safety

What constitutes a safe port is a subjective test, which depends on a lot of different factors. However, the definition of safe port obligation is the same for time or voyage charters regardless of whether it is an express or implied obligation. The standard definition of a safe port is provided by the Court of Appeal in *The Eastern City*, a case based on a voyage charterparty. However above-mentioned, the definition is applicable for both time and voyage charters. Lord Justice Sellars stated that: "*If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship*."[10] Therefore, whether a port is safe for a particular vessel at a relevant time is a subjective test and depends on the circumstances of each case. The English courts are likely to give broader meaning to the definition of ports due to commercial and practical reasons, which will be examined below. However, before moving on to the definition of safety, it is important to underline that safe port obligation includes the safety of docks, wharves, berths and other places within the port to which the ship is directed.[11]

In Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.,[12] the ship was time chartered, which contained a clause reading as follows: "*Steamer to be employed in lawful trades for the conveyance of lawful merchandise between good and safe ports or places within the following limits… where she can lie safely always afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety*." The Court of Appeal stated that it was the intention of the parties, although not expressed in the words, that the vessel should be employed not only between safe ports but also between safe berths with similar qualifications.[13]

Thanks to the rich shipping history of the English common law jurisdiction, English courts had the chance to evaluate the meaning of port and safety under different circumstances since 19th century. In general, the risks considered

10 Leeds Shipping Co Ltd v Societe Francaise Bunge (*The Eastern City*) [1958] 2 Lloyd's Rep 127 (C.A.), p. 131.

11 Compania Naviera Maropan S.A. v Bowater's Lloyd Pulp and Paper Mills, Ltd (*The Stork*) [1955] 1 Lloyd's Rep 349, p. 350.

12 [1935] 52 Lloyd's Rep. 141 (CA)

13 *Ibid*, p. 149.

by the courts while examining the safety of a port can be divided into two categories as the risks related to the physical and non-physical characteristics of the port.

a. Risks Related to the Physical Characteristics of the Port

A port might be safe for one type of vessel but not for another due to the physical characteristics of the port, such as not having a sufficient manoeuvring room, swell or not having sufficient tugs or warning mechanisms.[14] Therefore, these characteristics might be geographical, meteorological, or structural. The test provided in the classic definition of a safe port states that the port must be safe for the particular ship chartered.

One of the most common problems related to commercial ports is that most of them are initially not built to operate for mega-ships. They may need to adapt to accommodate more ships due to increasing demand in international trade. However, ports may not be able to expand their infrastructure if there is no space available for extension. Then, they may rely on other mechanisms such as tug or pilotage services to make the port safe for bigger ships. For example, in *The Sagoland*,[15] a large ship was ordered to Londonderry. She was the largest ship ever to go there. The water way to this port was so narrow that the ship was unable to enter without tugs. However, no tugs were available at Londonderry. The owners claimed the expense of obtaining the tugs because the charterer breached the safe port obligation. The judge confirmed that the cost was recoverable because the port was unsafe for this ship. It was underlined that the port is perfectly safe for most of the ships but not for the ship in question.[16] On the other hand, a port will not be unsafe just because the ship needs assistance or tugs. If the tugs were available, the master's obligations to exercise good navigation and seamanship would require making use of them. In such a case, the charterer would have the burden of these expenses. In other words, the charterers would not be in breach of their safe port obligation, but they would be liable for the cost incurred. On the other hand, if the quality of the services provided by the pilot or tug services is inadequate, this might make the port unsafe.

Another element of the test is that the port must be safe for the particular ship in the relevant period of time. The relevant time means the entire period of time during which the ship is using the port from the moment of entry to the

14 *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA); Tage Berlund v Montoro Shipping Corp Ltd (The Dagmar), [1968] 2 Lloyd's Rep. 563 (QB); Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen), [1988] 1 Lloyd's Rep. 500.

15 Axel Brostrom & Son v. Louis Dreyfus & Co. (1932) 38 Com. Cas. 79 (KB).

16 *Ibid*, p. 137.

time of departure.[17] The definition of the relevant period of time is broad enough to include the approaches to a port or leaving it. For example, in *The Sussex Oak*[18] the vessel was time chartered under the Baltime form and was ordered to Hamburg in January. The vessel encountered ice both on the approach to the port and on the return voyage and suffered damage. The Court held that "*… there is a breach of Clause 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety*."[19] This judgment is important because of two reasons. Firstly, it shows that the definition of a port is not limited to a particular vicinity or place. Instead, the court gave broader meaning to ensure safety in approach and departure for commercial and practical reasons. Secondly, the judgment provides a time frame in which the port must be safe. Once the ship reaches the port, the port must be safe in terms of its physical characteristics for the particular ship to use it at the relevant time. However, the port does not have to be safe for uninterrupted use, provided that she can leave in safety when the port becomes dangerous.

It is common practice for large vessels to wait in the open sea during certain weather conditions because it is safer for ships to face the strong wind or waves in the open sea rather than being in a port. In *The Eastern City*, the ship was chartered from one or two safe ports in Morocco to one safe port in Japan. Shortly after the arrival of the ship to the nominated port, the wind got stronger and started dragging the anchor. The master decided to move to the open sea. However, the vessel was blown against the rocks and sustained damage. The defendant alleged that the cause of the grounding was the voluntary assumption of risk by the master and his negligent navigation. The Court of Appeal held that the port was unsafe due to the lack of reliable holding ground in the anchorage area and high winds. [20] In the judgment of Queen's Bench Division, Justice Pearson stated that *"... a port can be safe for a ship even though the ship may have to leave it when certain weather conditions are imminent, nevertheless such a port is not safe for the ship unless there is reasonable assurance that the imminence of such weather conditions will be recognized in time and that the*

[17] Transoceanic Petroleum Carriers v. Cook Industries Inc (*The Mary Lou*) [1981] 2 Lloyds Rep 272 (QB), p. 277.

[18] Grace v. General Steam Navigation (*The Sussex Oak*) (1949) 83 Ll.L.Rep. 297 (KB).

[19] *Ibid*, page 304; See also Unitramp v. Garnac Grain Co. Inc. (*The Hermine*) [1979] 1 Lloyd's Rep. 212 (CA).

[20] *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA), p. 136.

ship will be able to leave the port safely."[21] In other words, the fact that the ship had to leave the port due to weather conditions does not make the port unsafe. In practice, there are mechanisms in some ports providing an adequate warning for ships to leave the port on time. However, not having such mechanisms to enable the ships to leave the port under such circumstances will make a port unsafe.

While the shipping industry is heading towards having unmanned vessels and fully autonomous commercial ports, there is an additional risk that needs to be evaluated under the safe port obligation. There is an increase in the number of ports reporting cyber-attacks due to the high level of digitisation.[22] Therefore, cyber risks have become a safety concern related to the physical characteristics of the ports. Due to the heavy reliance on digital systems, cyber-attacks can make a port unsafe for a ship to reach, use and return from it. Therefore, a cyberattack may render a port unsafe. The existing legal framework is broad enough to provide guidance in relation to cyber risks. An analogy might be drawn with the situation where a port is unsafe due to an insufficient amount of tug or a lack of warning systems. Hence, if a port is exposed to cyber-attacks due to an inadequate cyber security system, it can render the port unsafe.

b. Risks Related to Non-Physical Characteristics of the Port

The definition of safety is wide enough to cover more than the physical characteristics of the port. One of the earliest examples of such a wide interpretation of safety was provided in Ogden v. Graham,[23] where the defendants chartered a ship to proceed from England to a safe port in Chilli. The charterer named Carrisal Bajo as the port of discharge and directed the ship to that port. However, at that time, the port was already closed by order of the Chilian government. As a result, the ship was confiscated for some time. The court had to decide whether the charterer was liable to the shipowner in damages for sending the ship to an unsafe port. In fact, the port was physically accessible for the ship. However, the ship would not be able to proceed without being confiscated by the government of the place. Thus, the court held that the port was not safe within the meaning of the charterparty due to the political situation. It is important to note that the political risks might include outright warfare, blockade, civil unrest, politically inspired retaliation against vessels of a specific flag such as embargo and terrorism.[24] These political risks are becoming a lot more common due to

21 *The Eastern City* [1957] 2 Lloyd's Rep. 153, p. 172.

22 Mayank Suri, "*Autonomous Ships and the Proximate Cause Conundrum - A Maritime And Insurance Law Tango"* (2020) 51 Journal of Maritime Law & Commerce 163.

23 (1861) 1 B. & S. 773. (QB).

24 Charles GCH Baker and Paul David, 'The politically unsafe port' [1986] LMCLQ 112; See also Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter) (2006) 703 LMLN 1.

the international nature of the maritime trade. Especially in a world divided by political incentives, the owners need to make sure that their vessels are not trading in the ports of a hostile state. Otherwise, their ships may not suffer physical loss, but they might be at risk of being seized.

Considering the nature of the maritime business, some of these dangers and risks might cause serious delays while trying to avoid danger.[25] However, it does not automatically make a port unsafe. The question is how long the delay must be to render a port unsafe. Here we have another subjective test. The delay must be sufficient enough to frustrate the contract. Since the charterer takes the risk of delay in a time charterparty, the issue of delay is especially important for a voyage charterparty. In *The Hermine*,[26] the ship was chartered on the Baltimore Grain Form C to load a full cargo of soya at Destrehan on the Mississippi. After the loading was completed, the ship was delayed as a result of various factors, including severe fog, which had been restricting navigation and the grounding of other vessels, blocking the pass. As a result, the ship encountered delays. The court held that the delay would only make a port unsafe if the delay was a frustrating delay and not just a commercially unacceptable delay.[27] In other words, the courts will look at the time of danger and the duration of the contract and will decide whether it is a frustrating delay or not. Typically, a frustrating delay is a delay that is so great that it deprives the party substantially of what they intended to receive under the contract.

The question of frustrating delay and safe port have become popular during the recent pandemic. With the increasing number of preventive measures, ships experienced delays due to health and safety reasons, including quarantine requirements. They even faced the danger of being banned from travelling to certain areas if they were to visit one of the ports affected by the pandemic. In theory, a contagious disease may render a port unsafe, but there is a high threshold hold.[28] In the context of delays due to the recent pandemic, it is difficult to prove that the time spent in quarantine at a port will be sufficient enough to rely on a frustrating delay, especially in the time charterparty context.

Therefore, the meaning of safety is interpreted more than the physical conditions of a port or damage caused to a ship. Understanding the scope of safe port obligation is important to understand how to allocate the risk between the owner and charterer. However, there are two important thresholds in the classic

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[25] Paul Todd, "*Laytime, demurrage and implied safety obligations*" (2012) 8 Journal of Business Law 668-682, p. 674.

[26] Unitramp v Garnac Grain Co Inc (*The Hermine*) [1979] 1 Lloyd's Rep 212 (CA)

[27] *Ibid*, p. 220.

[28] Howard Bennett; Julia Dias; Stephen Girvin; Stephen Hofmeyr; Simon Kerr; Alexander MacDonald; Peter MacDonald Eggers; Richard Sarll, *Carver on Charterparties*, (2nd Sweet & Maxwell 2020), 4-038.

definition of a safe port. What causes the unsafety should not be an abnormal occurrence and cannot be avoided by good navigation and seamanship. In other words, if a port becomes unsafe due to abnormal occurrences, or a loss is suffered due to the negligence of the master, then the charterers are not liable for breach of safe port obligation.

2. Exceptions to the Obligation

a. Abnormal Occurrences

What is an abnormal occurrence is a fact sensitive question that must be decided according to the circumstances of the particular case.[29] Thus, what is abnormal will change depending on the particular port. In early cases, the court defined an abnormal occurrence as an event that is not related to the characteristics of the port.[30] However, the definition of safety is not limited with such characteristics. Abovementioned, a port might be unsafe due to political reasons too. Therefore, if there is a sudden and unexpected coup, it would be an abnormal occurrence.[31] However, if such political crises are normal for the particular port, then it might be an unsafe port as explained above.

In *The Evia (No 2)*,[32] the vessel was ordered to Basrah. War broke out between Iran and Iraq and as a result the vessel was trapped after the discharge. The question was whether the outbreak of war was a characteristic of the port or an abnormal occurrence. If it was an abnormal occurrence, then the charterer did not breach its obligation. The Court of Appeal held that the outbreak of war was not connected with the port's characteristics, so it was an abnormal occurrence. Therefore, the charterers were not in breach of their obligation. In other words, if the vessel had been hit by fire, the owners would have had to bear the damage themselves and recover from their insurers. They could not have recovered it from the charterers.[33]

Later, in the House of Lords, Lord Roskill stated that *"... since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after the Evia's arrival and was due to an unexpected and abnormal event, there was at the former time no breach of clause 2 by the respondents..."*[34] Lord Roskill's statement indicates that the obligation of the charterers arises at the time they

29 Rhidian Thomas, "*The Safe Port Promise of Charterers from the Perspective of the English Common Law*" (2006) 18 The Singapore Academy of Law Journal 597, p. 615.

30 *The Mary Lou* [1981] 2 Lloyd's Rep 272 (QB), p. 278; See also Richard Aikens, "*Lord Mustill and Maritime Law*" (2017) LMCLQ 349-359.

31 Paul Todd, *Principles of the Carriage of Goods by Sea* (1st edn Routledge 2015), p. 221.

32 Kodros Shipping Corporation v Empresa Cubana De Fletes (*The Evia 2*) [1982] 1 Lloyd's Rep 334 (CA).

33 *Ibid*, p. 339.

34 [1982] 2 Lloyd's Rep. 307 (HL), p. 319.

give the order. Furthermore, when the instructions were given, the charterer's obligation is to nominate a port that is prospectively safe. Therefore, the port does not need to be safe at the time the order is given as long as it will be safe for the ship by the time she arrives.[35]

The definition of abnormal occurrence recently examined by the Supreme Court in Gard v China National (*The Ocean Victory*),[36] where the court had to consider whether the combination of long waves and severe northerly winds were an abnormal occurrence at the port of Kashima in Japan. The ship was ordered to carry iron ore from Saldahna Bay to Kashima. It is a very frequently used and highly efficient port. The ship had to stop discharging due to heavy rain and strong wind. The weather reports warned of high seas, heavy rain, gales and storm surge. The master decided to leave the berth but lost control of the ship while leaving the port due to the strong northerly wind and grounded. Later, she became a total loss. The owner and the demise charterer claimed that the port was unsafe. However, the charterer said the port was safe, but these occurrences were abnormal. It is also important to note that such occurrences never happened at the same time since the construction of the port.

At the first instance, the court stated that the danger faced by the Ocean Victory flowed from two characteristics of the port. It might be a rare event for those two events to occur at the same time but there is no meteorological reason why they should not occur at the same time.[37] It was also stated that neither of these conditions on its own rendered the port unsafe. The Court of Appeal, however, overturned the first instance judgment and stated that the court had to considered whether the simultaneous coincidence of the two features was an abnormal occurrence or a normal characteristic of the port.[38] In the Court of Appeal, Justice Longmore stated that the concurrent occurrence of those events was rare according to the evidence relating to the past frequency of such events occurring. As a result, the court held that the event was an abnormal occurrence and so the charterers were not in breach of the safe port obligation.[39] Later, the Supreme Court upheld the Court of Appeal decision.

b. Good Navigation and Seamanship

The last limp of the safety test is whether a danger is avoidable by ordinary good navigation and seamanship. It can be used as a defence by the charterer to avoid liability. Most of the ports have hazards for the ships due to

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35 For further discussion: B. J. Davenport, "*Unsafe Ports Again*" (1993) Lloyd's Maritime and Commercial Law Quarterly 150.

36 [2017] 1 Lloyd's Rep. 521; [2017] UKSC 35.

37 [2013] EWHC 2199 (QB), p. 127.

38 [2015] EWCA Civ 16; [2015] 1 Lloyd's Rep. 381, [55]- [56].

39 *Ibid,* [63].

different characteristics futures. However, they are also likely to have various preventive measures and warning mechanisms to make the port safe for ships. The definition of the safe port underlines that a port only becomes unsafe if the danger cannot be avoided by good navigation and seamanship. In other words, the owner and master cannot avoid responsibility for the consequences of those risks that a competent master could have avoided. The loss suffered as a result of such dangers cannot be attributed to the charterers.[40] Thus, the charterer would not be in breach of its safe port obligation, if the danger can be avoidable by ordinary care and skill. Following the classical definition of safe ports, Lord Justice Sellers recognised this reality, stating that *"Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimised by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship*."[41]

Therefore, if more than ordinary skill is required to avoid the danger, the port will not be safe.[42] However, it does not mean that the port will be automatically unsafe if the ship is damaged regardless of the fact that ordinary good navigation and seamanship were exercised. In *The Mary Lou*, the court confirmed this view and stated that *"... care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely, that the casualty was the result of simple bad luck*."[43] On the other hand, if it is established that the master acted so negligently that it broke the chain of causation between the charterer's order and damage, the charterer won't be liable for the damage.[44]

3. The Nature of the Obligation

In some sophisticated charterparties, such as Shalltime, the charterer's obligation is limited to one of due diligence.[45] However, the charterer's primary obligation is an absolute one at the common law, unless otherwise expressly stated as in Shalltime 4 form[46]. Therefore, the charterer will be strictly liable for

40 St Vincent Shipping Co Ltd v Bock, Godeffroy & Co (The Helen Miller) [1980] 2 Lloyd's Rep 95.

41 *The Eastern City* [1958] 2 Lloyd's Rep 127 (CA), p. 131.

42 Kristiansands Tankrederi A/S v. Standard Tankers (Bahamas) Ltd. (*The Polyglory*) [1977] 2 Lloyd's Rep. 353, p. 365.

43 *The Mary Lou* [1981] 2 Lloyd's Rep 272 (QB)

44 *Ibid,* p. 279; See also Charles GCH Baker, 'The safe port/berth obligation and employment and indemnity clauses' [1988] LMCLQ 43, p. 50.

45 Yvonne Baatz, *Maritime Law* (5th edn Informa Law 2021), p. 152.

46 Clause 4(c): "Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports,

damages suffered by the shipowner as a result of unsafety in the port subject to the limitations abovementioned. The test is whether the port is prospectively safe, not whether the port is reasonably safe. As a result, the charterers will be liable regardless of the fact that they were ignorant of the unsafety.

In *The Terneuzen*,[47]for example, the ship developed a list during loading. To correct that list, the master ordered deck cargo to be loaded on the starboard side of the vessel, but the ship still preserved her port list. Later, it was discovered that the ship had grounded. This was unexpected neither by the charterer nor the master. They were unaware of the unsafety of the berth. However, the Court of Appeal held that the charterers are liable for the damages.

A port might be safe when nominated. However, it might become actually or prospectively unsafe while the ship is sailing towards it or while the ship is in the port. It was established that the charterer's obligation of safety is not a continuing one. In *The Lucille*, [48] the ship was ordered to Basrah on the eve of the outbreak of war in September 1980. In the meantime, heavy fighting on land and sea was reported. It was clear that there was a warlike situation gradually worsening at the time of the charterers' orders. Later, the ship was fired upon by Iranian forces and sustained damage. The court evaluated a number of issues. In relation to the secondary obligation, Justice Bingham stated that when the nominated port becomes unsafe, the charterer will have a secondary obligation to nominate an alternative safe port. Nonetheless, the nature of this secondary obligation is unclear.

4. Remedies Available for Breach

If the charterer orders the ship to a prospectively unsafe port, what options does the owner have? An order to an unsafe port will be outside the contractual limits provided by charterparties. Thus, the owner is not obliged to send the ship to the nominated port if it is prospectively unsafe.[49] In fact, if the owner is aware of the danger but still chooses to proceed to the nominated port and suffers a loss, then he cannot ask for compensation for the loss.

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berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

47 Lensen Shipping v Anglo-Soviet Shipping (*The Terneuzen*) (1935) 52 Lloyd's Rep. 141 (CA).

48 Uni-Ocean Lines Pte. Ltd. v. C-Trade S.A. (*The Lucille*) [1984] 1 Lloyds Rep 244 (QB).

49 *The Stork* [1955] 1 Lloyd's Rep 349, p. 373.

In *The Kanchenjunga,*[50] the ship was sub-chartered for a single voyage from loading ports defined as 1/2 safe ports Arabian Gulf excluding Iran and Iraq but including Kharg, Lavan and Sirri Islands. She was ordered to load a cargo of crude oil at Kharg Island, which was not a prospectively safe port at the time of the nomination. The owner told the master to proceed to the unsafe port. Later, she had to proceed to a point of safety away from the island due to an air raid. The owner asked the charterer to nominate another port, which would be safe. However, the charterer insisted on their nomination. Justice Hobhouse stated that the owners had waived their right to treat Kharg Island as non-contractual because they were aware of the danger. However, they were entitled to damages under a war risks clause in the charter.

On the other hand, if the charterer insists on his invalid nomination, the charterer will be in a repudiatory breach of contract. As a result, the owner will be entitled to elect to terminate the contract and claim damages.[51] However, the owner must be careful because they might end up in a repudiatory breach if they elect to terminate when they do not have the right to terminate.

The damages for any breach of safe port obligation are limited by the rules of causation and remoteness.[52] Therefore, the charterer will be liable for all the damages suffered as a result of the breach. Furthermore, the owner is entitled to recover the cost of avoiding the danger. For example, in *The Inishboffin*,[53] one of the damages the owner claimed was for the cutting of the masts. The ship was loaded when she went through the canal, and her masts were just low enough to clear the bridge. However, after the discharge, the masts had to be cut in order to enable the vessel to leave the port. The court held that the costs were recoverable because it was to avoid the danger.

CONCLUSION

The definition of the safe port obligation has changed and extended over time. As the leading jurisdiction, the English courts adopted a flexible and practical approach when they deal with the definition of safety and how to imply such obligation if there is no express clause in a charterparty. The paper covered the framework provided by the existing legal literature, which seems wide enough to guide us in more recent risks, such as cyber-attacks, pandemics,

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50 Motor Oil Hellas *(*Corinth*)* Refineries SA v Shipping Corp of India (The *Kanchenjunga*) [1990] 1 Lloyd's Rep 391 (HL).

51 Yvonne Baatz, *Maritime Law* (5th edn Informa Law 2021), p. 155.

52 Reardon Smith Line Ltd. v. Australian Wheat Board (*The Houston City*) 1956 1 Lloyds Rep 1, p. 10.

53 Limerick Steamship Company, Ltd v W.H. Stott & Co Ltd (The Irishboffin) (1920) 5 Ll.l Rep 190; (1921) 7 Ll.l Rep 69.

or trade wars, which might affect the safety of ports. As it is suggested in the paper over and over again, defining the nature and scope of the safe port obligation is important to understand who will be liable when the ship suffers a loss due to the breach of the safe port obligation. This paper analysed what constitutes a safe port and the limits of the safe port obligation. It is established that the definition of safety is not just limited to the physical characteristics of a port but also includes other kinds of risks related to non-physical characteristics of the port, such as political and administrative risks or delays. However, what constitutes safe is a subjective test and depends on the facts of the case. Thus, the answer to that question might change from ship to ship and from time to time. Later, the nature of the obligation was discussed to understand the charterer's obligation. It was established that the charterer's obligation of safety is not a continuing one. Therefore, once the nominated port becomes unsafe, the charterer has a secondary obligation to nominate an alternative safe port. Finally, the remedies available for parties were discussed. It is clear that the safe port obligation is an absolute one. Therefore, the charterer will be strictly liable unless otherwise stated in the contract or the loss suffered is caused by one of the exceptions.

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DUTY OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: DOES THE MODERN WORLD STILL NEED THIS CONCEPT?

Uluslararası Ticari Tahkimde Gizlilik Yükümlülüğü: Modern Dünyanın Hala Bu Konsepte İhtiyacı Var mı?

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L&JR
Year: 13, Issue: 24
July 2022
pp.19-34

Article Information

Submitted	*:18.02.2022*
Revision Requested	*:13.03.2022 14.03.2022*
Last Version Received	*:07.04.2022*
Accepted	*:16.06.2022*

Article Type

Review and (Literature) Scan Article

ABSTRACT

In today's world, arbitration plays a crucial role in resolving international commercial disputes. The aforementioned significance is based on the distinguishing features of the arbitration over ordinary court litigation, and the "duty of confidentiality" stands out among the mentioned features with its essential feature. On the other hand, it is also known that the request for confidentiality in arbitration does not provide absolute confidentiality under all circumstances and the level of confidentiality differs due to the approach adopted by the arbitration centers. This situation causes the validity of the concept of the duty of confidentiality and its place in the modern world to be questioned. In this study, firstly the duty of confidentiality was examined in terms of possible definitions, different approaches and comparing with the privacy. Then, the English approach was explicated with the help of remarkable former cases and the case of *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP"),* thoroughly. After that, the other different approaches were identified by analysing the related decisions and statutory regulations. Next, the arguments against confidentiality were scrutinised. Lastly, the sustainability of duty of confidentiality in international commercial arbitration in the modern world was discussed due to the sections of this article.

Key Words: Duty of Confidentiality, International Commercial Arbitration, Privacy, English Approach, *Emmott-MWP.*

ÖZET

Günümüzde uluslararası ticari anlaşmazlıkların çözümünde tahkimin çok önemli bir rolü bulunmaktadır. Anılan önem, müessesenin olağan yargılamaya kıyasla sahip olduğu ayırt edici özelliklere dayanmakta olup, "gizlilik yükümlülüğü " bahse konu özellikler arasında temel niteliği veya çekiciliği ile öne çıkmaktadır. Öte yandan tahkimde gizlilik talebinin her şartta kesin bir gizlilik sağlamadığı ve tahkim merkezlerinin benimsediği yaklaşıma göre gizlilik seviyesinin farklılaştığı da bilinmektedir. Bu durum ise gizlilik yükümlülüğü konseptinin geçerliliği ve modern dünyadaki yerinin sorgulanmasına neden olmaktadır. Bu çalışmada, öncelikle gizlilik yükümlülüğü olası tanımlar, farklı yaklaşımlar ve mahremiyet ile karşılaştırma açısından incelenmiştir. Daha sonra, İngiliz yaklaşımı *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP")* davası ve daha önceki dikkate değer davalar yardımıyla etraflıca izah edilmiştir. Ardından ilgili

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kararlar ve yasal düzenlemelere yer verilerek diğer farklı yaklaşımlar tespit edilmiştir. Son olarak, gizliliğe karşı ileri sürülen argümanlar ve çalışmanın önceki bölümlerindeki tespitler bağlamında uluslararası ticari tahkimdeki gizlilik yükümlülüğünün modern dünyadaki sürdürülebilirliği değerlendirilmiştir.

Anahtar Kelimeler: Gizlilik Y*ükümlülüğü,* Uluslararası Ticari Tahkim, Mahremiyet, İngiliz Yaklaşımı, *Emmott-MWP.*

INTRODUCTION

In today's world, arbitration has a significant role in resolving international commercial disputes. The primary reason behind this reality is its distinctive features which creates a considerable advantage over ordinary court litigation such as the neutrality of the forum, enforcement power of the award[1], shorter process time and confidentiality.[2] Most probably, confidentiality is one of the essential or the most appealing, of rationales which parties decide to arbitrate.[3] The main reasons of demand for confidentiality could be counted as involved parties might not want to disclose their trade secrets, business plans, strategies, contracts, financial results or any other information which is related to their businesses.[4] Arbitration proceedings are not open to the public. Therefore, unlike public trial court proceedings, there is no chance to reach the documents of arbitration proceedings which are necessary for conducting proceedings. Moreover, the award itself also is protected by a duty of confidentiality.[5]

It can be widely acknowledged that England has been an arbitration-friendly jurisdiction that respects the demands of the parties in terms of confidentiality.[6] Upon the English approach is examined in detail, it will be seen that absolute confidentiality is not always provided automatically under any circumstances or any cases. For example, landmark decision of the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP")*[7] incorporates exceptions and limitations on the scope of the duty of maintaining confidentiality. Furthermore, it should be remembered that there are also other cases which affect the evolution of the matter before this decision is made.

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1 With the help of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") which has been ratified by 159 parties, the courts are under the obligation of enforcing the arbitral awards.

2 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 3-4.

3 Kyriaki Noussia, *Confidentiality in International Commercial Arbitration a Comparative Analysis of the Position Under English, US, German and French Law* (Springer-Verlag 2010) 1.

4 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International BV 2011) introduction xvi.

5 Ibid (n 3) 1.

6 Ibid 94.

7 [2008] EWCA (Civ) 184.

In this essay, primarily the concept of confidentiality will be analysed. Then, the case of *Emmott-MWP* will be scrutinised and before that related cases will be assessed in terms of confidentiality. Later on, the other different approaches and the related decisions will be identified. Next, arguments against confidentiality will be examined. After that, it will be discussed that the importance level of confidentiality in international commercial arbitration in the modern world. Finally, the results of the argument will be summarised in the conclusion section.

1. THE DEFINITION OF DUTY OF CONFIDENTIALITY

First of all, before commencing to identify the concept of confidentiality, there is a need to clarify the meaning of privacy in arbitration that often confused with confidentiality. It should be highlighted that there is no guarantee that the private nature of the arbitration would always procure absolute confidentiality.[8] Therefore, these two concepts should be identified separately. The primary purpose of the privacy that provides a right to exclude strangers out of the arbitral proceedings[9] and the limits of this restriction depends on each party's consent which has to be stated expressly. Besides, some of the international organisations have established rules regarding this issue. For example, it can be seen in The London Court of International Arbitration (LCIA) Rules Art. 19.4[10]or International Chamber of Commerce (ICC) Rules of Arbitration Art. 26(3).[11]As a result, the concept of privacy fundamentally refers to conducting proceedings in private by excluding third parties out of the equation, nothing more.

Secondly, the concept of confidentiality is known as the one of the most important peculiarity of arbitral proceedings[12] and there are several advantages which have been mentioned in the introduction section. In addition, it could depress the risk of getting harmed for ongoing business operations[13]and parties

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8 Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review. 969, 974-75.

9 Ibid 972.

10 "All hearings shall be held in private, unless the parties agree otherwise in writing". 'LCIA Arbitration Rules (2014)' (*Lcia.org*, 2014) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 13 March 2019.

11 "Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted". 'Arbitration Rules - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 13 March 2019.

12 Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' [2013] 23 J. Arb. Stud. 25.

13 Charles S. IV Baldwin, 'Protecting Confidential and Proprietary Commercial Information in International Arbitration' [1996] 31 Tex. Int'l L. J. 451,453.

could readily protect themselves from possible interventions stemmed from media and also their rivals.[14]

Thirdly, despite the significance of the concept, there are not lots of sources both at legislative and institutional level to define the scope of the duty of confidentiality.[15] In ICC Rules, Article 22(3) empowers the Arbitral Tribunal to "take measures for protecting trade secrets and confidential information" rather than constituting a brief definition. In UNCITRAL Rules[16], the only article about confidentiality is article 32(5) that "the award may be made public only with the consent of both parties". Another example is that The English Arbitration Act[17] does not refer to the obligation of confidentiality.[18]

Fourthly, the confidentiality of arbitration can be perceived by the parties as a universal concept in the world. However, there are several approaches adopted by different jurisdictions. For instance, while The United Kingdom and France accept an implied duty of confidentiality to various levels, on the contrary, Sweden and Australia assess the matter differently that there has to be either mutual consent of the parties or applicable laws to implement such confidentiality.[19] Thus, the English approach does not need any specific clause in the arbitration agreement which reflects parties' intention expressly for procuring confidentiality.[20]

In summary, it can be said that there is no clear definition regarding the duty of confidentiality and practices vary from country to country. Moreover, the lack of definitions indicates that the task of creating the framework was often left to the courts. Following section will be focused on the evaluation of the duty of confidentiality with respect to the English perspective.

2. THE ENGLISH APPROACH

As mentioned in the introduction section, in order to comprehend the case of Emmott-MWP completely, related previous cases should be sifted throughly. The practice and law of confidentiality in commercial arbitration is comprised of three main cases in England[21]; *Dolling-Baker v. Merrett*[22]("Dolling-Baker"),

[14] Ibid (n 12) 27.

[15] Michael Hwang and Katie Chung, 'Defining The Indefinable: Practical Problems of Confidentiality in Arbitration' [2009] 26 Journal of International Arbitration 609, 610.

[16] 'UNCITRAL Arbitration Rules' (*Uncitral.org*, 2019) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> accessed 13 March 2019.

[17] 'Arbitration Act 1996' (*Legislation.gov.uk*, 1996) <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 13 March 2019.

[18] Ibid (n 3) 9.

[19] Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' [2017] 22 Harv. Negot. L. Rev. 275.

[20] Ibid (n 2) 190.

[21] Ibid (n 6) 286.

[22] [1990] 1 W.L.R. 1205.

Hassneh Insurance Co of Israel v Steuart J Mew[23](“Hassneh”), *and Ali Shipping Corporation v. Shipyard Trogir*[24](“Ali Shipping”).

The case of Dolling-Baker has a unique significance to demonstrate the English perspective regarding confidentiality. Because the private structure of the arbitration has never been underlined as a pivotal part of the arbitral proceedings as bright as before by the Court of Appeal. In this decision, the court determines the framework of confidentiality which points out the necessity of an implied obligation on both parties for all agreements of arbitration which composes of “not to disclose any documents, transcripts or in any other way what evidence had been given by any witness or notes of the evidence prepared for and used in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court”. To eliminate the ambiguity, above sentence shall be divided into two separate sentences.[25] Moreover, it was also held that there was no correlation between the implied duty of confidentiality and the confidential nature of the materials protected. Therefore, despite the implied obligation of confidentiality, if the court decides to disclose and examine documents as a precondition for the disposal of fair action, there is a possibility of disclosure of relevant documents.[26] Lastly, it was stated that the limits of the implied obligation should be assessed on a case-by-case basis, taking into account the circumstances of each case.[27]

In Hassneh, the definition of the implied duty of confidentiality was expanded by the Commercial Court by adding arbitral awards to the previous description placed in Dolling-Baker. Also, it was noted that, even without the consent of the other party, it could be decided to limit implied duty of confidentiality in terms of awards when it was necessary to protect the interests of justice or party rights.[28]

In Ali Shipping, the Court of Appeal stated that “the obligation of confidentiality arises (whatever its precise limits) as an essential corollary of the privacy of arbitration proceedings.”[29] Despite the difficulty in determining the limits of confidentiality, the court proposed an optimal way to reach the best possible solution “by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in light of the particular circumstances and

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23 [1993] 2 Lloyds’s Rep. 243.

24 [1998] 1 Lloyd’s Rep. 643

25 Ibid (n 10) 1213.

26 Ibid (n 10) 1214.

27 Christoph Henkel, ‘The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration’ [2012] 37 N.C.J. Int’l L. & Com. Reg. 1059, 1068.

28 Ibid (n 11) 249.

29 Ibid (n 12) 651.

presumed intentions of the parties at the time of their original agreement."[30] After that, five exceptions were structured regarding implied obligation of confidentiality: "(i) express or implied consent of the party who originally produced the material; (ii) order of the Court; (iii) the leave of the Court; (iv) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; (v) where the "public interest" requires disclosure."[31] Nevertheless, an objective rule was necessary to apply the relevant exceptions. Thus, the court noted that those exceptions will not be activated, unless passing the test of reasonable necessity that "it is sufficiently necessary to disclose an arbitration award to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must, therefore, be a necessary element in the establishment of the party's legal rights against the stranger."[32]

From what has been discussed in this section, it can be concluded that the concept of confidentiality is considered as an implied obligation under the English approach. That is to say; confidentiality is an integral part of the arbitration agreement, even if it is not explicitly requested. However, after chronologically analysing the relevant cases, it appears that the first two cases have adopted a case-by-case approach, while the last case focuses on constituting a framework that propounding the exceptions of confidentiality, besides the resolution of its case. Thus, it can be argued that the perspective of examining confidentiality-based cases in England is shifted from the case-by-case basis to the institutional framework. Despite the general tendency, there is one more substantial case that supports the case-by-case approach. This case will be examined in detail in the next section.

3. JOHN FORSTER EMMOTT V MICHAEL WILSON & PARTNERS LTD [33]*("EMMOTT-MWP")*

3.1 FACTS, ISSUE AND COURT'S HOLDING

Michael Wilson and Partners Ltd ("MWP") is a law company that to procure legal services in Kazakhstan[34] and John Forster Emmott ("Emmott") had been a partner and also a shareholder of the company from 2001 to 2006. After that, Emmott practised through Temujin International Ltd ("TIL") with two former employees (David Slater and Robert Nicholls) of MWP.[35] Later on, MWP initiated proceedings in various countries against different persons/

30 Ibid.
31 Ibid 652.
32 Ibid 648.
33 [2008] EWCA (Civ) 184.
34 Ibıd para 2.
35 Ibıd para 3.

entities, and the allegations were related to scheme to transfer MWP's business portfolio to TIL in breach of contract and trust. There were several conducting proceedings in different countries: Arbitration proceedings against Emmott in London; litigation proceedings against Slater and Nicolls ("SN") in New South Wales ("NSW"); related proceedings in the British Virgin Islands ("BVI"), Bahamas, Colorado and Jersey.[36]

In the London arbitration, at first MWP made accusations regarding conspiracy and fraud against Emmott, but after a while, the allegations were withdrawn by MWP.[37] On the other hand, NSW proceedings, at first did not incorporate the allegation of conspiracy and fraud, but later on, amended MWP's accusations broadened to include them. Broadly, this situation created an inconsistency among proceedings. Furthermore, while MWP is presenting to the NSW court, they claimed that the same allegations were still in progress in both London and BVI. Although Emmott was not a party in NSW, he still made an application for disclosure of the documents which was produced in the London arbitration proceedings in order to prevent the misleading of justice with the help of false information supplied by MWP. As a result, the application was accepted by the English High Court. After that, MWP appealed. Lastly, the English Court of Appeal held that Emmott could disclose the related documents.

3.2 OBSERVATIONS OF THE COURT OF APPEAL AND SIGNIFICANCE OF THE DECISION

While reaching the aforementioned decision, the English Court of Appeal made the following observations: Firstly, The Court of Appeal scrutinised the confidentiality matter with the light of previous cases. While performing this revision, they indicated the difference between the obligations of confidentiality derived from the nature of the documents themselves and the nature of arbitration itself which means an implied obligation that "the obligation is not limited to documents which contain confidential material, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law". After that the limits of the implied obligation was underlined that "there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court".[38]

36 Ibıd para 4.
37 Ibıd para 10.
38 Ibid para 81.

Secondly, the court stressed that "the limits of that obligation are still in the process of development on a case–by–case basis"[39] and after that they noted that the principal exceptions were as follows: "where there is consent, express or implied; where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; where the interests of justice require disclosure; (perhaps) where the public interest requires disclosure".[40]

Finally, they brought additional exceptions considering the unique peculiarities of the case. They stated that the documents required for disclosure were in principle confidential, but the confidentiality was subject to two possible exceptions in the present case. First, the disclosure might be permissible if the documents were indispensable for the protection of the legitimate interests of an arbitrating party such as to found a cause of action against a third party, or to defend a claim or counterclaim brought by the third party.[41] Second, the disclosure could be convenient if the party had an aim to use the cloak of confidentiality as a misleading instrument by precluding the facts from foreign courts to mislead them.[42]

After having explicated the decision, it can be reached that the methodology of analysing is well-organised and contemplated. Accordingly, it can be defined as a summary of English approach that creates an opportunity to comprehend the evolution of the duty of confidentiality. As it has been mentioned in English Approach, despite the *Ali Shipping* set a framework about exceptions, The Court of Appeal extended these exceptions and stated that the case-by-case approach has to be taken. Thus, they assessed the interest of justice as a boundless matter by accepting its international nature rather than confined to the inherent interest of justice in England. As a result, the case of *Emmott-MWP* made a crucial contribution to the duty of confidentiality concept by summarising the previous authorities' principals, demonstrating the importance of the implied obligation in English approach and emphasising the necessity of the case-by-case perspective.

4. IS THE DUTY OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION A MUST IN MODERN WORLD CONDITIONS?

After having identified the approach taken in the decision of *Emmott-MWP* which represents English perspective, the next step will be the assessment of

39 Ibid para 107.
40 Ibid.
41 Ibid para 27.
42 Ibid para 28.

the sustainability of the duty of confidentiality under the circumstances of the modern world. This section will be divided into three sub-sections. Firstly, the position of other countries will be analysed in order to contemplate the perspective of other jurisdictions with respect to related cases and provisions. Later on, views of anti-confidentiality will be identified. Finally, the matter of maintaining the duty of confidentiality will be discussed in the last sub-section concerning previous findings in this article.

4.1 THE PERSPECTIVE OF OTHER JURISDICTIONS

As it has mentioned before that the English approach adopts an implied duty of confidentiality and the approach has been taken by France is also attributed to the same ecole. However, the tendency for constituting exceptions regarding the duty of confidentiality is different in France which does not incorporate any exclusions expressly in the decisions.[43] Therefore, it can be said that there is a room for demanding both public disclosure and confidentiality at the same time in arbitration proceedings.[44]

Unlike implied duty of confidentiality, there are other jurisdictions that have adopted the notion of express duty of confidentiality such as Australia and Sweden. In Australia, the case of *Esso Australia Resources Ltd. v. The Honourable Sydney James Plowman*[45]*("Esso")* has a high importance level. Because, before this decision, they were following the discipline of the implied duty of confidentiality school.[46] *Esso* demonstrates the new notion of Australian courts that they prefer to express confidentiality agreements rather than procuring the confidentiality with the help of an invisible cloak as English approach did.[47] Besides, the court underlined that a fundamental reason for arbitration's appeal and efficiency is stemmed from the privacy, not confidentiality and they defined confidentiality as a consequential benefit.[48] In Sweden, they share a similar view with Australian's *Esso* in terms of duty of confidentiality as it can be seen in the reasoning of *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*[49]*("Bulbank")* that there is no reason to engage the duty of confidentiality without a contract which has to refer a duty of confidentiality.

On the other hand, there is another approach that implements statutory regulation to deal with the matter. Singapore is one of the representatives of

43 Ibid (n 19) 291.
44 Ibid (n 27) 1076.
45 [1995] 128 ALR 391.
46 Hew R. Dundas, 'Confidentiality in English Arbitration: The Final Word? Emmott V Michael Wilson & Partners Ltd.' [2008] 74(4) Arbitration 458, 458.
47 Ibid (n 27) 1079.
48 Ibid (n 45) 401.
49 NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

this thought. In Singapore, the Arbitration Act[50] takes an unusual approach to the fore regarding disclosure of the information in Section 57(3) that is allowed either with the consent of the parties or "the court is satisfied that the information, if published (…), would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential". Also, Section 57(4) also has remarkable peculiarity to mention that indicates the Singaporean legislation has a purpose of making contributions to the development of law by allowing to publish decisions in law reports and professional publications with paying regard to the parties confidentiality.

4.2 ANTI-CONFIDENTIALITY

Although confidentiality in arbitration has been widely acknowledged as an affirmative determinant, there are also some views that call attention to the side effects of it.

Firstly, the parties of international commercial arbitrations are usually composed of private companies; however, there is always a possibility that one of the parties might be a State, a State entity or a State instrumentality.[51]These type of cases might appeal the public interest because the outcome of the decision has the power to influence the entire community. Therefore, public curiosity through the decision-making process such as reasoning and ruling would be expected behaviour from rational individuals.[52]Furthermore, unlawful activities such as money laundering, bribery, corruption are also within the range of international commercial arbitration, and public officers or officials of foreign transnational corporations might involve these issues that arouse the interest of the public.[53]

Secondly, since confidentiality hinders the flow of information such as details of reasons and rulings, it might have a detrimental influence on the progress of standardisation of commercial practices.[54]It means that legal advisers have to deal with the lack of resources to offer decent service to their clients.

Thirdly, publication of reasoned awards would make a contribution to procure consistency in the arbitral system. More broadly, the published awards

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50 'Arbitration Act - Singapore Statutes Online' (*Sso.agc.gov.sg*, 2002) <https://sso.agc.gov.sg/Act/AA2001?ProvIds=P1X-#pr57-> accessed 15 March 2019.

51 Gabriele Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?' [2015] 3(1) GRONINGEN J. NT'L L. 1,8.

52 Ibid.

53 Sherlin Hsie-lien Tung and Brian Lin, 'More Transparency in International Commercial Arbitration: To Have or Not to Have' [2018] 11 Contemp. Asia Arb. J. 21, 27.

54 Gu Weixia, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?' [2006] 15 American Review of International Arbitration 607,629.

could ‘coalesce into a collective arbitral wisdom’ that may be used by future arbitrators and parties.[55]Indeed, it can be accepted that it may reduce the multi-headed approaches on the same subjects. Also, it might also depress possible future disputes and create an opportunity in terms of parties to select eligible arbitrators.[56]

Finally, confidentiality limits the accountability, because if there is no self-regulation mechanism[57] on the parties in arbitration, there is a possibility to encounter inconvenient actions. The more or less same situation is also valid for arbitral tribunals that without public scrutiny, arbitrators might conduct proceedings imprecisely and it might affect the accuracy of award not surprisingly.[58]

4.3 DISCUSSION: IS THERE A PLACE FOR DUTY OF CONFIDENTIALITY IN MODERN WORLD?

There are three different perspectives with respect to the duty of confidentiality that has been examined thus far. However, none of them offers a perfect balance regarding the degree of confidentiality. For this reason, questions may naturally arise about whether there is such an equilibrium point or not? Alternatively, whether the modern world needs such duty or not at first place?

It can be thought that with the help of privacy, third parties would not be allowed to access the knowledge produced in arbitration proceedings, and the confidentiality of proceedings are accepted as automatically procured, but there is no obstacle to disseminate information in terms of parties of the arbitration. Because of this, there is a need for establishing a mechanism or a term which explicates the matter such as the concept of confidentiality.

In its most conservative form, the scope of confidentiality concept provides full protection not to disclose any information. Notwithstanding, there is no such absolute confidentiality in reality. The approach taken by the United Kingdom and France can be accepted as the representatives of conservatism because they adopt the perspective of an implied duty of confidentiality which means that there is no need to determine confidential provisions in the contract as there has already been an invisible cloak to deal with the matter. However, as it can be seen in the landmark case of *Emmott-MWP* that despite the presence

[55] Richard C. Reuben, ‘Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice’ [2000] 47 UCLA L. Rev. 949, 1085.

[56] Matthew Carmody, ‘Overturning The Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration’ [2016] 19 Int’l Trade & Bus. L. Rev. 96, 169.

[57] “Public scrutiny”

[58] Claudia Reith, ‘Enhancing Greater Transparency In The UNCITRAL Arbitration Rules - A Futile Attempt’ [2012] 2 Y.B. on Int’l Arb. 297, 300.

of the implied duty in England, it includes lots of exceptions such as public interest, parties consent, the order of the court, the interest of the justice that limits such an implied obligation with respect to reasonable necessity test. In addition, although the French approach does not incorporate any exceptions, they have a position that public disclosure and confidentiality requests can co-exist in arbitration. Another thing is that there is a direct result of this approach which is the erosion of the party's autonomy. Although parties have an advantage by not dealing with the set of terms regarding confidentiality in contract, it should not be forgotten that the party's autonomy is one of the essential elements of arbitration.

On the other hand, there is another approach which is attributed to express duty of confidentiality. The main difference of this approach is in terms of supporting the party's autonomy. Otherwise, the exceptions placed in *Emmott-MWP* case are not valid just in England; they represent the possible conditions that any jurisdiction may face. Therefore, the duty of confidentiality cannot isolate itself from the actual conditions whether it is implied or expressly structured. That is to say, if exceptions and other arguments against the duty of confidentiality are always there, why would the modern world have to deal with such duty instead of creating a new system?

After examining the Singaporean Act, it can be reached that there are logical ways to satisfy both parties and public at the same time by publishing awards with extracting related information about parties and essential points of the case which should be kept confidential. Also, the idea of publishing awards in law reports or professional journals is brilliant, when considering to make a contribution to the development of arbitral law, accountability of the future awards and the satisfaction of the public interest which are the severe criticisms against the duty of confidentiality.

As a result, there is no doubt that confidentiality is an essential part of the arbitration proceedings; however, the current framework does not respond to the needs of the modern world and creates uncertainty. Because of that, optimal satisfaction of all parties cannot be provided under existing circumstances. Therefore, constructive ideas such as Singaporean Arbitration Act provided or different assessment systems should be generated while implementing the duty of confidentiality.

CONCLUSION

In this article, firstly the duty of confidentiality was examined in terms of possible definitions, different approaches and comparing with the privacy. Then, the English approach was explicated with the help of remarkable former cases in order to contemplate the case of *Emmott-MWP,* thoroughly. Later on, *Emmott-MWP* decision was investigated by emphasising the significant

points such as facts, holdings and observations. After that, the other different approaches were identified by analysing the related decisions and statutory regulations. Next, the arguments against confidentiality were scrutinised. Lastly, the sustainability of duty of confidentiality in international commercial arbitration in the modern world was discussed due to the sections of this article.

As it has been seen in the related sections, the case of *Emmott-MWP* has a paramount spot in English approach in terms of confidentiality. Because the entire perspective of implied obligation was compounded by this case and they underlined that while assessing the matters case by case approach should be implemented. Besides, it can be said that the significance of this case is not just about repeating or summarising the previous cases; the boundlessness feature of justice was also added in the concept by them. On the other hand, the necessity of the duty of confidentiality should be accepted as a complicated concept in the modern world. The previous sections have demonstrated that confidentiality is a vital part of the arbitration; however, it brings uncertainty because of the current structure. As a result, there is a need to define the limits for duty of confidentiality clearly concerning current exceptions as well as anti-confidentiality arguments in order to have a stable place in the modern world for this concept.

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THE PROBLEM OF COMPETING JURISDICTION FROM THE PERSPECTIVE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*

Uluslararasi Deniz Hukuku Mahkemesi Perspektifinden Yarışan Yargı Yetkisi Sorunu

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L&JR
Year: 13, Issue: 24
July 2022
pp.35-54

Article Information

Submitted	*:17.03.2022*
Revision Requested	*:17.03.2022 13.05.2022*
Last Version Received	*:09.06.2022*
Accepted	*:16.06.2022*

Article Type

Research Article

Özet

İkinci Dünya Savaşı sonrası uluslararası hukukun gelişimi ve uzmanlık alanlarına ayrılmasıyla birlikte uluslararası yargı mercilerinin hızlı şekilde çoğalması ihtilafların her bir alt disiplinin gerekleri doğrultusunda çözümlenmesini sağlamıştır. Bununla birlikte yaşanan bu gelişme bazı sorunlara da neden olmuştur. Bu sorunlardan önemli bir tanesi de yarışan yetki olarak isimlendirilen aynı uyuşmazlığın farklı yönleri itibariyle birden fazla uluslararası yargı merciinin yetkisine girebilmesidir. Uluslararası hukuk henüz bu konuda bir yeknesaklık getirmeye yönelik genel çaplı bir düzenlemeye gitmemiştir. Bu doğrultuda her bir uluslararası yargı merci kendi kurucu antlaşması veya statüsü doğrultusunda önüne gelen ihtilafı çözmekte veya diğer yargı merciinin vereceği nihai karara kadar bekletmektedir. Uluslararası alanda en yeni yargı organlarından birisi olan Uluslararası Deniz Hukuku Mahkemesi de şimdiye kadar karşılaştığı bazı uyuşmazlıklarda bu sorunu deneyimlemiştir. İşbu çalışmada bilhassa Uluslararası Deniz Hukuku Mahkemesini merkeze alarak yeri geldikçe de 1982 BMDHS kapsamındaki deniz hukuku uyuşmazlık çözüm sistemi çerçevesinde diğer uluslararası yargı mercileri ile yarışan yetki kapsamında karşılaşılan olaylara hem kuramsal açıdan hem de uygulama açısından örnekler verilmek suretiyle mesele izah edilmeye çalışılacaktır.

Anahtar Kelimeler: Uluslararası Deniz Hukuku Mahkemesi, Uluslararası Adalet Divanı, Uluslararası yargı organları, Yarışan yargı yetkisi, 1982 BMDHS

Summary

With the development of international law after the Second World War and its division into areas of expertise, the rapid proliferation of international judicial authorities enabled the resolution of disputes in line with the requirements of each sub-discipline. However, this development also caused some problems. One of these problems is

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There is no requirement of Ethics Committee Approval for this study.

* This study basically relies on the third part of my book "Uluslararası Deniz Hukuku Mahkemesinin Yapısı ve Yargı Yetkisi" (Oniki Levha Yayınları 2017). This paper has been examined by Turnitin software against plagiarism. I acknowledge that I complied with the ethical principles and conduct while writing this study and there is no need to get ethical permission from other scientific studies. Undoubtedly, all errors are solely my own.

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that the same dispute, which is called competing jurisdiction, can come under the jurisdiction of more than one international judicial body due to different aspects. International law has not yet made a general regulation to bring uniformity in this regard. In this respect, each international judicial body resolves the conflict that comes before it in accordance with its founding treaty or status or makes it wait until the final decision of the other judicial authority. The International Tribunal for the Law of the Sea which is one of the newest judicial bodies in the international arena has experienced this problem in some disputes it has faced so far. In this study, the issue will be explained by giving examples both theoretically and practically, of the events encountered within the scope of the dispute resolution system of the law of the sea under the 1982 UNCLOS, especially by centering the International Tribunal for the Law of the Sea.

Keywords: International Tribunal for the Law of the Sea, International Court of Justice, International judicial bodies, competing jurisdictions, 1982 UNCLOS

INTRODUCTION

Today, with the proliferation of international courts and tribunals, international law reached a new level. Surely, such proliferation represents the development of international law towards a complex legal system, but this progress also has caused some problems like the so-called fragmentation of international law and competing jurisdiction among international judicial authorities. In this study, I will try to elaborate on the competing jurisdiction issue by putting the center on the International Tribunal for the Law of the Sea and comparing it with the main international judicial bodies.

In particular, until 1997, when the International Tribunal for the Law of the Sea was established, since the International Court of Justice dealt with the disputes on the law of the sea before, that situation caused the establishment of the Tribunal to be met with suspicion by some authors. Because, the International Court of Justice has improved its capabilities in this field by looking at various law of the sea disputes since the Corfu Channel case, which is the first case it dealt with.

Hence, as expressed by skeptic writers, the fact that two permanent judicial authorities are currently dealing with the law of the sea disputes has been met with doubt, especially regarding the jurisdiction issue and uniformity of case law.[1]

[1] See, e.g., Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications Limited 1991) 21. (Lauterpacht argues that this newly established tribunal would not be sufficient since it was not given exclusive jurisdiction by the 1982 UNCLOS (art. 187 and art. 292) provisions, which allowed non-state organizations to apply to the court.); Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 The International and Comparative Law Quarterly, 864. (According to Judge Oda, if the development of the law of the sea is separated from international law and left to the jurisdiction of another judicial body, this may lead to the undermining of international law.); Deniz Kızılsümer, 'Onuncu Kuruluş Yılında Uluslararası Deniz Hukuku Mahkemesi', (2005) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 58. (According to the author, although the resolution of disputes is regulated in detail in UNCLOS, the

In this direction, in this study, I will examine whether these doubts are right and whether competing jurisdictions have caused a problem in practice so far.

I. The Causes of Competing Jurisdiction Among International Judicial Bodies

The matter of competing jurisdiction is not new to the law in broad terms. Indeed, in domestic laws, this phenomenon frequently has been experienced between civil and administrative courts or trial courts and constitutional courts. However, for international law, the matter of competing jurisdiction became a significant topic due to the improvements in the international legal system.[2] For avoiding overlapping jurisdictions, some international treaties contain special provisions that govern the dispute settlement procedure like in the instances of Article 35 of the ECHR, Article 281 and 282 of the UNCLOS, and Article 2005 of the NAFTA. However, these types of provisions are meaningful and useful for regulating the jurisdictional relationships in the same field of international law.[3] On the other hand, since most of the specialized universal tribunals and courts look at separate branches of international law (commercial, maritime, criminal, human rights, investment, development, environmental law, etc.), overlaps can be detected between the powers of some of them.[4] There are various reasons for this situation. One of these reasons is the predominance of common parties in some international disputes that concern different treaty regimes and courts, or jurisdictions established under these treaty regimes.[5]

For example, if the property of a foreign investor is expropriated through a discriminatory intervention, the dispute would be brought before regional and universal human rights mechanisms (e.g., ECtHR and UN Human Rights Committee) or investment arbitration court (e.g., ICSID) or interstate proceedings (e.g., International Court of Justice).[6] In this example, the dispute

extensive exceptions and limitations introduced by UNCLOS, along with other mandatory procedures, have significantly limited ITLOS's powers.)

2 Nikolaos Lavranos, *On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals*, EUI MWP, 2009/14 – p. 1. http://hdl.handle.net/1814/11484

3 Jasper Finke, 'Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute' (2006) 49 German Y.B. Int'l L. 307, 310-311.

4 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2004) 47.

5 See also, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Geneva, 2006, p. 14, para. 15.

6 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 84. In this regard, Lowe illustrates such a competing jurisdiction with a different example. According to his example, if a merchant ship flying the flag of State A is seized by State B, the jurisdiction of various international jurisdictions may come to the fore. If these two states

whose parties and subject are the same; due to the right to "property", can be subjected to the relevant human rights courts, due to the violation of the contract between the state and the investor or the interstate bilateral investment treaty, can be subjected to the investment arbitration court, and finally, if it is entered to the jurisdiction of an interstate judicial authority when the foreign investor's national state uses the "diplomatic protection" right of the state.

Another reason for competing jurisdiction is that some sub-branches of international law do not have a special judicial body of their own. An example is international environmental law. Despite various calls, an "international environmental law court" has not been established and it is not likely to be established in the near future. Since there is no special court specific to this field, it can be stated that several international courts have special importance in terms of environmental law. Examples include the International Court of Justice, the International Court of Law of the Sea, the World Trade Organization Appeal Body and Panels, the European Court of Justice, and regional human rights mechanisms.[7]

Regarding the competing jurisdiction matter, Lowe resorts to a triple categorization. Accordingly, both judicial bodies can have general authority, one general and the other special authority, and finally, both can be special authorities.[8] To give an example in this direction, both the Permanent Court of Arbitration and the International Court of Justice are in the position of two general competent jurisdictions as they have developed their capacities to resolve disputes regarding environmental law.[9] For both special jurisdictions, we can give examples of WTO Dispute Resolution Bodies dealing with disputes under the 1994 GATT and tribunals dealing with maritime law disputes (ITLOS and arbitral tribunals).[10] I will discuss the competing jurisdiction between one specific and one general authorized dispute resolution mechanism under a sub-

have accepted the jurisdiction of the Court by Optional Clause under Article 36/2 of the Statute of the International Court of Justice, the jurisdiction of the Court will come into question. If they chose the ITLOS under 1982 UNCLOS Part XV, the jurisdiction of the Tribunal may come into question. Apart from these, if a Bilateral Joint Commission is established within the framework of the Treaty of Friendship, Trade, and Navigation the authority of such Commission between the two states may arise. Finally, State A may apply to the WTO dispute resolution system, claiming that its commercial rights were damaged within the framework of the 1994 GATT. (See, Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Aust. YBIL 191.

7 Philippe Sands, *Principles of International Environmental Law*, Second Edition, (CUP 2003) 214.

8 Lowe, 'Overlapping Jurisdiction in International Tribunals' 192.

9 Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 273.

10 Lowe, 'Overlapping Jurisdiction in International Tribunals' 203.

title 1982 UNCLOS article 282.[11] Subsequently, I will examine the jurisdiction of ITLOS that competes with other courts and jurisdictions.

II. The Dispute Settlement Mechanism under the 1982 United Nations Convention on the Law of the Sea (UNCLOS)

At the Conference of the 1982 UNCLOS, it clearly occurred that there was significant disagreement among the states regarding which dispute settlement method should be preferred in the disputes derived from the interpretation or application of the Convention. Whereas some states wanted the continuance of the ICJ as an exclusive judicial body on the matters concerning the law of the sea disputes, the second group of states considered that the new law of the sea regime should be entrusted to the authority of a tribunal that will be created specifically for this purpose.[12]

On the other hand, the third group of states defended that arbitration is a more preferable method in terms of flexibility compared to the standing courts and tribunals. Finally, the fourth group of states (particularly socialist states) indicated the need for specialized arbitral bodies for resolving technical issues. In the end, negotiators of the UNCLOS found a practical solution by adopting the principle of freedom of choice which is enshrined in art. 287 of the Convention.[13]

Article 287 requires the State Parties to make a declaration regarding which procedure they choose. According to paragraph 3 of Article 287 if a State, party to a dispute did not make a declaration it shall be deemed to accept Annex VII arbitration procedure. In the preparatory phase of the Convention when this issue was discussed, first it was offered that the parties would use the tribunal chosen by the defendant. But some states expressed their dissatisfaction since they do not want to accept the jurisdiction of the ICJ in case of the defendant selects the International Court. Upon that, the Annex VII arbitration method was preferred as a default procedure.[14] Similarly, if the parties of a dispute chose different procedures, the plaintiff-side may submit it only to Annex VII arbitration if the parties do not agree otherwise.

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[11] 1982 UNCLOS Article 282 *Obligations under general, regional or bilateral agreements*: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree".

[12] John G Merrills, *International Dispute Settlement* (CUP 2011) 170.

[13] Ibid; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 56; Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* Volume V (Martinus Nijhoff Publishers 1989) 42.

[14] Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* 57.

III. The Problems Encountered by the International Tribunal for the Law of the Sea within the Scope of Competing Jurisdiction Issue with Other Judicial Bodies

A. The Approach of the International Tribunal for the Law of the Sea to the Dispute Resolution Procedures in the Non-UNCLOS Documents and Criticisms Against That

The jurisdiction of the judicial bodies regarding international law disputes mainly arises from the consent of the states. In this context, if for the settlement of certain types of disputes, a different method is agreed upon by the states, it is necessary to resort to a special court or settlement procedure (*lex specialis*) instead of the general competent international court, unless the states decide otherwise.[15]

The MOX Plant dispute[16] is a good example of developments in the competing jurisdiction among international bodies. The MOX Plant cases refer to three linked sets of litigation arising out of a decision of the United Kingdom to authorize the construction and operation of a plant to make mixed oxide fuel (MOX).[17] Thereby, the dispute was brought before three different dispute resolution mechanisms by Ireland. These tribunals are the 1982 UNCLOS Annex VII arbitration, the OSPAR Convention, and finally the ITLOS. Until Annex VII arbitration court is formed for resolving the dispute under 1982 UNCLOS article 287, it was brought before the International Tribunal for the Law of the Sea to order interim measures under article 290/5. Apart from these, the European Commission applied to the European Court of Justice against Ireland on October 30, 2003, on the grounds that Ireland applied to the competent judicial authorities under the 1982 UNCLOS instead of going to the competent European Community authorities in the decision-making process.[18]

15 Lowe, 'Overlapping Jurisdiction in International Tribunals' 195. However, it is also expressed by the author that a special judicial authority may decide that it is unauthorized or that it may indeed be unauthorized. (*Ibid*, footnote 7).

16 *MOX Plant (Ireland v. the United Kingdom), (Provisional Measures, Order of 3 December 2001),* ITLOS Reports 2001; Judgment of the ECJ (Grand Chamber) of 30 May 2006, Case C-459/03, Commission v. Ireland; Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01; Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Ireland v. The United Kingdom, PCA Case No. 2001-03.

17 Robin R Churchill, "Mox Plant Arbitration and Cases" in Rüdiger Wolfrum and Anne Peters (eds.), *The Max Planck Encyclopedia of Public International Law* (OUP 2018).

18 Yuval Shany, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', (December 2004) 17 Leiden Journal of International Law 815, 816; Kerem Batır, 'Birleşmiş Milletler Deniz Hukuku Sözleşmesi Uyarınca Uyuşmazlıkların Çözümü: Mox Plant Davası ve Yargı Yetkilerinin

Just before this application, on 24 June 2003, the 1982 UNCLOS Annex VII arbitration court adjourned the next hearing in its Order no. 3 no later than 1 December 2003, approved the interim measures ordered by the ITLOS on 3 December 2001, and rejected the requests for interim measures and asked the parties to facilitate the resolution of unresolved issues individually or jointly within the institutional framework of the European Community and to inform the arbitral tribunal of developments.[19] In the next hearing on 14 November 2003, it decided to suspend the case until the European Court of Justice decides otherwise. However, it stated that it would continue to hold the dispute.[20]

The European Court of Justice, on the other hand, in its decision on 30 May 2006, determined that under the 1982 UNCLOS article 282, the system envisaged in the European Community Treaty for the settlement of disputes between member states has priority over the dispute resolution procedures in the UNCLOS Part XV.[21] The Court, among other reasons[22], decided that Ireland

Örtüşmesi', (2008) 16 Uluslararası Hukuk ve Politika 57, 76. The arbitral tribunal established pursuant to the OSPAR Convention concluded that it is competent for the dispute, despite United Kingdom's objections. However, in the end, it refused Ireland's demands. (Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, Ireland v. the United Kingdom, Final Award, p. 58 ff., para. 185). The arbitral tribunal's refusal to harmonize the OSPAR Convention with the environmental information access regime in European Community law and its failure to apply international law other than the OSPAR Convention was considered a regrettable aspect of the decision. (Shany, 'The First Mox Plant Award' 826).

19 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01, Order No. 3, p. 20.

20 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01, Order No. 4, p. 2 ff. The decision to suspend the case was seen as positive in that it alleviates jurisdictional conflict, reduces the risk of conflicting judgments, and helps maintain compliance with international law. (Shany, 'The First Mox Plant Award' 827).

21 Judgment of the ECJ (Grand Chamber), Case C-459/03, Commission v. Ireland, p. I-4708, para. 125.

22 One of the important issues emphasized by the Court is Ireland's defense before the Annex VII arbitration court that the relevant provisions of the various directives of the European Community have been violated. According to the Court, these claims were presented not only for the purpose of interpreting the general provisions of the 1982 UNCLOS but also as international law rules to be applied by the arbitration court pursuant to article 293. This indicates that Ireland intends to obtain a decision from the Annex VII arbitration court that the provisions of the European Community law instruments have been violated by the United Kingdom. On the other hand, in accordance with Article 292 of the European Community Treaty, the jurisdiction of the Court is exclusive in resolving disputes arising from the interpretation and application of the provisions of Community law. (Ibid, pp. I-4713 et al., para. 148-152).

did not comply with its obligations arising from Articles 10 and 292 of the European Community Treaty by applying the dispute resolution procedures stipulated in the 1982 UNCLOS regarding the MOX Plant dispute.[23] Thereupon, on 6 June 2008, the Annex VII arbitration court concluded the proceedings by stating that Ireland withdrew its request with Order No. 6.[24]

One of the important consequences of Article 282 of the 1982 UNCLOS is that it limits the possibility of the parties to the dispute to unilaterally choose the judicial authorities to which they will apply (forum shopping) and prevents the use of dispute resolution procedures in both the 1982 UNCLOS and the non-UNCLOS legal documents.[25]

Regarding article 282, it is stated in the Virginia Commentary that states can choose different judicial bodies for certain types of disputes in bilateral friendship, trade, and navigation agreements.[26] Apart from this, it was stated that in the multilateral agreements concluded under the auspices of international organizations such as IMO, provisions regarding the use of arbitration for possible disputes are included. Finally, it was emphasized that the parties can take the dispute to another judicial body with a special agreement between them.[27] Therefore, the dispute resolution systems introduced in such agreements within the scope of Article 282 have been given superiority compared to the resolution procedures in the 1982 UNCLOS Part XV.

Concerning the competing jurisdiction topic in the Southern Bluefin Tuna dispute, which is another important dispute on the subject, the problem was taken place between the mandatory and binding dispute resolution provisions of the 1982 UNCLOS Part XV and the optional and non-binding procedures of the 1993 Convention on the Conservation of Southern Bluefin Tuna[28] which was signed by Australia, New Zealand and Japan.[29] In the dispute arising from the application of this Convention, New Zealand and Australia started the proceedings under the 1982 UNCLOS Part XV and applied to the ITLOS for interim measures. Before the ITLOS, New Zealand asserted that Japan has

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23 *Ibid,* s. I- 4720, para. 184/1.

24 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. United Kingdom, PCA Case No. 2002-01, Order No. 6, p. 3; Batır, 'Birleşmiş Milletler Deniz Hukuku Sözleşmesi Uyarınca Uyuşmazlıkların Çözümü' 77. (Batır describes the termination of the process two years after the decision of the Court as noteworthy in that it left the issue of the exclusive jurisdiction of the Court controversial).

25 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 203.

26 Rosenne and Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 26.

27 Ibid.

28 United Nations Treaty Series, Vol. 1819 (1994) 359 ff.

29 Stephens, *International Courts and Environmental Protection,* 274.

breached its obligations under Articles 64 and 116 to 119 of the United Nations Convention on the Law of the Sea regarding the conservation and management of the southern bluefin tuna stocks.[30]

The ITLOS, in its interim measures in the Southern Bluefin Tuna case, contrary to the position taken by the Annex VII arbitration of the legal documents other than 1982 UNCLOS, did not take into account their privileged status under article 282 of the UNCLOS.[31] Shany argues that such an overly restrictive interpretation of the Tribunal's competing jurisdiction would make article 282 largely meaningless.[32] In line with this idea, he stressed that in the Mox Plant case, in their separate opinions some of the judges expressed their concerns about this overly restrictive approach of the ITLOS regarding the competing jurisdiction.[33]

In my opinion, article 282 should not be interpreted too broadly to allow states to escape from the mandatory judicial procedures established by the 1982 UNCLOS. Because in Article 282, it is clearly mentioned that the parties have agreed that the dispute will "be submitted to a procedure that entails a binding decision" other than the 1982 UNCLOS. In this context, the provision of Article 16/2 of the 1993 Convention[34] between the parties in the Southern Bluefin Tuna dispute does not impose a mandatory judicial procedure, as it states that it can be appealed to the International Court of Justice or arbitration with the consent of all parties to the dispute.[35]

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30 Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p.285, para. 28.

31 Ibid, p. 294, para. 54.

32 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 238.

33 Judge Jesus argued that the Court had interpreted Article 282 too narrowly, precluding the possibility of its applicability in some cases. In this context, he stated that he agreed with the decision but did not agree with the reasoning. Because, although the OSPAR Convention is essentially a regional agreement within the scope of article 282, Ireland's claims in the OSPAR arbitration court are narrower than the UNCLOS Annex VII arbitration court. Therefore, these two disputes are different disputes and article 282 cannot be applied to this case. (Separate Opinion of Judge Jesus, MOX Plant (Ireland v. The United Kingdom), Provisional Measures, Order of 3 December 2001, p. 1). Judge Anderson also stated that the Court had examined the question of whether the arbitral tribunal had prima facie jurisdiction on the basis of the limited resources available to it. In this regard, the judge stated that by applying the test introduced by Lauterpacht, an answer was sought to the question of whether article 282 "clearly excludes" the authority of the arbitration court and that the same question was valid for article 283 as well. The court gave a negative answer to both questions. However, he stated that he had some doubts regarding the reasoning made on the basis of the facts. (Separate Opinion of Judge Anderson, MOX Plant (Ireland v. The United Kingdom), Provisional Measures, Order of 3 December 2001, p. 1 ff.).

34 See, Text of the Convention for the Conservation of Southern Bluefin Tuna, https://www.ccsbt.org/sites/default/files/userfiles/file/docs_english/basic_documents/convention.pdf

35 The Annex VII arbitration court decided that in accordance with the "1993 Convention

In this respect, I would like to state that I do not agree with Shany, especially with his view on the Southern Bluefin Tuna case. As a matter of fact, it was stated in the doctrine in the Southern Bluefin Tuna case that "the decision of Annex VII arbitration court in many respects undermines the compulsory judicial regime stipulated by the Convention".[36] Similarly, it was stressed that the effectiveness of mandatory judicial procedures was reduced by Articles 281 and 282 of UNCLOS 1982, which could create a procedural obstacle to the dispute resolution system in Part XV, as seen in the *Southern Bluefin Tuna* and *Mox Plant* cases.[37]

B. Competing Jurisdiction Between the International Tribunal for the Law of the Sea and the International Court of Justice

In the event of a law of the sea dispute regarding the interpretation or application of the 1982 UNCLOS, there are different possibilities and opinions as to whether the Convention will be bound by the dispute resolution procedures in accordance with the 1982 UNCLOS article 282.

According to the first view, if both parties to the dispute have accepted the compulsory jurisdiction of the ICJ in accordance with Article 36/2 of the Statute of the Court, this situation is considered an agreement within the meaning of Article 282 of UNCLOS 1982, and it is argued that the dispute should be brought before the Court. However, it was argued by Shany that this interpretation would bring with it various drawbacks. First of all, it is

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for the Conservation of Southern Bluefin Tuna" signed between the parties to the dispute, the parties could not resort to compulsory judicial remedies unless they reached an agreement between them regarding the dispute. Despite the fact that it gave a decision of lack of jurisdiction, the arbitral tribunal concluded that when the "1995 Agreement on the Application of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 on the Protection and Management of on Straddling Fish Stocks and Highly Migratory Fish Stocks" came into force, it would not only be effective in resolving the procedural problems that came before but further if this Agreement is implemented sincerely and effectively, it will also resolve the substantive problems. (Southern Bluefin Tuna Case, (Australia, and New Zealand v. Japan) Award on Jurisdiction and Admissibility August 4, 2000, rendered by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, p. 109 ff. para. 71). Unfortunately, on 11 December 2001, approximately 1.5 years after the final decision was made in this dispute, the 1995 Agreement entered into force.

36 Berat Lale Akkutay, *1982 Birleşmiş Milletler Deniz Hukuku Sözleşmesi Çerçevesinde Uyuşmazlıkların Çözüm Yolları* (Adalet Yayınevi 2012) 41. For the names of international lawyers of this opinion, see, Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2019) 500, footnote 29).

37 James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 736. The author states that a similar situation could have occurred in the Swordfish Stocks case between the European Community and Chile if the dispute had not been resolved by agreement of the parties.

problematic to accept notifications made under Article 36/2 of the Statute as agreements establishing the jurisdiction of the Court.[38] Because it is a completely fictional assumption that the declarations made by the state parties to the dispute under Article 36/2 of the Statute of the Court are accepted as an "agreement" within the meaning of Article 282 of UNCLOS 1982. In addition, it is not reasonable to rank among the judicial authorities independently of the 1982 UNCLOS article 287. Except for the dispute resolution procedures in article 287, the cases that the Court deals with are essentially non-UNCLOS cases.[39]

According to the second view, the acceptance of the Court's compulsory jurisdiction under Article 36/2 of the Statute of the Court should be considered as a choice of dispute resolution proceedings under Article 287 of UNCLOS 1982. Because it may be deemed unnecessary for a state that has accepted the compulsory jurisdiction of the Court to also make a declaration that it accepts the jurisdiction of the Court in accordance with Article 287 of UNCLOS 1982.[40] According to Treves, such an approach would be wrong. Even in cases where one of the parties to the dispute accepts the jurisdiction of the Court under Article 36/2 of the Statute of the Court and the other party under Article 287 of UNCLOS 1982, it is debatable whether they can be deemed to have accepted the same procedure under Article 287/4 of the Convention.[41]

We can say that the current approach of the relevant states and the International Court of Justice is in line with the first view, namely the approach that the adoption of the Court's compulsory jurisdiction under Article 36/2 of the Statute would fall within the scope of 1982 UNCLOS article 282. As a matter of fact, in the case of Maritime Delimitation in the Indian Ocean between Somalia and Kenya, according to the Court's judgment of 2 February 2017 regarding the preliminary objections, both states did not notify which jurisdiction they had chosen under Article 287/1 of the 1982 UNCLOS. However, except for Kenya's reservation, both states accepted the jurisdiction of the Court under article 36/2 of the Statute.[42]

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[38] Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 204.

[39] *Ibid,* 205.

[40] *Ibid,* 206.

[41] Tullio Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea", in Chandrasekhara Rao, and Rahmatullah Khan (eds.), *The International Tribunal for the Law of the Sea Law and Practice* (Kluwer Law International, 2001) 129. Treves' approach is to take the first view. Accordingly, if both parties to the dispute have accepted the compulsory jurisdiction of the Court, this situation is considered as an "agreement" in accordance with Article 282.

[42] Maritime Delimitation in the Indian Ocean, (Somalia v. Kenya), Preliminary Objections, I.C.J. Judgment of 2 February 2017, p. 14, para. 33. Kenya stated that since both they and Somalia failed to notify which jurisdiction to resolve maritime disputes pursuant to

Kenya stated that it accepted that such acknowledgment of the Court's discretionary jurisdiction by both parties to the dispute constituted an agreement under 1982 UNCLOS article 282, thereby replacing the dispute resolution system of Chapter XV Chapter 2 of the Convention. However, Kenya argued that the reservation it made while accepting the jurisdiction of the Court under Article 36/2 of the Statute constituted an obstacle to the formation of such an agreement. Kenya, therefore, argued that its reservation highlighted the dispute resolution system in 1982 UNCLOS Part XV as *lex specialis* and *lex posterior*.

Although Somalia did not accept this last claim, it stated that agreed with Kenya that accepting the optional jurisdiction of the Court constitutes an agreement within the meaning of article 282 of the Convention, and therefore, emphasized that it preceded the dispute resolution system in article 287.[43] The Court first emphasized that, in the preparatory works (*travaux préparatoires*) of the 1982 UNCLOS, there was no sign of intent that Article 282 excludes optional clauses acknowledging the Court's jurisdiction. It concluded that it did not ensure that Chapter 2 could be appealed, and therefore the appeals for authorization should be dismissed.[44] As can be seen, both the parties to the dispute and the Court accept that in accordance with Article 36/2 of the Statute, the optional clauses accepting the jurisdiction of the Court are an agreement that falls within the scope of Article 282 of UNCLOS 1982.

It is also possible for the jurisdiction to compete between the ICJ and the ITLOS with the notification of which jurisdiction the states have chosen in accordance with the 1982 UNCLOS article 287. Because some states such as Belgium, Finland, and Oman have declared both the ICJ and the ITLOS without making a preference order between them. While Italy declared that it chose both jurisdictions, it clearly emphasized that it preferred both of them, without giving priority to one over the other.[45]

In the event of a dispute between two states, both of which have made such a declaration, how should one act if one of the parties applies to the ICJ, but

article 287/1 of UNCLOS 1982, the dispute should normally go to Annex VII arbitration. However, according to Kenya, since the bilateral memorandum of understanding signed between the parties in 2009 on the boundary of the continental shelf in the Indian Ocean foresees the settlement of the dispute through the Commission on the Delimitation of the Continental Shelf, they put forward in accordance with Article 36/2 of the Statute, "another method for the settlement of the dispute between the parties. or unless it is decided to resort to methods" constitutes an obstacle to the jurisdiction of the Court in the context of the reservation. (*Ibid*, p. 21 ff., para. 52). This claim was not accepted by the Court.

43 *Ibid,* s. 38, para. 109-111.

44 *Ibid,* s. 43-44, para. 129-134.

45 Lowe, 'Overlapping Jurisdiction in International Tribunals' 196; Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", (1999) 31 International Law and Politics, 809, 819.

the other party considers the ITLOS authorized and files a lawsuit before the ITLOS? Regarding this issue, Lowe recommends that the first applied judicial authority suspend the proceedings if it is thought that the second applied judicial authority may also be competent. In this way, the second judicial authority will be expected to make its decision as to whether it is authorized or not.[46]

In this respect, the findings of the Permanent Court of International Justice regarding jurisdiction in the Chorzów Factory case are also important. In the aforementioned case, the PCIJ explained the situation regarding the jurisdiction between itself and the German-Polish Mixed Arbitration Court with the following words. "*...the Court, when it has to define its jurisdiction about that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice*".[47]

Lowe has rightly stated that despite the above-mentioned decision, the situation may not always be so clear.[48] Therefore, it is not possible to generalize, and it is necessary to examine the situation of the relevant judicial authorities in terms of the authority in each case.

C. Competing Jurisdiction Between the International Tribunal for the Law of the Sea and World Trade Organization Dispute Settlement Mechanism

Towards the end of 2000, there was a dispute in which the ITLOS and the WTO Dispute Settlement Mechanism were in such competing jurisdictions. The subject of the dispute concerns the legality of transit restrictions imposed by Chile, which prevented European Community fishing vessels from entering their ports due to their failure to fulfill their obligations regarding the maintenance of swordfish stocks in international waters. The dispute in question was brought before the WTO Dispute Settlement Mechanism by the European Community on the grounds that the freedom of transit of European goods was not complied with in accordance with GATT Article V (Chile also relied on the environmental exception in the GATT).

Thereupon, Chile applied to the International Tribunal for the Law of the Sea (on the grounds that the European Community's fishing practices are in violation of the provisions of the 1982 UNCLOS Articles 116-119), and upon the request of both parties, a special chamber was established by the ITLOS to look into the

46 Lowe, 'Overlapping Jurisdiction in International Tribunals' 197.

47 Collections of the Permanent Court of International Justice Series A9, Factory at Chorzów (Jurisdiction), Judgment of 26 July 1927, p. 30.

48 Lowe, 'Overlapping Jurisdiction in International Tribunals' 197.

dispute. Later, after the mutual negotiations of the parties, and upon reaching an agreement on 16 October 2008, the dispute was resolved by non-judicial means, although an important case emerged regarding the competing jurisdiction. This case is important in that it shows that the law of the sea is not a stand-alone field and that it may conflict with other fields of international law.[49]

Well, on the assumption that such a dispute has been decided by the ITLOS, will it be possible for the WTO Dispute Settlement Mechanism to decide the case before it? More generally, will the decision of an international judicial body constitute *res judicata* before another international judicial body? As it is generally accepted, *res judicata* can only be applied if the following three conditions are met: *1. The parties must be the same, 2. The subject of the lawsuit/claim (petitum) must be the same, 3. The cause of action (causa petendi) must be the same.*

The third condition will usually prevent a decision of one international court from being considered *res judicata* in another international court. Because, as I mentioned before, the jurisdiction of international courts and tribunals is established on the basis of their founding treaties. Therefore, for example, a dispute that ITLOS has previously decided can be brought before the WTO Dispute Settlement Mechanism even if the parties and material subject are the same. Because *causa petendi* (reason for action), which is the third condition required in terms of *res judicata*, is 1982 UNCLOS in the case before the ITLOS, while the relevant WTO Agreement in the case before the WTO Dispute Settlement Mechanism.[50]

As a different possibility, on the assumption that the ITLOS decides that it would be better for the dispute to be resolved by the WTO, despite this decision, WTO will not be able to examine the disputes arising from the allegations of violation of the 1982 UNCLOS. Therefore, it is not possible to refer the case from the ITLOS to the WTO within the framework of the *forum non-conveniens doctrine* used in domestic law.[51] Because each international judicial authority can only rule on the violation of international agreements related to its field of duty. Otherwise, it will be possible for international judicial authorities to make their legitimacy controversial by violating each other's jurisdictions. As a result, it would be more accurate to talk about the competition of different jurisdictions in parallel with each other, rather than the overlap of jurisdiction between these two international judicial bodies specialized in certain fields.[52]

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49 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 51 ff.; James Harrison, *Making the Law of the Sea* (CUP 2011) 290.

50 Joost Pauwelyn and Luiz Eduardo Salles, "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions", (2009) 42 Cornell Int. Law J., 77, 103.

51 *Ibid,* 111 ff.

52 Stephens, *International Courts and Environmental Protection*, 275.

D. The Other Side of the Coin in the Competing Jurisdiction: An Example of the Relationship Between the International Tribunal for the Law of the Sea and the European Court of Human Rights

The decision of the Grand Chamber of the ECtHR in the *Mangouras v. Spain* case is important in terms of evaluating the relationship between the two judicial bodies within the scope of jurisdiction. In this case, the Grand Chamber of the ECtHR revealed the differences in jurisdiction between the two forums by examining the case law of the International Tribunal for the Law of the Sea to release the ship and its crew on reasonable bond, adjudicated under Articles 73 and 292 of UNCLOS 1982.

The ECtHR stated that it is interesting to examine the approach of the ITLOS in its case law regarding the detention of foreign nationals by the coastal state and the determination of the amount of bond. However, ECtHR drew attention to three main differences. The first of these is that the ITLOS is tasked with establishing a balance between the conflicting interests between the two states and the ECHR between the state and the individual. The second is that the cases before ITLOS are related to the detention and release of both the ship and its crew. Thirdly, unlike this case, which is currently before the ECtHR due to an environmental disaster, the majority of the cases before the ITLOS stem from the violation of fishing regulations.[53]

The ECtHR noted that the ITLOS was aware that its jurisdiction was different from its own, however, similar criteria were applied in determining the amount of security required for the detainee. Referring to the case of *Hoshinmaru* (*Japan v. Russian Federation*), the ECtHR has compiled the methods of determining the reasonable bond amount in the previous cases of the ITLOS in this case and the criteria stated here are; the gravity of the crimes alleged in the present case, the fines that were or may be imposed in accordance with the law of the detaining state in a reasonably proportionate manner, and the monetary value of the detained ship and the confiscated cargo were among the elements within the scope of the assessment.[54]

As a result, the ECtHR seems to have drawn a clear line between its own jurisdiction and that of the ITLOS. Because, pursuant to article 292 of UNCLOS 1982, the procedure of prompt release of the ship and its crew upon the payment of a reasonable bond or other financial security is an authorization granted to ITLOS. The ECtHR, on the other hand, does not have the authority to determine a reasonable bond for such release. In short, there is no overlapping jurisdiction

[53] Judgment on the merits delivered by the Grand Chamber, *Mangouras v. Spain* [GC], no. 12050/04, ECHR 2010, s. 15, para. 46.

[54] *Ibid,* s. 16, 28; para. 47, 89.

between the two international courts under the procedure for the release of the ship and its crew. However, we can say that there is a competing jurisdiction in terms of the demands of the crew. In this respect, it is possible to appeal to the ECtHR due to allegations of violations arising from the European Convention on Human Rights, and to the ITLOS in accordance with 1982 UNCLOS article 292 for the prompt release of the ship and crew in return for a reasonable bond.

CONCLUSION

Although it is a relatively newly established international judicial authority, the International Tribunal for the Law of the Sea has a similar working style to the International Court of Justice and sees the Court not as a competitor, but as a partner with which international law has been co-developed, so far in terms of competing jurisdiction in the law of the sea disputes, it did not encounter any major problems. Since ITLOS's relationship with other international mechanisms is more specialized in a certain field compared to the ICJ, the competing jurisdiction issue makes it possible for the plaintiffs to apply to more than one judicial authority in different aspects of a dispute. Particularly, if we consider that the ICJ has more comprehensive authority regarding the matters that came before it in terms of *ratione materiae*, it is quite possible for the ICJ to encounter overlapping jurisdictional situations with other judicial bodies.

This situation, in my opinion, poses much more danger than the possible problems that may arise in ITLOS's mutual relations with the ICJ. As a matter of fact, as I mentioned above, until now, ITLOS has not had a fundamental problem in its relations with the ICJ over the issue of jurisdiction. On the other hand, on the assumption that a dispute concerns both law of the sea and environmental law or both law of the sea and human rights law, there is no obstacle in terms of international law for plaintiffs to apply to both ITLOS and WTO dispute settlement mechanism or regional human rights mechanisms.

Consequently, despite the views on the fragmentation of international law, ITLOS has become a specialized judicial body that will respond to the needs of the law of the sea in line with the jurisprudence of the International Court of Justice, by fulfilling the unique requirements of the law of the sea which has become a more specific area and strengthened its normative aspect with the 1982 UNCLOS. Nevertheless, inevitably the proliferation of international courts and tribunals caused some jurisdictional problems at the international level. Although, the emergence of that new problem type in international law, it is fair to say that the ITLOS has coped with those challenges well even though it has not had enough judicial experience.

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REGULATION OF CREDIT RATING AGENCIES IN TERMS OF CONFLICT OF INTEREST AND CIVIL LIABILITY IN EUROPEAN UNION

Avrupa Birliği'nde Kredi Derecelendirme Kuruluşlarının Çıkar Çatışması ve Hukuki Sorumluluk Açısından Düzenlenmesi

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L&JR
Year: 13, Issue: 24
July 2022
pp.55-72

Article Information

Submitted :*17.03.2022*
Revision Requested :*22.04.2022* *25.04.2022*
Last Version Received :*12.05.2022*
Accepted :*16.06.2022*

Article Type

Research Article

Abstract

Credit rating agencies (CRA) have been evaluating the creditworthiness of financial instruments, issuers of these instruments and enterprises and providing ratings since the early 1900s. Ratings of CRAs indicate the risk of whether borrowers will fully repay the interests and principal at due time, thereby helping lenders and investors make the right decision.

Since CRAs have important role in the financial markets, it is expected that CRAs are not involved in conflicts of interest when providing rating. Conflicts of interest would affect the objectivity, impartiality and reliability of CRAs and thereby undermining the credibility and well-functioning of financial markets.

Following the financial crisis in 2008, European Union introduced some regulations and addressed all the problematic issues with CRAs. This essay addresses the European Union Regulation made in response to the global financial crisis in terms of conflict of interest and methods adopted to tackle this ongoing problem.

This essay's main purpose is to answer the research question of how it is possible to meet the burden of proof requirements for holding CRAs liable for the losses arising from conflict of interest and other breaches of CRA Regulation. Investor and issuers shall meet the burden of proof requirements in CRA Regulation Article 35a(1) and (2) to claim damages against CRAs. However, the provisions in CRA Regulation regarding burden of proof on civil liability requires high threshold to meet. Therefore, the allowance given to national courts to ease the claimants' burden of proof (Article 35a, point 2) is vital for claimants.

Key Words: Conflict of Interest, Civil Liability, Credit Rating Agencies

Özet

Kredi Derecelendirme Kuruluşları 1900'lü yılların başından bu yana finansal araçların, ihraç edenlerin ve işletmelerin kredibilitesini değerlendirmekte ve derecelendirme yapmaktadır. Bu derecelendirmeler, faizlerin ve anaparanın zamanında ve tam olarak geri ödeyip ödenmeyeceği riskini göstermekte ve böylece borç verenlerin ve yatırımcıların doğru kararı vermelerine yardımcı olmaktadır.

There is no requirement of Ethics Committee Approval for this study.

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Kredi derecelendirme kuruluşları finansal piyasalarda önemli bir role sahip olduklarından, derecelendirme yaparken çıkar çatışmasına girmemeleri gerekmektedir. Çıkar çatışmaları, derecelendirme kuruluşlarının tarafsızlığını ve güvenilirliğini etkileyebilmekte ve böylece finansal piyasaların güvenilirliğine ve işleyişine zarar verebilmektedir.

2008 yılındaki küresel ekonomik krizin ardından, Avrupa Birliği yeni tüzükler yayınlamış ve derecelendirme kuruluşlarına dair sorunlu konuları çözmeye çalışmıştır. Bu makale, küresel mali krize yanıt olarak getirilen Avrupa Birliği Tüzüğünü "çıkar çatışması" sorunu ve bu sorunu çözmek için benimsenen yöntemler açısından ele almaktadır.

Bu makalenin temel amacı, kredi derecelendirme kuruluşlarının, çıkar çatışması ve Tüzükte yer alan diğer ihlaller sebebiyle neden oldukları zararlardan sorumlu tutulabilmesi için yerine getirilmesi gereken ispat külfetini ilgili Tüzük hükümleri bağlamında ele almaktır. Yatırımcı ve ihraççılar, zararlarının tazmini için Tüzüğün 35a(1) ve (2) maddesinde belirtilen ispat yükü gerekliliklerini yerine getirmek zorundadırlar. Ancak, Tüzükte yer alan ispat yükü eşiği yüksek olup, davacıların ispat yükünü hafifletmek için ulusal mahkemelere verilen yetki [Madde 35a(2)] talep sahipleri için hayati önem taşımaktadır.

Anahtar Sözcükler: Çıkar Çatışması, Hukuki Sorumluluk, Kredi Derecelendirme Kuruluşları

INTRODUCTION

Credit rating agencies (CRA) are gatekeepers which play important role in ensuring integrity and stability in financial markets and contribute the development and the well-functioning structure of these markets, which is why they are essential for a resilient economy. CRAs have been evaluating the creditworthiness of financial instruments, issuers of these instruments and enterprises and providing ratings with regard to them since the early 1900s.[1] Ratings of CRAs indicate the risk of whether borrowers will fully repay the interests and principal at due time, thereby helping lenders and investors make the right decision. As there are an informational asymmetry and lack of full transparency which make risk evaluation more difficult in terms of investors and lenders, CRAs help mitigate these informational asymmetries, by providing information in the form of rating. These ratings help investors and lenders to predict the perils they might face when making financial decisions.[2]

Since CRAs are gatekeepers with reputational capital and as mentioned above have important role in the financial markets in terms of issuers and investors, it is expected that CRAs are not involved in conflicts of interest when providing rating. Conflicts of interest would affect the objectivity, impartiality and reliability of CRAs and thereby undermining the credibility and well-functioning of financial markets. Conflict of interest is also shown among the

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1 Chiara Picciau, 'The Evolution of the Liability of Credit Rating Agencies in the United States and in the European Union: Regulation after the Crisis' (2018) 2 ECFR 339, 340

2 Harry McVea, 'Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back' (2010) 59 INT'L & COMP. L.Q 701, 706

triggers of the global financial crisis in 2008 and the leading CRAs called ‘the big three’ were harshly criticised for not providing independent ratings under “issuer-pays” model.[3]

Following the financial crisis in 2008, European Union (EU) introduced some regulations[4] and addressed all the problematic issues with CRAs in response to the crisis.[5] With these regulations, EU focused on reducing reliance on CRAs, increasing transparency and accountability, enhancing competition in the credit rating market, raising the quality of the rating process and especially civil liability of CRAs and reducing conflicts of interest.[6]

This article suggests that conflict of interest is one of the main problematic issues regarding credit rating and CRAs that negatively affect the efficiency and reliability of financial markets and even indirectly economies of countries as seen in global financial crisis in 2008. Therefore, it is very crucial to regulate this issue and to ensure good quality of credit ratings. In this context, this article addresses the EU Regulation on CRAs and the amending Regulations made following the global financial crisis in terms of conflict of interest and methods adopted to tackle this ongoing problem. Most importantly, this article aims to draw the readers’ attention to the difficulty in proving conflict of interest and holding CRAs responsible for the losses they cause by applying the relevant EU Regulation, despite the regulations made in EU in order to tackle this issue in good faith. This essay’s main purpose is to find the answer of the question of how it is possible to meet the burden of proof requirements for holding CRAs liable for the losses they cause on the basis of conflicts of interest and other breaches.

This article proceeds as follows:

Section 2 examines the concept of “conflict of interest” and the systemic role of CRAs in financial markets and the effects of these gatekeepers on the financial crisis in 2008. Section 3 deals with the EU Regulation introduced following the global financial crisis regarding CRAs in terms of the issue of conflicts of interest and addresses the methods adopted by the Regulation. Section 4 examines the issue of conflict of interest as an infringement leading

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3 Morten Kinander, ‘Conflicts of interest in finance - Does regulation of them reduce moral judgment, and is disclosure harmful?’(2018) 26,3 JFRC 334, 336

4 Regulations are applicable and binding in all EU member states.

5 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies [2009] OJEU L302/52; Regulation (EU) No 513/2011 of the European Parliament and of The Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies [2011] OJEU L145/30; Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on Credit Rating Agencies [2013] OJEU L146/1

6 See<https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/managing-risks-banks-and-financial-institutions/regulating-credit-rating-agencies_en> accessed 2 December 2021

to civil liability and includes opinions regarding the problematic issue of burden of proof. Section 5 concisely summarizes the conclusions reached.

1. The Systemic Role of CRAs In Financial Markets and the Issue of "Conflict of Interest"

The concept of 'conflict of interest' can broadly be defined as an incompatibility between personal interests and professional responsibilities that affects someone's actions, judgments, independence and impartiality.[7] This interest could be any interest that could compromise or negatively affect the independent judgment.[8]

The conflict of interest has been one of the main problems of credit rating system for a long time. CRAs play an important role in determining investor's decisions or lending decisions and therefore ratings should not be affected by the relationships between CRAs and their clients which are called conflict of interest.

Where companies need to raise fund and decide to issue debt securities, these issuers ask CRAs to rate their products to ensure that their securities become more marketable.[9] CRAs provide their opinions on the possibility that an issued debt security will perform in accordance with its terms and these ratings show how likely issuers are able to make its repayments.[10] Hence, even though credit ratings are not an indicator of a profitable investment, they are able to have decisive influence on potential investor's decision regarding purchase of issued debt securities and therefore a conflict of interest between CRAs and issuers which affects the good quality of rating may lead to investors' economic losses and disruption in financial markets. CRAs would be involved in conflict of interest if they provide too favourable rating with the expectation of entering into more rating contract with a client, which is against the best interest of the investors and the market.[11]

Also, where the ratings provided for borrowers are affected by a conflict of interest between CRAs and borrowers, it might influence the amount of loan borrowed and interest rate at which the loan will be paid off. In this case, as credit ratings are provided for the evaluation of counterparty risk, disruption of quality in ratings would be harmful for the financial institutions and the market.

7 See <https://www.financial-ombudsman.org.uk/corporate/policies/conflicts-interest> accessed 6 December 2021

8 Kinander (n 3) 338.

9 International Organization of Securities Commissions (IOSCO) The Role of Credit Rating Agencies in Structured Finance Markets Final Report May 2008 <https:// www. iosco. org/ library/ pubdo cs/ pdf/ IOSCO PD638. pdf.> accessed 7 December 2021, 3

10 ibid 4.

11 Kinander (n 3) 346.

Ratings also help businesses assess the possibility of potential partnerships and other business relationships with the business provided rating.[12] Therefore, conflict of interest in rating contracts may negatively affect financial life.

In addition, after declaration of rating, CRAs keep tracking their clients' credit ratings and can update its rating, if necessary, based on new data. Therefore, the affects of conflict of interest may be long-lasting.

CRAs' role in the global financial crisis in 2008 and the issue of conflict of interest which is inherent in "issuer-pays model" are widely accepted by commentators.[13] It is argued that as CRAs always tend to create strong relationships with lucrative and well-known clients and then maintain these relationships, CRAs were more lenient at rating assets for these clients than for other customers before 2008.[14] With the help of CRAs' unsustainable credit ratings, issuers managed to issue financial instruments with the highest creditworthiness and met institutional investors' criteria to make investment in these securities[15] and created one of the factors of the financial crisis. As a result, even though there are other different factors in the crisis, CRAs are considered as one of the main contributors.[16]

2. EU Regulation on Credit Rating Agencies Following the Global Financial Crisis and the Issue of Conflicts of Interest

The first EU Regulation after global financial crisis was published in 2009 which is Regulation (EC) No 1060/2009 on CRAs.[17] With this regulation some problematic issues were addressed regarding CRAs, including conflict of interest. However, some issues remained unregulated such as civil liability, over-reliance on CRAs etc. Therefore, in 2013, Regulation (EU) No 462/2013[18] was published which amended Regulation (EC) No 1060/2009.[19] Within this

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12 See <https://www.spglobal.com/ratings/_divisionassets/pdfs/guide_to_credit_rating_essentials_digital.pdf> accessed 7 December 2021

13 Thomas M.J. Möllers and Charis Niedorf, 'Regulation and Liability of Credit Rating Agencies –A More Efficient European Law?' (2014) European Company and Financial Law Review 11 3 333,336; Picciau (n 1) 340.

14 Picciau (n 1) 383.

15 Thomas J. Pate, 'Triple-A Ratings Stench: May the Credit Rating Agencies be Held Accountable?' (2010) 14,1 Barry Law Review, 24, 31-32

16 Picciau (n 1) 354.

17 Regulation (EC) No 1060/2009 of the European Parliament and of the Council on Credit Rating Agencies [2009] OJEU L302/52

18 Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on Credit Rating Agencies [2013] OJEU L146/1

19 Francesco De Pascalis, 'Civil Liability of Credit Rating Agencies From a European Perspectıve: Development And Contents of Art 35(a) of Regulatıon (EU) No 462/2013' (2013) University of Oslo Faculty of Law Legal Studies Research Paper 2015-05, 1 <https://

Regulation there are some new rules regarding conflict of interest in addition to other subjects.

2.1 Issuer-Pays Model

Issuer-pays model is a remuneration model or business model in credit rating sector in which CRAs are paid in return for their ratings by issuers whose financial instruments are rated or by entities rated.[20] The fundemental benefit of this model is that as the cost is borne by issuers and entities, credit ratings are utilised by market participants freely.[21] However, this remuneration model also encourages building long-term client-CRA business relationships and CRAs may not remain impartial and may not keep their objectivity because issuers' and entities' payment are their main source of income.[22] CRAs tend to provide more favourable ratings to protect their business relationships with issuers and entities. Higher ratings would strenghten the possibility of ensuring getting additional rating work from issuers.[23] Also, in this model, issuers have leverage or bargaining power over CRAs to get higher ratings and undoubtedly CRAs perceive this monetary pressure and are highly likely impressed.[24]

Entities and issuers which want to get the most favourable ratings solicit ratings from different CRAs and select the highest one. This situation in practice leads to rating shopping and causes reduction in quality of ratings. Because, CRAs compromise their objectivity and impartiality in order to compete with the other CRAs.[25]

It can be clearly said that even though it is widely accepted that issuer-pays model deeply affects the good quality of credit ratings and might create negative results for investors since the global financial crisis, it still remains the predominant model.[26] This situation which is caused by the regulatory preference not cutting the relationships between CRAs and issuers obviously hinders the impact of the Regulation.[27]

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papers.ssrn.com/sol3/papers.cfm?abstract_id=2546756> accessed 7 December 2021

20 Tim Wittenberg, 'Regulatory Evolution of the EU Credit Rating Agency Framework' (2015) 16,4 EUR BUS ORG LAW REV 669, 677; European Commission, *Study on the State of the Credit Rating Market Final Report MARKT/2014/257/F4/ST/OP* (European Union, 2016) 10

21 European Commission (n 17) 10.

22 European Commission (n 17) 10.

23 Dori K. Bailey, 'The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence' (2016) 93, 2 Denver Law Review 275, 349

24 Steven L. Schwarcz, 'Private Ordering of Public Markets: The Rating Agency Paradox' (2002) 1 University of Illinois Law Review 1,15

25 European Commission (n 17) 20.

26 European Commission (n 17) 10.

27 Andreas Kruck, 'Resilient blunderers: credit rating fiascos and rating agencies' institutionalized status as private authorities' (2016) 23, 5 Journal of European Public

The EU Legislator, on the one hand allows CRAs to provide rating service on the basis of issuer-pays model, on the other hand tries to mitigate the flaws of this model. In this respect, the CRA Regulation requires that fees charged by CRAs for rating services shall not be determined depending on the rating grade or on any other result of the work performed.[28] These provisions aim at reducing possibility of conflicts of interest in order to protect investors.

2.2 Double Credit Rating and Maximum Duration of Rating Contracts

CRA Regulation requires the issuers and related third parties to solicit credit ratings from two or more CRAs and stipulates the conditions for these CRAs. However, this rule only applies to credit ratings for structured finance instruments.[29] In our view, even though the scope of this provision is limited to structured finance instruments, this double rating requirement can, to a certain extent, fix the reduction in quality of ratings based on conflict of interest resulting from issuer-pays business model because double rating mechanism ensures additional checking on ratings.

In addition, the CRA Regulation provides a requirement for the issuers to limit long term relationships between CRAs and issuers. For instance, the CRA Regulation requires a maximum period (4 years) for the issuance of solicited credit ratings on new re-securitisations with underlying assets from the same originator.[30] In other words, the CRA Regulation sets out a compulsory rotation rule requring issuers of structured finance products with underlying re-securitised assets to change the CRA every four years.[31] Inter alia, with this rule on rotation mechanism, the EU Legislator aims to mitigate conflicts of interest based on long-lasting contractual relationships, by strengthening the independence of CRAs towards issuers soliciting their ratings.[32] It is surely beyond doubt that as this mechanism applies only to new resecuritisations, its effect of preventing conflict of interest would take place to a limited extent.

2.3 Previous Advisory Services

The EU Legislator bans CRAs from providing consultancy or advisory services to issuers or related third parties regarding their corporate or legal structure, assets, liabilities or activities, considering the risk of losing impartiality of CRAs in rating activities towards the entities and related third

Policy 753, 764

28 CRA Regulation, Annex I, Section B, point 3c.

29 CRA Regulation, art. 8c.

30 Wittenberg (n 17) 686-687.

31 See <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_13_13> accessed 12 December 2021

32 Wittenberg (n 17) 688.

parties which they previously provide consultancy and advisory.[33] The rule mentioned aims to help to mitigate the peril of conflict of interest resulting from "double-hatting" relationship with issuers.

In addition, in order to mitigate the conflict of interest and strengthen the market supervision by The European Securities and Markets Authority (ESMA)[34] in this sense, the EU Legislator provides a requirement for CRAs to prevent rating shopping of issuers.[35] In this respect, CRAs are required to notify ESMA information about all entities or debt instruments submitted to it for their initial review or for preliminary rating.[36]

2.4 Prohibitions on Credit Rating Service

The EU Legislator prohibits providing credit rating service where conflict of interest arising from various interest relationships such as shareholding or control may compromise the impartiality of the CRA. For instance, an issuer who is also shareholder in CRA and who can be effective in management of CRA could influence the CRA to provide favourable rating on his product.

The CRA Regulation addresses conflicts of interest and provides governance and internal procedures in Article 6a and details in Annex I regarding the situations based on shareholding or control relationships where a CRA shall not issue a credit rating or a rating outlook or shall, in the case of an existing credit rating or rating outlook, immediately notify where the credit rating or rating outlook is potentially affected.

3. The Issue of "Conflict of Interest" and Civil Liability of Credit Rating Agencies in EU

3.1 Legal Framework on Civil Liability of Credit Rating Agencies in EU

The first CRA Regulation numbered 1060/2009 did not address the issue of civil liability of CRAs directly. It only says that rating organizations could be held liable by national courts by applying their own national laws. Recital (69) of CRA Regulation numbered 1060/2009 clearly expresses that any claim against CRAs based on infringement of the provisions of this Regulation should be brought under the applicable national law. The first regulatory step on civil liability of CRAs at the level of EU was taken with the adoption of CRA

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[33] CRA Regulation, Annex I, Section B, points 4 and 5.

[34] The European Securities and Markets Authority (ESMA) is an independent EU Authority that aims to ensure the stability of the EU's financial system by protecting investors and promoting stable and orderly financial markets. ESMA is also the single direct supervisor of Credit Rating Agencies within the EU. See <https://www.esma.europa.eu/supervision/credit-rating-agencies/supervision> accessed 5 May 2022.

[35] Wittenberg (n 17) 691.

[36] CRA Regulation, Annex I, Section D, Part I, point 6.

Regulation numbered 462/2013 which is applicable in all member states.[37] EU Legislator, with this Regulation, aims to provide investors with a legal remedy to compensate their losses based on CRAs' flawed ratings.

As credit ratings have a remarkable influence on investor's investment decisions and on the demand for financial products, CRAs have a significant responsibility towards investors and issuers. However, there is not always a contractual relationship between CRAs and issuers rated on an unsolicited basis or investors on which issuers and investors base their claims against CRAs. Therefore, it is very important step to establish civil liability system and provide right of compensation for issuers and investors not requiring contractual relationship between the party suffering loss and the party commiting infringement.[38]

In this respect, CRA Regulation Article 35a(1) establishes the main principle that CRAs could be held liable against investors and issuers for the losses their infringements caused irrespective of whether there is a contractual relationship between the parties.[39] It clearly provides that CRAs can be held liable for committing, intentionally or with gross negligence, any of the infringements listed in Annex III of this Regulation having an impact on a credit rating and investors or issuers may claim damages against that CRAs for damage caused to it because of that infringement.

3.2 Breach of Rules on Conflict of Interest as an Infringement

According to CRA Regulation Article 35a(1), CRAs can only be liable for their infringements listed in Annex III. In Annex III which was introduced by Regulation (EU) no 513/2011 and later amended by Regulation (EU) no 462/2013, every infringement are spesificially provided. There is no general provision describing the infringements, since all relevant infringements ranging from breach of conflict of interest rules to violations of disclosure requirements which may cause civil liability of CRAs are provided in detail.[40] Investors and issuers who want to claim their damages against CRAs shall indicate that the CRA has committed an infringement and that that infringement had an impact on the credit rating issued on the basis of accurate and detailed information (Article 35a(2)).

In this respect, breach of conflict of interest rules provided in CRA Regulation are one of the infringements laid out in Annex III which might lead to CRAs to be held liable. Burden of proof of infringement based on conflict of interest shall be borne by investors as is in case of other infringements.

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37 Picciau (n 1) 384.

38 CRA Regulation (EU) no 462/2013, Recital (32).

39 CRA Regulation (EU) no 462/2013, Recital (32).

40 Picciau (n 1) 386.

In conclusion, CRAs could only be held liable for the infringements they commited intentionally or with gross negligence in accordance with the article 35a(1). According to article 35a(1) of the CRA Regulation, infringement with simple negligence is not a cause of action.

3.3 The Problematic Issue of Burden of Proof on Conflict of Interest

Investor and issuers shall meet the burden of proof requirements which are laid down in CRA Regulation Article 35a(1) and (2) in order to claim damages against CRAs. Investors shall prove three facts leading to liability of CRAs which are as follows;

1. Investors shall indicate that the CRA has committed an infringement of CRA Regulation and
2. Investors shall prove that the infringement mentioned had an impact on the credit rating issued and also
3. Investors are required to prove their reliance on credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating.

In addition, in terms of issuers' burden of proof there is an additional requirement. Accordingly, an issuer shall establish that the infringement was not caused by misleading and false information given by the issuer to the CRA, directly or through information publicly available.

After global financial crisis in 2008, investors tried to bring actions against CRAs for the losses they incurred. In response to this over-exposure to claims, CRAs, in order to defend themselves and suggest their non-liability, created a counter- argument that their ratings are only their opinions provided on a company's creditworthiness and it doesn't mean they absolutely assure credit quality and they don't recommend purchasing, holding or selling securities.[41]

Another obstacle to hold CRAs liable against investors and issuers were shown that it is hard to establish the liability of a CRA in the non-existence of a contractual relationship between a CRA and an investor or an issuer rated on an unsolicited basis.[42] In this respect, Article 35a have made it legally possible and acceptable to create casual link between credit rating and investors' and issuers' loss despite the lack of contractual relationships and also laid down the standards for causation and burden of proof.

However, in our view it can be said that the provisions in CRA Regulation regarding burden of proof of liability requires high threshold to meet by

[41] Jan De Bruyne, 'A European Perspective on the Liability of Credit Rating Agencies' (2018) 17, 2 Journal of International Business and Law 233, 233-234

[42] CRA Regulation (EU) no 462/2013, Recital (32).

investors and have some gaps in some matters. Being aware of this issues, EU Legislator prefered providing some alternative mechanism to mitigate these difficulties which will be examined below.

3.3.1 Proof of Conflict of Interest as an Infringement

According to article 35a, CRAs might be able to held liable for their infringements committed intentionally or with gross negligence and listed in Annex III having an impact on a credit rating. The same article also says that it is the resposibility of the investor or issuer to provide accurate and detailed information demonstrating that the CRA has committed an infringement and that infringement had an impact on the credit rating issued.

As it can be seen, first of all, issuers and investors are required to prove the infringement of this Regulation in terms of meeting burden of proof requirements. For instance, an investor who wants to make a claim against a CRA which commited an infringement concerning conflict of interest requirment placed in Point 7, Section I of Annex III to Regulation (EC) no 1060/2009, shall prove that that CRA commited the infringement set out in this particular provision. In other words, the investor shall prove that that CRA set up a compensation system for the independent members of its administrative or supervisory board which is linked to the business performance of the CRA. However, in practice, an investor probably might not be able to identify this kind of infringement because it is related to the company's internal compensation system and even though CRAs are under the requirement of disclousure of the general nature of its compensation arrangements, that compensation system linked to the business performance might be established de facto and only be detected in an administrative investigation. Even if the investor identify something wrong with the credit rating and inaccuracy in related rating, it is hardly possible to link this flawed rating with the infringement.

In this liability system, as can be seen that the burden of proof rests completely with the investor. The EU Legislator might have anticipated that reversal of the burden of proof could have considerably increased opportnities for investors and issuers to claim their damages, but in the mean time it would have also caused "flood of cases". Therefore, the EU Legislator reached the solution that the burden of proof rests on investors, but national courts have some discretionary power in determining what and how detailed the damaged party must allege and prove the infringement, taking into consideration that the investor or issuer may not have access to information which is absolutely under the control of the CRA.[43]

43 Picciau (n 1) 387-388.

When it comes to moral element of the infringement, there is no clarity in CRA Regulation on who would bear the burden of proof on moral element. But, considering the general principles of law, the party who bears the burden of proof on the illegality (infringement), damage and causation would bear the burden of proof on moral element and therefore in our case, we can say that investors and issuers shall prove the intentional infringement or infringement with gross negligence. However, there is an exceptional provision in CRA Regulation which expresses that matters regarding the civil liability of a CRA which are not addressed by this Regulation shall be governed by the applicable national law as determined by the relevant rules of private international law.[44] That is why, burden of proof on moral element of infringement shall be determined by applicable national law.

3.3.2 Proof of Infringement's Impact on the Issued Rating

Investors and issuers shall prove not only the existence of the infringement but also the impact of the infringement on the rating issued [Article 35a(2)]. According to Article 35a, the party who is damaged is required to prove the infringement, for instance the infringement of a rule relating to conflict of interest, and also to prove that the infringement of the rule on conflict of interest affected the rating process in a way that resulted in an incorrect credit merit assessment and to indicate how that took place in the spesific situation.[45] In other words, the party incurred loss shall establish the link between the infringement and its impact on rating.

However, it doesn't seem that easy to connect the infringement to the rating's inaccuracy, because the only information the investors have is the information disclosed by CRAs in accordance with the regulatory obligations. Even though the disclosure requirements of CRAs are helpful to claim damages, its effectiveness is limited, since such information doesn't suffice for the proof that a particular infringement caused a specific rating inaccuracy which, in turn, leads to individual loss incurred. In other words, although disclosure requirements of CRAs absolutely help investors claim damages against CRAs, they do not include in detail all the potentially significant aspects of the rating process.[46] For instance, it is almost impossible to prove that the CRA has failed to ensure that a staff who is involved in rating doesn't accept money, gifts or favours from anyone with whom the CRA does business and also this infringement of the rule regarding conflict of interest has caused a specific rating inaccuracy which, in turn, has leaded to individual loss in particular case. Also in some cases, even

[44] CRA Regulation, art. 35a, point 4.
[45] Picciau (n 1) 388.
[46] Picciau (n 1) 388.

though investors can identify the inaccuracy in credit rating, they might not be able to figure out which infringement caused the loss.

Therefore, the allowance given to national courts to ease the claimants' burden of proof (article 35a, point 2) is vital to grant investors an effective remedy. Otherwise, the relevant rules regarding burden of proof might turn out to be very difficult for the injured party and this right to claim damages which is granted to investors would be meaningless.[47]

Finally, in this respect, it can be stated as a solution for a more effective civil liability system that explicitly providing investors with right to use ESMA's sanctioning decisions and also it's findings regarding infringements of CRAs to meet their burden of proof could help mitigate the difficulties of Article 35a because when compared to investors who may not have access to information concerning how the rating service has been provided in a particular case, ESMA is authorized to use significant investigative powers such as requesting documents, conducting interview that could lead to detect an infringement more easily.[48]

3.3.3 Proof of Reliance on Rating

Investors can claim damages only if their investment decision was based on the credit rating issued and if such reliance was reasonably exercised. Investors, inter alia, shall prove that they acted reasonably when relying on the rating.[49] This reliance shall be exercised for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating. In our view, this requirement establishes the link between loss incurred by investor and the rating. "Reliance" establishes the causal link which is a condition for liability of the CRA.

This requirement shall be met differently in terms of institutional investors. The reliance threshold for institutional investors is higher than the one for private investors, because, according to article 5a, all entities listed in article 4 (1) have to make their own risk assessments and may not solely or automatically rely on other credit ratings. Therefore, CRAs would be liable to institutional investors less often than to private investors.[50] Private investors don't have to make their own risk assessment. They only have to indicate that they reasonably relied on the rating.[51]

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47 Picciau (n 1) 388.
48 Picciau (n 1) 397-400.
49 Möllers and Niedorf (n 12) 347.
50 Matthias Lehmann, 'Civil Liability of Rating Agencies: An Insipid Sprout from Brussels' (2016) 11, 1 Capital Markets Law Journal 60, 64
51 Möllers and Niedorf (n 12) 347.

Article 35a(1) of CRA Regulation provides that reliance on rating shall be placed for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating in order to hold CRAs liable. However, there is no clarity regarding how reliance is exercised in CRA Regulation. According to Article 35a, the term ‘reasonably relied’, shall be interpreted and applied under the applicable national law.

Finally, in order to ease the burden of proof, it is expressed by some scholars that requiring investors to prove reliance on rating might be penalizing and therefore it should be allowed by applicable national laws [in the context of both Article 35a(4) and 35a(5)] that investors can establish causal link or reliance by merely demonstrating that the inaccurate credit rating untruly changed the price of the financial products or represented a necessary precondition for the trade of the instruments on the market which means without the rating the financial instrument would not be marketable.[52]

3.4 Recent Trends and Developments on Civil Liability of CRAs in EU

CRA Regulation entered into force in 2013. However, until now, decisions holding CRAs liable are very rare in EU. These are not decisions made by applying CRA Regulation either.

It was reported recently that the Berlin Court, in May 2020, ruled in favour of investors who claimed its damages against a German CRA for the breach of a duty of care for a bond rating. The Court based it’s decisions on German national law rather than CRA Regulation, since the bond had already been rated before CRA regulation entered into force.[53] This decision may be interpreted positively since it is a step forward in terms of judicial approach towards CRA liability. It is also positive development to make an assessment and attemp to apply CRA Regulation by the Court to the case on CRA liability and then to apply national law instead which is also provided and encouraged in Article 35a(5) of CRA Regulation.

In 2018, the Higher Regional Court of Düsseldorf ruled that Article 35a does not establish any liability of a CRA towards the investor if its rating relates to the issuer of the financial instrument bought by the investor but not to the financial instrument itself.[54] Even though the Court didn’t ruled the existence of liability of the CRA, this decision can also be considered important, since the Court acknowledged that Article 35a applies to liability of CRA arising from its rating activities.

52 Picciau (n 1) 391.

53 See<https://www.allenovery.com/en-gb/global/news-and-insights/publications/first-german-decision-holding-credit-rating-agency-liable-to-investors> accessed 19 December 2021.

54 OLG Düsseldorf, Urteil vom 08.02.2018 - I-6 U 50/17

To conclude, it can be said that investors have started bringing their claims against CRAs and in the near future we can see the decisions holding CRAs liable for their flawed ratings.

CONCLUSION

The issue of conflict of interest has been one of the biggest problems of credit rating system for a long time. CRAs play an important role in determining investor's decisions or lending decisions and therefore ratings shouldn't be affected by conflict of interest.

The role of CRAs in the global financial crisis in 2008 and the issue of conflict of interest originating from "issuer-pays model" are widely accepted. It is argued that as CRAs always tend to create strong relationships with lucrative clients, CRAs were more lenient at rating assets for these clients than for other customers before 2008.

The first EU Regulation on CRAs [Regulation (EC) No 1060/2009] following the global financial crisis was published in 2009. With this regulation some problematic issues was adressed, including conflict of interest. In 2013, Regulation (EU) No 462/2013 was published which amends Regulation (EC) No 1060/2009. This Regulation, inter alia, includes the rules on civil liability of CRAs. With this regulation, EU Legislator aims to provide investors and issuers with an opportunity to compensate their losses arising from CRAs' ratings. It is accepted as a very important step to establish civil liability system and provide right of compensation for issuers and investors, not requiring contractual relationship between the party suffering loss and the party commiting infringement.

In this respect, CRA Regulation Article 35a(1) clearly provides that CRAs can be held liable for committing, intentionally or under gross negligence, any of the infringements listed in Annex III of this Regulation having an impact on a credit rating and investors or issuers may claim damages against that CRAs for damage caused to it due to that infringement.

Investor and issuers shall meet the burden of proof requirements which are laid down in CRA Regulation Article 35a(1) and (2) in order to claim damages against CRAs. However, in our view, the provisions in CRA Regulation regarding burden of proof on civil liability requires high threshold to meet by investors. Therefore, the allowance given to national courts to ease the claimants' burden of proof (article 35a, point 2) is vital for investors in terms of having an effective remedy. Otherwise, the relevant rules regarding burden of proof might turn out to be very difficult for the damaged party and this right to claim damages which is granted to investors would be meaningless.

In addition, it can be stated as a solution for a more effective civil liability system that explicitly allowing investors to rely on ESMA's sanctioning decisions and also it's findings regarding infringements of CRAs to meet their burden of proof could help mitigate the difficulties of Article 35a because when compared to investors who may not know how the rating service has been performed in a particular case, ESMA is authorized to use significant investigative powers such as requesting documents, conducting interview that could lead to detect an infringement more easily.

Amendments to CRA Regulation regarding civil liability entered into force in 2013, however, so far, decisions holding CRAs liable are very rare in EU. These are not decisions made by applying CRA Regulation either. But, neverthless, these decisions can also be considered important, since the Courts acknowledged that Article 35a applies to liability of CRA arising from its rating activities.

Finally, it can obviously be seen that investors have started bringing their claims against CRAs and in the near future we will be able to see the decisions on civil liability of CRAs.

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COMPENSATING DAMAGES ARISING FROM PUBLIC SERVICES THROUGH ALTERNATIVE DISPUTE RESOLUTION METHODS. QUEST FOR FUTURE*

Kamu Hizmetlerinden Kaynaklanan Zararların Alternatif Uyuşmazlık Çözüm Yöntemleriyle Giderilmesi. Geleceğe Yönelik Bir Arayış

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L&JR
Year: 13, Issue: 24
July 2022
pp.73-108

Article Information

Submitted : *11.04.2022*
Revision Requested : *28.04.2022 05.05.2022*
Last Version Received : *13.05.2022*
Accepted : *16.06.2022*

Article Type

Research Article

ABSTRACT

In Turkey, as in the world, idea of resolving administrative disputes through non-judicial mechanisms has emerged in order to eliminate inconveniences caused by the increase in administrative justice's workload. However, current Turkish constitutional structure and administrative law's pecularities make it difficult for alternative resolution methods to be a real alternative to jurisdiction. Although procedures such as administrative appeals, mediation and application to ombudsperson, which are in force, have a very wide application and are advantageous methods compared to judicial adjudication in theory, they are far from being a success due to practicalties. In order to explore ways to reduce the workload of administrative justice and increase use of alternative methods in Turkish administrative law, developments in French law, which gives great importance to judicial authority in administrative disputes, might be taken into account. Thanks to amendments made in French legislation, alternative remedies, which also exists in Turkish law such as mediation or ombudsperson, have become more effective.

Keywords: alternative methods, ombudsperson, mediation, administrative dispute, administrative appeal.

ÖZET

Dünyada ve Türkiye›de de idari yargının iş yükünün artmasından kaynaklanan olumsuzlukların giderilmesi bakımından idari uyuşmazlıkların yargı dışı mekanizmalar yoluyla çözümlenmesi anlayışı ortaya çıkmıştır. Ancak, Türk hukukundaki mevcut anayasal yapı ve idare hukukunun kendine has özellikleri, alternatif çözüm yöntemlerinin idari yargıya gerçek bir alternatif olmasını güçleştirmektedir. Yürürlükte olan idari başvurular, arabuluculuk ve ombudsmanlık başvurusu gibi usuller teorik anlamda çok geniş bir uygulama alanına sahip olmasına ve yargıya nazaran avantajlı özellikler taşımasına rağmen, başarılı olmaktan pratikte oldukça uzak kalmıştır. Türk hukukunda idari yargının iş yükünü azaltmak ve idari uyuşmazlıkların çözümünde alternatif yöntemlerin kullanımını artırmak bakımından, idari uyuşmazlıkların çözümünde yargı yoluna büyük önem atfeden Fransız hukukundaki gelişmelerin incelenmesi faydalı olabilecektir. Fransız mevzuatında yapılan değişikliklerle arabuluculuk ve ombudsmanlık kurumu gibi

There is no requirement of Ethics Committee Approval for this study.

* This work has been supported by Scientific Project Commission of Galatasaray University under grant number #19.200.005.

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Türk hukukunda da yer alan alternatif yöntemler daha etkin hale getirilmiştir.

Anahtar Kelimeler: alternatif yöntemler, ombudsman, arabuluculuk, idari uyuşmazlık, idari başvuru.

INTRODUCTION

In the last paragraph of Article 125 of Turkish Constitution it is stipulated that, the administration shall be liable to compensate for damages resulting from its actions. Articles 40 and 129 of the Constitution also contain provisions regarding liability. The state has the duty to provide public services in most appropriate conditions and at the highest level in meeting the needs. In case of failure of fulfilling this duty, aggrieved persons may demand compensation from administration.

Pursuant to Article 2 of Administrative Judicial Procedure Law(AJPL), lawsuits filed for compensation of damages arising from public services are full remedy actions. Besides, according to Article 155 of the Constitution, the Council of State is the last instance for reviewing judgments of administrative courts. So the aggrieved person may apply to administrative courts in order to demand compensation from administration.

As the scope of public services extended, there has been a striking increase on caseload of administrative tribunals[1]. Because of this excess, judicial procedures take long time. Expansion of judicial review has led to inefficiencies, such as delays and disproportionate litigation costs, that compromised ability of the courts to safeguard a proportionate dispute resolution and diminished their ability to assure good administration[2]. Access to justice has become more difficult and expensive[3]. This violates the right to a fair trial which is enforced by the European Convention of Human Rights (ECHR)[4]. As a matter of fact, the Council of Europe recommended application of alternative dispute resolution methods also for administrative disputes in 2001[5].

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1 Karine Gilberg, Fransız İdari Yargı Sisteminde Reformlar ve Alternatif Uyuşmazlık Çözüm Yöntemleri (Council of Europe 2020) 29.

2 David Marrani and Youseph Farah, 'ADR in the Administrative Law: A Perspective from the United Kingdom' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) p. 259; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2018) 1 ELTE Law Journal 371.

3 Mehmet Karaarslan, 'Genel ve Özel Bütçeli İdarelerin Taraf Olduğu Uyuşmazlıkların Çözümünde Yardımcı Bir İdari Birim: 'Hukuki uyuşmazlıkları Değerlendirme Komisyonu' in Tahir Muratoğlu and M. Burak Buluttekin (eds) *Hukukta Alternatif Uyuşmazlık Çözüm Yolları* (Seçkin 2018) 84.

4 Yahya Zabunoğlu, 'Adil Yargılanma Hakkı ve İdari Yargı' (2000) 2000 Yılı Yargı Reformu Sempozyumu 319.

5 Council of Europe Recommendation, Rec(2001)9 03/09/2001.

Alternative dispute resolution procedures have been applied for a long time in private law[6]. Because of the fact that administrative trials have become increasingly formal, costly, and lengthy, resulting in expenditures, alternative tools that are faster, less expensive and contentious, has also begun to be regulated for administrative disputes[7]. Alternative methods are aimed to provide most appropriate dispute resolution and promoting public trust to administration[8]. Here, dispute is evaluated in terms of legality, equity and fairness, which prevents negative consequences that will occur in case of legal rules' strict application. Alternative methods also have better possibilities to preserve good relations between parties of dispute[9].

Alternative dispute resolution methods might be defined as procedures which generally require the participation and assistance of an independent and impartial third party and that are alternative to litigation carried out by courts[10]. Although it is not impossible to make an exhaustive list, some of them might be enumerated as negotiation, mediation, short trial, preliminary impartial assessment, mini jury trial, ombudsman and arbitration[11]. Alternative tools are described in US Administrative Dispute Resolution Act of 1996 as "any procedure that is used to resolve issues in controversy"[12], which can be understood in a narrower sense, by focusing not on alternatives to proceedings led by administrative authority but to proceedings of a court considering administrative appeals, besides mediation and ombudsperson[13]. But, alternative tools are not real alternatives to courts which replace them, but might be accepted as procedures that could be applied before taking a case to the court[14].

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6 Council of Europe Recommendation, Rec(86)12 16/05/1986.

7 Rec. (n5).

8 Litvins (n2) 372.

9 Nilay Arat, 'Türk İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (Doctoral thesis, İstanbul University 2009) 73; Bengt Lindell, 'Alternative Dispute Resolution and the Administration of Justice – Basic Principles' (2007) 51 Scandinavian Studies in Law 315.

10 Mustafa Özbek, 'İdarî Uyuşmazlıkların Çözümünde Yargılama Dışı Usuller (I)' (2005) 56 Türkiye Barolar Birliği Dergisi 90; İbrahim Özbay, 'Alternatif Uyuşmazlık Çözüm Yöntemleri' (2006) 10(3-4) Erciyes Üniversitesi Hukuk Fakültesi 461.

11 ibid 464.

12 www.adr.gov.

13 Alexander Balthasar, 'Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law' (2018) 1 Elite Law Journal 11; Ahmet Özkan, 'Alternatif Uyuşmazlık Çözüm Yollarının Yargılama Sürecine Etkisi ve İdari Yargı Sisteminde İşlerliği' (2016) Süleyman Demirel Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 620; Nusret İlker Çolak 'İdari Uyuşmazlıklarda Alternatif Çözüm Yolları' www.ilkercolak.com.tr accessed 15 December 2021.

14 Özbay (n10) 460.

In countries of Anglo-Saxon law sphere, alternative methods have emerged in both private and public law. Since specialized rules are not applied for public activities, same authorities participate in resolution of disputes between individuals and administration with individuals: ombudsperson resolves disputes arising from consumer law, construction law, insurance law or labor law[15]. In Scandinavian countries, where alternative procedures have a wider application, administrative courts' monopolistic nature in dispute resolution has been weakened and control on administration is shared between judicial and independent administrative authorities. In this study, which aims to explore ways to reduce the workload of administrative justice by increasing application of alternative methods, solutions will be sought based on developments in French law, which gives great importance to administrative judicial authority as in Turkish law.

In first chapter, current legal situation concerning applicability of alternative methods in Turkish law and their success will be examined **(I)**. In second part by analyzing situation in comparative law, we will look for solutions to make them successful and present new methods that might succeed **(II)**.

I. ALTERNATIVE DISPUTE RESOLUTION METHODS IN ADMINISTRATIVE LAW: ARE THEY REALLY USEFUL?

In accordance with principles in Turkish Constitution, arrangements have been made to distribute dispute resolution authority between judiciary and alternative methods **(A)**. Various studies were made to break the judicial monopoly in resolution of administrative disputes. However, it is hard to say that they have been successful **(B)**.

A. Applicability of Alternative Dispute Resolution Methods and its Limits

In administrative law the fundamental principle is judicial review of the legality of administrative actions. According to Article 125 of Constitution, recourse to judicial review shall be available against all actions of administration who shall be liable to compensate for damages resulting from its actions. As also emphasized by the Constitutional Court, it is unconstitutional to exclude actions of administration from judicial review[16].

Besides, according to Article 2 of the Constitution, Turkey is a democratic state, governed by rule of law, within the notion of justice, respecting human rights. The efficiency of judicial protection and dispute resolution presents one of the cornerstones of a democratic state. Undoubtedly, in accordance with the

15 Özbek (n10) 129.

16 Constitutional Court, E:2008/112-K:2010/31, 04/02/2010.

principle of rule of law, there should be no administrative action not subjected to judicial review[17]. The purpose of administrative judicial review is to force administration to stay within the scope of rule of law[18]. Administrative justice has two sets of values[19]: delivering of fair and quality justice, achieving of efficient resolution of dispute[20].

However, alternative methods focuses on interests of parties rather than focusing upon the parties' existing rights[21]. The main aim is not ensuring rule of law, but resolving the dispute. Therefore, application of alternative methods in administrative law, falls short of satisfying the constitutional values[22]. Here, we need to ask how to apply administrative methods while preserving constitutional values. Since it is almost impossible to maximize these values, it is useful to utilize the complementarities among judicial review, the tribunals system and administrative dispute resolution[23].

The most important discussion concerning alternative dispute resolution tools is on principle of access to court. This principle is one of the essential features of rule of law which is protected under Article 2 of Constitution, but it is also covered in Article 36 of Constitution. Article 125 of the Constitution ruled that recourse to judicial review shall be available against all actions of administration. The alternative methods should be commenced or continued if the litigation before the court is unavoidable and judicial review is a remedy of last resort. Aggrieved individuals should have the option to seek remedy before the court following an unsuccessful alternative procedure. The same approach is also underlined by the Constitutional Court, "…alternative dispute resolution methods are introduced in order not to occupy the courts with matters that do not need to be resolved through litigation and subsequent judicial review do not prevent the right to access to a court."[24] So, alternative methods cannot replace jurisdiction. The Council of Europe's the Committee of Ministers also recommends that the use of alternative means should allow appropriate judicial review which ensures protecting both users' rights[25].

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17 Bahtiyar Akyılmaz, Murat Sezginer, Cemil Kaya, *Açıklamalı – İçtihatlı Türk İdari Yargılama Hukuku* (Savaş 2019) 107.

18 Metin Günday 'İdari Yargının Görev Alanının Anayasal Dayanakları' (1997) 14 Anayasa Yargısı Dergisi 347.

19 Erhan Tutal, *Dünyada ve Türkiye'de Ombudsmanlık* (Adalet 2014) 241

20 Constitutional Court, E:1976/1-K:1976/28 25/05/1976.

21 Nilay Arat, 'Türk İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (Doctoral thesis, İstanbul University 2009) 899.

22 Marrani and Farah (n2) 267.

23 ibid 260.

24 Constitutional Court, E:2016/143-K:2017/23, 09/02/2017; Constitutional Court, E:2013/96-K:2014/118 03/07/2014.

25 Council Directive 2008/52/EC 21 May 2008 certain aspects of mediation in civil and commercial matters [2008] OJ 136/3.

The right to access to a court is protected in Article 6 of ECHR[26] which is also underlined by European Court of Human Rights (ECtHR). Firstly, the application of noncompulsory alternative methods is not accepted as a restriction of the right to access to a court[27], where aggrieved person has possibility of making a claim before the court or sustaining the right until the end of alternative resolution initiative. Also, mandatory alternative methods before starting court trial are not found directly contrary to the ECHR. The right to access to court might be restricted with the condition of exhaustion of remedies. But, if such conditions delay the filing of the case for a long and indefinite period, this may be considered a violation of the right[28]. The ECtHR found it unlawful not to set a deadline for conclusion of application[29]. A reasonable period of time must be allowed for the application to a mandatory procedure, otherwise it is considered as a violation of the right to access to court[30]. Moreover, if the deadline is missed due to complexity of procedure, it would be a violation of the right to file a lawsuit[31].

In accordance with the explanations above, it is possible to resolve administrative disputes with alternative methods. However, it is obligatory to keep open the possibility of applying to the judicial authorities if the dispute cannot be resolved by these methods[32].

Furthermore, the role of court acting in the field of administrative law is quite different from that in private law. Also, the role of administrative authority differs from the parties'. Firstly, relationship between individuals and administration is asymmetrical, authoritarian, unequal and hierarchical[33]. Since one of the parties has an advantage, this kind of relationship is contradictory to the idea of negotiation[34].

Secondly, administrative authority is bound by the principle of legality. The actions of administration should be based on the competences given by

26 Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011) 270.

27 K. Burak Öztürk, *Hak Arama Özgürlüğü Çerçevesinde Zorunlu İdari İtiraz* (Yetkin 2015) 115.

28 Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı* (Beta 2008) 134.

29 *Janosevic v. Sweden* App nº34619/97 (ECtHR 21/05/2003).

30 *Hennings v. Germany* App nº12129/86 (ECtHR 16/12/1992).

31 *De Geouffre de la Pradelle v. France* App nº12964/87 (ECtHR 16/12/1992).

32 Özbay (n10) 463.

33 K. J. de Graaf and A. T. Marseille and H. D. Tolsma, 'Mediation in Administrative Proceedings: A Comparative Perspective' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 595.

34 Arat (n9) 220; Lindell (n9) 315.

the legislator[35]. The activity of negotiate could only be lawful if the authority is legally competent to amend its precious decision[36]. The administration is sometimes completely bound by the law; but in other cases, has discretionary power. If administration has no discretionary power, there is a very limited applicability of alternative tools. Otherwise, if administration acts in a different way from the statutory rules, it would be against the rule of law.

Another problem is related to the principle of equality. Article 10 of Constitution guaranteed that administrative authorities are obliged to act in compliance with the principle of equality. This fundamental principle implies equal treatement of equal cases. This rule limits possibility of an administrative authority negotiating on the use of its discretionary power[37]. Here, in response to the appeal, it has competence to investigate whether to use its discretionary power differently, which might keep with the interests of parties. But also, administration should apply its discretionary power for the benefit of public interest[38].

Lastly, an important characteristic of alternative methods is confidentiality. Access to information is also one of the most important features that will allow for public participation and contribute to the accountability of administration. In this respect, aspect of confidentiality in dispute resolution and principle of transparency in administrative law seem to be in conflict with each other[39].

Because of these reasons, it is hard to say that alternative tools play a major role and are a real alternative to court proceedings, but might be applied in a limited scope of subjects. Firstly, all actions of administration subject to private law are eligible for alternative procedures. For the matters of administrative law, since the wills of parties are not considered in matters of public interest, the application of alternative methods will be narrower. Here, resolution of dispute may create results that exceeds the limit of the rights and interests of parties. In general, it might be considered that negotiation should not lead a party to renounce the exercise an action for excess of power, if the object of dispute affects third parties[40]: such as rulemaking acts of administration. Also, individual acts that have effects on behalf of third parties do not seem conducive. Besides, if administration has bound power or in the matter of

35 Arat (n21) 895.

36 Aynur Cidecigiller, *İdarenin Taraf Olduğu Uyuşmazlıkların Sulh Yoluyla Çözümlenmesi* (Adalet 2015) 35.

37 Arat (n21) 896.

38 Indeed, control of discretionary power of administration, United Kingdom, is accepted as one of the reasons for emergence of ombudsperson. (Müslüm Akıncı, *Bağımsız İdari Otoriteler ve Ombudsman*, (Beta 1999) 269).

39 De Graaf and Marseille and Tolsma (n33) 599.

40 Arat (n9) 234.

sanctions, administration has no authority to negotiate. In general, we can say that matters concerning demands of compensation which cause full remedy action are suitable for negotiation process[41].

B. Current Alternative Methods: Are They Really Alternative?

In Turkish legislation there are several arrangements ensuring alternative procedures to administrative disputes. Some of them are for the resolution of disputes between administrations[42]. For example, in Article 4 of Law No. 3533, a procedure of arbitration has been regulated for settlement of private law disputes between administrations[43]. In addition, sometimes administrations are authorized to settle disputes between individuals, where administration acts as conciliator, not as a party of dispute[44]. In this study, which only examines the damages on individuals as a result of the administrative activities, these remedies will not be examined.

Alternative methods that find the widest application in administrative law may be listed as administrative appeals, mediation and ombudsperson institution **(1)**. However, it is still disputable these procedures constitute a real alternative to justice **(2)**.

1. Current Alternative Dispute Resolution Methods

Administrative applications are the earliest method for compensation of damages arising from administrative activities. This method is based on understanding that administration should indemnify damages caused by itself (**a)**. Another method is mediation procedure, whose limited application in administrative disputes has begun since 1990s **(b)**. The ombudsperson is also one of the nonjudicial dispute resolution mechanism, who investigates administration's behaviours **(c).**

a. Administrative Appeals

Administrative appeals might be described as requests addressed to a public authority by which aggrieved person demands administrative measures to be taken regarding an administrative decision or action[45]. The appeal may concern

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41 Murat Asiltürk, 'Arabuluculuk Müessesesinin İdari Yargılama Hukuku Uyuşmazlıklarının Çözümlenmesinde Uygulanabilirliği' (2014) 95 Terazi Hukuk Dergisi 37.

42 Aynur Hasoğlu, 'İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (2016) 65(4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 1989.

43 Laws n°3867, 3289, 4586, 5312 and 5502 contain regulations regarding resolution of disputes between administrations through arbitration.

44 In Laws n°442, 6326, 3091, 406 and 2813, there are regulations regarding resolution of disputes between individuals by administration.

45 Dacian C. Dragos and David Marrani, 'Administrative Appeals in Comparative European Administrative Law: What Effectiveness?' in Dacian C. Dragos and Bogdana Neamtu

legality or appropriateness of administration[46]. An administrative appeal can be addressed to the authority which has issued the unlawful decision or to its hierarchically superiors. The subject of appeal might be annulment, modification or issuance of a new act, but also compensation of damages. With exceptions, in general they are optional. Also, administrative appeal and judicial review that are independent of each other and do not interfere with one another.

The administrative appeals reduce the caseload of administrative courts by providing a mechanism for aggrieved person to seek redress and an option for administration to mend its errors. Therefore, administrative appeal is included in the category of alternative tools[47]. Administrative appeals have many advantages. Firstly, both parties avoid complications and expenses of long judicial process. Also, relations between the individual and administration is improved by providing a method that favors a form of dialogue. Further, parties of dispute themselves are best equipped to handle disputes, as judges may not always have a fully nuanced understanding of how the administration functions and administrative authorities must balance individual interests[48]. The most important inconvenience is the inexistence of guarantee on impartiality in administrative appeals[49], as there is no assurance that the authority will not be inclined to favor the decision already made.

In Turkish Law, administrative appeal is a dispute resolution tool envisaged in Article 13 of the AJPL only for compensation of damages arising from administrative actions which is also called a 'preliminary decision'[50]. If an individual suffers losses, prior to commencing court proceedings, an administrative appeal must be filed to demand damage. Individuals should apply to the relevant administration within one year after the learning of violating action and in any case, within five years from action. If this request is rejected or no response is given within thirty days, it will be possible to file a lawsuit. However, the Council of State has developed a case-law that differs from legal regulation, regarding the date from which the one-five year periods will begin, for protecting the right to legal remedies. First of all, if the action and damage occur on different dates, it is necessary to consider the date when

(eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 540.

46 Jean Marie Auby, 'Les recours administratifs préalables' (1997) 1 AJDA.

47 Dragos and Marrani (n45) 539.

48 Rhita Bousta and Arun Sagar, 'Alternative Dispute Resolution in French Administrative Proceedings' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 63.

49 Litvins (n2) 372.

50 Onur Karahanoğulları, *İdari Yargı İdarenin Hukuka Zorlanması (Yargı Kararlarına dayalı Bir İnceleme)* (Turhan 2019) 321.

damage occurred fully and definitively[51]. In addition, the Council of State does not accept the date of action as beginning of the period; five-year period should be calculated from the date when administrative nature of damage is learned[52].

As the prior administrative appeal is mandatory, if a lawsuit for compensation of damage is filed directly before the court without making such application, this remedy will be rejected and the petition will be submitted to the administration that caused damage[53]. Here, if administration responds aggrieved person negatively, a new lawsuit might be filed[54]. Considering the compulsory nature of this appeal, if it is not filed within the time limit, the possibility of application will disappear, as well as the right to file lawsuit.

Another remedy for compensation of damages arising from public services' execution is the legal compromise regulated in Article 12 of the Decree Law No.659. This remedy is a method that can only be applied for compensation of damages arised during services rendered by administrations falling within the scope of this Decree. It is not possible to apply the procedure of preliminary decision in disputes to which Article 12 of Decree Law is applied[55].

It is possible to file a compromise application regarding the disputes arising from services provided by the administrations specified in the tables (I) and (II) attached to the Public Financial Management and Control Law (PFMCL): units affiliated to central government, Grand National Assembly of Turkey (GNAT), Presidency, high courts, ministries, their affiliated and related organizations, Council of Higher Education, Assessment, Selection and Placement Center, state and foundation universities and public institutions having separate public legal entities. It is not possible to implement the compromise procedure envisaged in Decree Law on the regulatory and supervisory authorities, the Social Security Institution and local administrations.

Both remedies of preliminary decision and compromise procedure stipulated in Decree Law are mandatory in which parties of dispute participate in process with their own consent, third parties are not included as either conciliator or mediator. If a solution is reached, the text signed by parties carries the provision of a verdict. If parties do not come to a common solution, recourse to judicial procedure remains possible[56]. These two remedies differ from each other in terms of procedural rules applied. In compromise procedure, which is regulated in detail in Decree Law, procedural rights and guarantees of parties in process are clearly protected.

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51 Council of State10th Chamber, E:2017/1003-K:2018/3493, 14/11/2018.

52 Council of State 10th Chamber, E:2004/2931-K: 2006/7287, 20/12/2006.

53 Council of State 8th Chamber, E:1987/340-K: 1989/306, 27/04/1989.

54 Turan Yıldırım and Gül Fiş Üstün, *Açıklamalı-Notlu İdari Yargılama Usulü Kanunu* (On İki Levha 2020) 266.

55 Council of State General Assembly, E:2018/4662-K:2019/1288, 25/03/2019.

56 Cidecigiller (n36) 285.

Applications for compromise must be concluded within sixty days. Otherwise, the request is deemed to be rejected. The applications are subjected to a two-stage review. Firstly, application is sent to legal dispute evaluation commission. All kinds of necessary research and examination, including expert examination are carried out and witnesses can be heard[57]. Here, subject of application, the way damage occurred, whether administration is responsible, amount of damage and compensation to be paid are determined. In the second stage, the report prepared by commission is submitted to the competent authorities. The decision-making authorities are respectively the top supervisor, minister in charge or president, depending on magnitude of the amount of damage claimed. If the competent authority accepts settlement, the applicant is given at least fifteen days to sign compromise.

On the day specified in invitation letter, if amount of compensation and payment method are agreed, a protocol is signed by parties which has the force of verdict. It is not possible to file a lawsuit regarding the agreed subject or amount. The compromise protocol does not include any remarks on issues such as fault, liability, and illegality. Therefore, compromise protocol does not have effect of a definitive judgment in terms of the illegality of action in cases to be brought before the court later on. If compromise protocol is not accepted, a dispute protocol is prepared and given to applicant, who may file before administrative court.

b. Mediation

The mediation is an agreement by finding an intermediate solution compromising demands of each party. In principle, all disputes between persons in same situation are concluded in same way in court proceeding; while the solution varies in mediation[58]. In Turkish law the mediation for disputes of administration entered into force in 2017 with Article 15 of Law No. 6325. A number of arrangements were made for the resolution of administration's private law disputes through mediation. However, apart from few exceptions, the said regulation has not achieved its expected positive result.

The procedure of mediation is defined as resolution of a dispute with the help of an impartial and reliable third party, upon the application of parties by applying procedures and principles that are determined by parties[59]. It is based on continuing voluntary consent of all disputants, mediator does not have the authority to impose a decision or measures upon parties[60]. By decreasing number of court judgements, mediation enhances efficiency of administrative proceedings.

57 Karaarslan (n3) 90.
58 Asiltürk (n41) 34.
59 Dir. (n34).
60 Litvins (n2) 379.

Mediator must be independent and impartial as a neutral third party. During the process, confidentiality and privacy of parties must be observed[61]. Three main characteristics of mediation are voluntariness, impartiality and confidentiality[62]. Mediation also scores high on aspects of procedural justice, parties have opportunity to be heard and are able to take control of process[63]. It is essential that information and documents obtained during mediation are kept confidential. When a lawsuit is filed regarding the dispute, invitation made by parties to mediation, requests of parties, opinions and proposals put forward, acceptance of any case and all documents cannot be put forward as evidence[64]. This characteristic of mediation limits public authorities' accountability and transparency[65].

Mediation might be implemented only in resolution of private law disputes which parties can freely dispose of[66]. Disputes arising from actions based on public power are excluded[67], which will be resolved in administrative jurisdiction. It is suggested that mediation finds application for administrative disputes in which a certain amount of money is involved such as, compensation claims, penalties, taxes, fees and financial liabilities[68]. Currently, mediation is applied only for private law disputes of administration. Disputes arising from contracts that are not related to execution of public services, such as lease agreements, contracts of sale, of carriage, of construction and subscription agreements signed between administration and individuals are subject to private law. Besides, disputes regarding the amount to be paid in expropriation procedures and disputes of administration in cases where workers are employed under a contract of employment might be also subject to mediation[69].

Two members determined by the top supervisor and the head of the legal unit or a lawyer shall represent administration during mediation negotiations[70]. Members of commission are fully authorized to take decisions independently. Decision, which is taken unanimously, does not have to be approved by their

61 www.eur-lex.europa.eu/eli/dir/2008/52/oj

62 UNCITRAL Conciliation Rules, www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en

63 De Graaf and Marseille and Tolsma (n33) 592.

64 Asiltürk (n41) 37.

65 Marrani and Farah (n2) 271.

66 Article 1/2.

67 Gül Fiş Üstün, 'Arabuluculuk Faaliyetlerinde İdarenin Yeri ve Yetkisi' (2020) 26(1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 14.

68 Mehpare Çaptuğ, 'İdarenin Taraf Olduğu Uyuşmazlıklarda Arabuluculuğun Uygulama Alanı ve Aksayan Yönler' (2021) 157 Türkiye Barolar Birliği Dergisi 305.

69 Fiş Üstün (n67) 14.

70 Article 15/8.

top supervisor[71]. However, mediator is not allowed to exercise powers that are exclusive to judicial power by their nature. Mediator cannot make viewing, witness and expert examinations. At the end of the negotiations, commission shall prepare a motivated report and keep them for five years.

Compensation lawsuits arising from decisions and actions of commission members within mediation activity can only be brought against the state. The compensation paid by the state might be recoursed to the members who abuse their power by acting against the requirements of their duty in one year from the date of payment. In accordance with Article 18/7 of Regulation on Mediation Law, members of Commission are not held responsible for their decisions except it is determined by a court decision that they have acted contrary to the requirements of their duty. Therefore, third parties can only file a lawsuit against the state due to activities carried out by commission; state may recourse to officers after a court decision establishes their fault[72]. The lawsuit filed against state will be opposed to Ministry of Treasury and Finance. Indeed, it is seen that damage caused by a public agent to his own institution is undertaken by another administration[73].

c. Ombudsperson

As a result of the need to restructure the public administration, new searches have begun to re-evaluate the functioning of public services and to minimize complaints. There was a need for a control mechanism which supervizes administration, that is constituted outside the judiciary power, but which is independent from administration[74]. Ombudsperson has direct connection with traditional parts of *trias politicia* (legislative, judicial and executive power), whether it is their status as a representative of the parliament, investigator of the government and the supporter of judiciary[75].

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71 In article 15, it has been stated that commissions represent administration, however their right to start mediation procedure is not recognized. In accordance with rule of law, unless such authorization is given by the highest supervisor of administration, it is not possible for commissions to apply *ex officio* to mediation.

72 Çaptuğ (n68) 310.

73 Fiş Üstün (n67) 22. The International Bar Association (IBA), defines the Institution of Ombudsperson as '[an] office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.' (Hazal Duran, 'The Intermediary Function of Turkey's Legislative Ombudsman in Resolving Public Disputes' (2021) 96 Bilig 37.)

74 Muhammed Serkan Şahin, *Kamu Denetçiliği* (Astana 2020)156.

75 Engin Saygın, 'Improving Human Rights through Non-judicial National Institutions: The Effectiveness of the Ombudsman Institution in Turkey' (2009) 3 European Public

Ombudsperson institution has entered into Turkish law as an alternative procedure of controlling actions of administration with the amendment in Article 74 of Constitution in 2010[76]. Pursuant to article 74/7 of Constitution, ombudsperson is regulated by Law nº6328. Purpose of the establishment of ombudsperson is to increase the quality of public service and to reduce the workload of judiciary. But also, the Ombudsperson is an institution that protects and promotes human rights and justice[77]. So, the Ombudsperson might be described as an authority which, is not limited to be a monitoring mechanism but which investigates on citizens'complaints and promote human rights and democracy. Therefore, ombudsperson is not only an alternative method of resolving disputes, but also a structure that aims to ensure the fairness of administration's acts and to prevent unfair behaviors of public officials[78].

Ombudsperson which is a public legal entity affiliated to the GNAT, examines complaints on functioning of administration in the name of parliament. The main reason why ombudsperson depends on parliament is to ensure independence of institution[79]. No organ, authority or person can give orders and instructions,

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Law Review 418; Milan Remac, 'The Ombudsman: An Alternative to the Judiciary?' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 568.

76 The first initiative of Turkish Parlement to create Ombudsperson Institution in Turkey was in 2006 by the Supervisory Institution Act. However, the former Turkish President Ahmet Necdet Sezer vetoed the forementioned Act depending on the justificaions on principle of separation of powers and unconstitutionality of the Ombudsperson Institution and sent it back to Parlement to be reconsidered. Following the Parlement's insistance and promulgation process, the President took the forementioned Act to the Constitutional Court. With its decision in 2008, the Constitutional Court declared the forementioned act unconstitutional and annuled. (Constitutional Court, E:2006/140-K:2008/185, 25/12/2008.) For detailed analysis and criticisms of the justifications in Presidents veto (Saygın (n75), 418 ff.

77 Saygın (n75) 425. In different texts of international or regional organizations, such as United Nations, Council of Europe, and the Organization for Security and Cooperation in Europe, the Ombudsperson is described as a '*national human rights institution'* which shows how the rule of law should be implemented. (Saygın (n75) 409 ff.)

78 H. Alpay Karasoy, 'Ombudsman in Turkey: Its Contributions and Criticism' (2015) 22 European Scientific Journal 47; Akıncı (n38) 286; Ahmet Yatkın and İzzet Taşar, 'Ombudsman As an Audıt Tool in Publıc Admınıstratıon: Comparatıve Case Study Research of Turkey And European Unıon' (2014) 59; Didem Geylani and Ahmet Nohutçu, 'The Effectiveness of the Public Auditorship Institution (Ombudsman) in Turkey and a Comparison with the National Ombudsmen of England and France' (2021) 106 Liberal Düşünce Dergisi 128; Duran (n73) 36.

79 Saygın (n75) 419; Servet Alyanak, 'The New Institution on Protection of Fundamental Rights: Turkish Ombudsman Institution' (2015) 1 Ankara Avrupa Çalışmaları Dergisi 12; Geylani and Nohutçu (n78) 129. However, it should be noted that relations between the Ombudsman Institution and the GNAT does not conform to a conventional hierarchical model. (Duran (n73) 41.)

send circulars, make recommendations to ombudsperson[80]. While performing their duties, ombudsperson and auditors must behave impartially[81].

Ombudsperson is competent to examine decisions, actions, attitudes, behaviors of administration and to make suggestions to administration in terms of compliance with law, equity and principles of good governance within the understanding of justice based on human rights[82]. Decisions and actions of ministries, local administrations, Social Security Institution, professional organizations having the characteristics of public institutions, public benefit associations and foundations, banks, companies operating in electricity and natural gas market, non-political activities of executive authorities might be questioned before ombudsperson[83]. Not only decisions and actions of administration, but also its behaviors, which cannot be contested before the courts, are under the supervision of ombudsperson. The institution does not start investigations *ex officio*; but upon complaint[84].

All real and legal persons may apply to ombudsperson directly[85]. This application which is free, can be submitted electronically or through other means of communication. Since application to ombudsperson is less formal, the opportunity to apply to Institution is quite wider[86]. In order to apply to ombudsperson, administrative appeals stipulated in the AJPL and mandatory administrative remedies stipulated in special laws must be exhausted. However, exhaustion of optional applications regulated in special laws is not necessary[87]. The applications filed without exhausting administrative remedies are sent to the relevant administration. Yet, ombudsperson accepts applications against attitudes and behaviors of administration and in cases where damages whose compensation is difficult or impossible, are likely to arise even if administrative remedies were not exhausted.

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80 Litvins (n2) 376; Duran (n73) 41.

81 Karasoy (n78) 47; Remac (n75) 567

82 Kadir Aktaş, 'Kamu Denetçiliği Kurumunun Anayasal Sistemdeki Yeri ve Etkinliği Sorunu' (2011) 94 Türkiye Barolar Birliği Dergisi 371; Saygın (n75) 425; Karasoy (n78) 52.

83 Alyanak (n79) 9; Tutal (n20) 200.

84 Saygın (n75) 424; Alyanak (n79) 20; Geylani and Nohutçu (n78) 132.
In Sweden, ombudsperson may start investigations upon a complaint or on his own initiative. And it should be noted that the number of investigations started with their own initiative is greater than the ones started after complaint. (Lester B. Orfield, 'The Scandinavian Ombudsman' (1966) 1 Administrative Law Review 19; Müslüm Akıncı, *İsveç İdare Hukuku* (Yetkin 2010) 169).

85 Karasoy (n78) 51; Yatkın and Taşar (n78) 132. Unlike the situation in British Law, there is no obligation to first apply to the parliament or any other body to seek remedy before ombudsperson. (Akıncı (n38) 332.) However, it could not be admitted that the groups or NGOs have right to complaint before the Ombudsperson. (Saygın (n75) 424.)

86 Alyanak (n79) 10; Litvins (n2) 376.

87 Alyanak (n79) 21.

An application can be made to ombusperson within six months from the date of notification of administration's reply; if administration does not respond application within sixty days, from the expiry of that period. Applications made within the period of filing suspends the filing period. The institution shall finalize its examination within six months from the application. In case of failure to conclude, suspended filing period starts to run.

As a result, if the application is found unreasonable and there is no violation of law or equity, it is rejected. In this case, pending filing period starts to run again from the notification of decision. If it is concluded that there is a violation, a recommendation is given. Recommendation is defined as a decision that includes suggestions for administration to accept the wrongful behavior, compensate damage, propose an amendment in regulations, withdraw, abolish or amend the act that is the subject of complaint[88]. If the application is accepted; related administration notifies the ombudsperson within thirty days whether it will comply with recommendation.

All information and documents that are requested by ombudsperson in relation to the subject of examination has to be given within thirty days. If not, the institution has the authority to initiate a disciplinary investigation. In this case, disciplinary investigation is not carried out by ompudsperson who only initiates it[89]. Ombudsperson has no authority to impose sanctions.

While exercising its supervising function, ombudsperson deals with the disputes between individuals and administration just like judiciary. Ombudsperson has authority to appoint experts; hear witnesses or relevant parties; can also make on-site wievings, who solve disputes while retaining impartiality, unlike administrative appeals. But also, ombudsperson has a normative function as a result of the necessity to explain the content of general normative concepts: good administration, proper administration, maladministration[90].

Appeals to ombudsperson have many fundamental and procedural advantages compared to judicial remedies[91]. Firstly, ombudsperson supervises decisions, actions, attitudes and behaviors of administration while in judicial review, it is only possible to examine decisions and actions of administration. The scope of activities that can be reviewed is wider[92]. Secondly, administrative judiciary checks compliance with the law, not fairness, which controls

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88 Kamu Denetçiliği Kurumu, *40 Soruda Ombudsmanlık*, (Kamu Denetçiliği Kurumu 2017) 48; Alyanak (n79) 23.

89 Yatkın and Taşar (n78) 134; Alyanak (n79) 12.

90 Remaac (n75) 574; Alyanak (n79) 22.

91 For detailed information Karasoy (n78) 8-10.

92 Cevdet Atay, *Denetim ve İdarenin Yönetsel Denetimi* (Anka 2017) 74; Tutal (n22) 198; Alyanak (n79) 10; Geylani and Nohutçu (n78) 129.

discretion of administration in terms of proportionality, compliance with the public service's requirements, and public interest[93]. But, it cannot review appropriateness of the actions[94]. Judicial power is limited to the review of legality and in no case review of expediency might be used. Judicial ruling shall not restrict the exercise of executive function nor remove discretionary power. However, ombudsperson conducts an audit of compliance with the law, including the expediency[95], who can cover different normative concepts such as proper administration, good administration and compliance with human rights[96].

Moreover, procedural rules of ombudsperson remedy are more favorable for applicant. Individuals must meet some requirements to file a complaint before ombudsperson, which are less formal than in case of court proceedings. For example, since principle of written judication in administrative jurisdiction is strictly enforced, it is not possible to hear witnesses while, ombudsperson can hear witnesses or related persons[97]. Also, ombudsperson can examine information and documents of state secret nature on-site while in administrative proceedings, these documents may not be provided.

Conversely, the decisions of the institution are advisory[98]. Administration is not obliged to follow recommendations of ombudsperson. In countries with young democratic traditions, ombudsperson faces the challenge of ensuring the fulfilment of its conclusions[99] which will cause a significant decrease in applications. Ombudsperson is established not to replace, but to supplement judiciary by presenting additional possibility to protect fundamental rights. In practice, courts do not directly rely on ombudsperson's decision in cases brought before administrative justice based on the data revealed by ombudsperson[100]. Although it is emphasized in the dissenting opinions of some decisions that the results of ombudsperson's examination should be considered, in practice judicial decisions are not based on those findings[101]. This approach causes

93 Alyanak (n79) 22. Council of State 5th Chamber, E:1978/2266-K:1980/2236, 18/06/1980.

94 Council of State 13th Chamber, E: 2013/1125-K:2013/1925, 26/06/2013.

95 Ombudsperson, nº2022/1628, 01/03/2022.

96 Ombudsperson, nº2018/8486, 24/12/2018.

97 Geylani and Nohutçu (n78) 132.

98 Duran (n73) 42; Remac (n75) 567; Geylani and Nohutçu (n78) 133.

99 Saygın (n75) 426; Alyanak (n79) 14; Litvins (n2) 376. For statistical ınformation on complaint applications and comparasion of the situation between Turkey, England and France, Geylani and Nohutçu (n78) 134 ff. For proposals to increase the effectiveness of the Ombudsperson Institution, Saygın (n75) 423 ff.

100 Council of State General Assembly, E:2021/2538-K:2021/3208, 20/12/2021; Council of State 13th Chamber, E:2020/3816,-K:2021/1104, 29/03/2021; Council of State 10th Chamber, E:2014/1938-K: 2016/222, 18/01/2016.

101 Council of State General Assembly, E:2020/1450-K: 2021/23, 21.06.2021.

that ombudsperson's decisions remain only at recommendation level, gives administrations wide discretion in their implementation[102].

2. Lack of Success

In order to reduce workload of administrative judiciary, different dispute resolution methods have been introduced. However, in practice, aggrieved individuals mostly preferred to apply directly to judiciary; notwithstanding the fact that a little number of applications were unsuccessful[103]. This situation reveals that these methods are not a real alternative to judiciary. There are several reasons.

The first reason arises from the financial responsibility of public officials. According to Article 40/3 of Constitution damages incurred through unlawful treatment by public officials shall be compensated by the state, who can recourse to responsible official. Besides, pursuant to Article 12/2 of Law No. 657, in case administration has been harmed because of the fault, negligence or imprudence of its agent, the damage is paid by relevant official. These regulations reveal financial responsibility of officials. The lack of legal guarantee regarding payments to be made without a judicial decision and liability of competent public officials prevented the implementation of both procedures[104]. There is also no regulation for exemption of public officials acting in line with recommendation of ombudsperson. In the understanding of public administration, atmosphere of distrust towards public agents and lack of trust in people who use authority on behalf of administration cause the competent authorities not to use their authority to pay, even if the demands are justified. It would be appropriate to specifically regulate these procedures by a separate law to envisage provisions that will force administration to respond applications[105] and to arrange judicial guarantees that are provided for public officials who fulfill ombudsperson's decisions[106].

Another reason why public agents avoid making a positive decision about applications for compensation, is for not being defective in audit conducted by the Court of Accounts. Pursuant to Article 160 of the Constitution, the Court of Accounts is charged with auditing expenditures, and assets of public administrations with taking final decisions on accounts and acts of the responsible officials. Public officials authorized in acquisition and use of

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102 Saygın (n75) 427; Karasoy (n78) 55; Geylani and Nohutçu (n78) 136; Onur Kaplan, 'Kamu Denetçiliği Kurumu Tarafından Verilen Tavsiye Kararlarının Hukuki İşlevi ve Etkisi' (2020) 13 Ombudsman Akademik 100.

103 Mutlu Kağıtçıoğlu, 'Kamu Denetçiliği Kurumunu (Türk Ombudsmanını) Yeniden Tasarlamak' (2018) 14 Anayasa Hukuku Dergisi 461.

104 Karaarslan (n3) 91.

105 Hasoğlu (n42) 1990; Çaptuğ (n68) 301.

106 Aktaş (n82) 366; Tutal (n22) 214.

all kinds of public resources are responsible for obtaining, use and abuse of resources effectively, economically and efficiently[107]. The Court of Accounts judges as a tribunal[108] actions of responsible officials that cause public loss. As a result of the trial, compensation of damage from responsible official might be decided[109]. In doctrine, Üstün argued that certain criteria should be clearly stipulated by legislator to limit the scope of the Court of Accounts' audit in cases of agreement through compromise and to be excluded from audit.

Besides, there is no budget in behalf of administration to cover payments regarding applications for alternative procedure. If dispute is resolved by an alternative method, sufficient funds shall be allocated to budget for the payment of administration[110]. In this way, administration may also save amount of interest that it will have to pay as a result of court decision[111]. Together with the strong emphasis on *service public*, prerogative of *puissance public*, and the role of the Council of State as conceived in Turkish law could also explain why alternative tools are implemented with resistance[112].

A disposition allowing resolution of disputes amicably between administration and aggrieved person was included in Law No. 4353[113]: In case of resolution of legal disputes between the state offices within general budget and other departments with real or legal persons, which have not yet been taken before a court, ministries are authorized to conclude compromises or to make amendments to agreements that include the recognition of a right up to an amount or the abandonment of a benefit. Amendments to agreements and compromises exceeding this amount shall be made by taking the Council of State's opinion. In this respect, it will be mandatory to seek opinion of the Council of State while settlement of disputes over the amount specified in Law[114]. Receiving opinion of the Council of State will not only relieve concerns arising from the trust of public official involved in dispute resolution, but also enable public official to take the initiative easily. Arranging a similar regulation would be beneficial to increase of aforementioned methods.

Moreover, it is also argued that the cases where the court does not evaluate legality nor use discretion power, but where performs a formal supervision, should be removed from administrative judiciary and resolved by alternative

107 Article 8 of PFMCL.
108 Constitutional Court, E:2014/172-K:2014/170, 13/11/2014.
109 Akyılmaz and Sezginer and Kaya (n17) 9-10.
110 Cidecigiller (n36) 249.
111 Arat (n9) 238.
112 ibid 223.
113 Law nº4353 was abrogated with Article 18 of Decree Law nº659.
114 Council of State 1st Chamber, E:2008/1570-K:2009/94, 19/01/2009; Council of State 1st Chamber, E:2005/164-K:2005/357, 14/03/2005.

methods[115]. Resolution of cases regarding the objections of students to exam grades by a commission determined by the Council of Higher Education can be given as an example. Since, court has very limited scrutiny, especially in disputes that require technical knowledge and expertise, disputes are generally resolved according to expert opinion. The function of court here is only to approve expert report[116]. Indeed, in its jurisprudence, the Council of State considers it unlawful for a tribunal to directly resolve issues that require technical expertise without seeking opinion of an expert[117]. Resolution of disputes by a committee having ability to evaluate the conflict will increase effectiveness and satisfaction of decision.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS IN ADMINISTRATIVE LAW: HOW TO MAKE THEM USEFUL?

In French law, rules governing contentious administrative law are found in *Code de Justice Administrative* (CJA) adopted in 2001. As in Turkish law, it is accepted that dispute resolution power must be exercised by administrative justice which may implement best privileged legal regime in relations with state. This fact is so deeply rooted that alternative methods were seen for a long time unnatural[118]. French *Conseil d'Etat* has been accepted as the main authority in supervision of administration in terms of compliance with the law and in resolving administrative disputes. Besides, the idea of execution of alternative methods was difficult to implement in France, where concept of legality is at center[119].

This situation has changed for reasons which *Conseil d'Etat* indicates in its report of 1993. Apart from well-known element of administrative justice's congestion, *Conseil d'Etat* invoked: the need to consider fairness in settlement of certain disputes; saved time, recent developments of certain contractual disputes; concern to bring administration and citizens closer by allowing a direct dialogue[120]. Beside reforms to improve traditional mechanism of judicial review[121], new dispute resolution methods has begun to be applied.

One of the oldest alternative method of resolving administrative disputes is to bring an administrative appeal. In French law, administrative application is

[115] Özbek (n10) 98; Cidecigiller (n36) 36.
[116] Çolak (n13).
[117] Council of State 10th Chamber, E:2005/1870-K:2006/2294, 10/04/2006; Council of State 10th Chamber, E:2001/1968-K:2003/692, 25/02/2002.
[118] Bousta and Sagar (n48) 57.
[119] ibid 59.
[120] Auby (n46) 10.
[121] Such as reforms concerning injunctions and possibility of issuing urgent judgments since 2000.

not required before filing a lawsuit, unless it is expressly regulated by law[122]. The Constitutional Council has ruled that obligation of a prior appeal does not call into question the exercise of right to seek against action before a court[123].

In practice, administrative appeals correspond to another aspect of problem. *Conseil d'Etat* has never really endeavored to give administrative appeals, a properly developed organization. In absence of legal provisions there are no clearly established procedural guidelines. It is *Conseil d'Etat* who accepts that even a verbally presented appeal may be admissible. The aggrieved person may raise any issues in the appeal, both related to fact or to legality or based on equitable considerations. Administrative appeals commonly have no suspensive effect on contested action[124].

There is no guarantee of impartiality and administrations are usually in favor of previous decisions, so administrative appeals are far from being succeed in resolving disputes. *Conseil d'Etat*, whose role has not been negligible, was thought to consider administrative appeals as a minor means of settling disputes. Methods of applying to *defenseur des droits* and recourse to mediation have become more effective with the amendments made in legislation **(A)** [125]. Moreover, independent authorities have been established within the administration, that are responsible for dispute resolution and which carry out functions as mediator **(B)**.

A. Activating Current Mechanisms

In order to reactivate alternative procedures, amendments were made in the fields of authority and scope of activity of mediator **(1)** and of ombudsperson **(2)**.

1. Tendency to Resolve Disputes through Mediation

After European Union Directive No. 2008/52 was transposed in domestic law in 2011, administrative disputes could be resolved through mediation if one of the parties is a European Union's citizen[126]. However, for disputes between administration and French citizens, mediation procedure could not be applied. Finally, with Article L.213 added to CJA in 2016, mediation became possible in administrative procedures, where mediation is defined as any structured process, by which two or more parties attempt to reach an agreement for amicable resolution of their differences, with assistance of a third party, chosen

122 Constitutional Council, nº88-154, 10/03/1988.

123 Gilberg (n1) 24.

124 Auby (n46) 14.

125 Conseil d'Etat, *Régler autrement les conflits: conciliation, transaction, arbitrage en matière administrative* La Documentation française 1993.

126 Dir. (n34)

by them with agreement. Mediation procedure can be initiated *ex officio* by court or upon request of parties[127], that deals with entirety or part of a dispute[128].

Mediators exercise their mission with impartiality, competence and diligence. As pointed out by Benard-Vincent: "mediator has become a new player in administrative law, positioned between administration and judge"[129]. Person who ensures mediation mission must have, through the exercise present or past of an activity, the qualification required given the nature of dispute[130].

Mediation is subject to the principle of confidentiality. Findings of mediator and statements collected during procedure may not be disclosed to third parties nor invoked or produced within the framework of a jurisdictional proceeding without parties' agreement[131]. There are two exceptions: presence of overriding reasons of public order or reasons related to protection of child or integrity of a person. The CJA defines two types of mediation: initiated by parties or by judge. Whatever the procedure is, mediation is always subject to agreement of parties even if they have not initiated it[132].

Mediator might be designated by the parties of dispute; the president of tribunal may also organize a mediation mission and appoint a mediator. When a tribunal is seized for a dispute, president of the court may order mediation mission to try to reach an agreement after having obtained their consent[133].

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127 Assemblée Nationale, 'Rapport d'Information sur l'évaluation de la médiation entre les usagers et l'administration' nº2702, 100, www.assemblee-nationale.fr; David Taron, 'Pourquoi et comment recourir à la médiation administrative?' www.village-justice.com/articles/pourquoi-comment-recourir-mediation-administrative 36131.html

128 Article R.213-1 of CSP

129 Georgina Benard-Vincent, 'Les enjeux de la médiation en droit administratif' (2017) La Grande Bibliothèque du droit www.blogdroitadministratif.net/2017/07/28/les-enjeux-de-la-mediation-en-droit-administratif. This subject indeed holds all the attention of doctrine: "the qualities of the mediator guarantee the balance of the parties." (Audrey Dameron, 'Les modes alternatifs de règlement des litiges administratifs: pour un équilibre des parties?' (2017) 101 Petites affiches, www.lextenso.fr.)

130 It is interpreted that the term "according to the case", should militate in favor of recourse to mediation professionals, magistrates can also refer to the list of mediators drawn up by each court of appeal. (David Taron and Jean Grésy, 'La médiation administrative: panorama des récentes évolutions' (2017) 169-170 Petites affiches www.lextenso.fr.) One of the difficulties for litigant and judge who wish to resort to mediation remains unquestionably the choice of mediator. But, article L.213-2 of CJA does not require that mediator presents guarantees of independence necessary. (Bertrand Nuret, 'La médiation en droit public: d'une chimère à une obligation?' (2019) 9 La Semaine juridique- Administrations et collectivités territoriales www.lexisnexis.fr.)

131 Gilberg (n1) 26.

132 Assemblée Nationale (n127) 100.

133 Taron (n127).

Time limits for judicial remedies are interrupted and prescriptions are suspended from the day on which, parties agree to resort to mediation, that begin to run again from the date on which either one or both parties or mediator declares that mediation is over. If dispute cannot be resolved within six months, litigation period begins to run[134]. Here exercise of a non-contentious or hierarchical appeal does not interrupt time limits again, unless it constitutes a mandatory prerequisite[135].

All kinds of administrative disputes can be brought before a mediator, but the CJA establishes an absolute prohibition which provides that "the agreement reached by parties cannot infringe rights of which they do not have free disposal". So, it will be impossible to resort to mediation if it results in renunciation of a fundamental right. It must be considered a priori that mediation should not lead a party to renounce exercise an action for excess of power which proceeds from the defense of interests beyond the sole parties. Also, recourse to mediation should also be extremely restricted when dispute involves sovereignty matters, fundamental interests of public persons or public interest[136]. In general, compensation demands which come under of full remedy action will be suitable for mediation process. Other areas where subjective rights are at stake, it is applicable. The recourse to mediation will be possible on questions such as progress of public agents, or issues in which trade unions could bring the claims for their members.

For certain administrative disputes mediation is obligatory[137]. The Constitutional Council did not find mandatory mediation requirement before exercise of the right to file before the court unconstitutional[138]. In such cases, prior mediation must be initiated within the period of two-months. Administrative authority must inform aggrieved person of this obligation and provide contact details of mediator. Otherwise, deadline for contentious appeal does not run. Here also, remedy to competent mediator suspends periods, which start to run again from the date on which mediation is declared over.

The texts do not determine deadline for termination of mediation process[139]. However, abuses should remain marginal since each party and mediator may end process. If mediation process is commenced by judge, judge himself

[134] Gilberg (n1) 19.

[135] Assemblée Nationale (n127) 101.

[136] Taron (n127).

[137] Before starting lawsuit concerning decisions relating to active solidarity income, relating to exceptional end-of-year aid which is granted by the State, relating to personalized housing assistance solidarity income and relating to specific solidarity allowance, procedure of mediation has to be exhausted.

[138] Constitutional Council, n°2016-739, 17/11/2019.

[139] Assemblée Nationale (n127) 101.

determines lenght of process. It can be terminated earlier if a party or mediator so requests. Result of mediation remains binary: either mediation is succeeded or it turns out unsuccessful. If it is successful, mediation must be formalized in writing, with a classic form of protocol. In the event of failure, filing period starts to run again from the date on which mediation terminates unsuccessfully[140].

2. Adventure of Ombudsperson: from "*Médiateur de la République*" to "*Défenseur des Droits*"

The institution of ombudsperson has entered into French Law under the name "*Médiateur de la République*" in 1973, which was only responsible for remedying administrative dysfunctionments, without competing with judiciary at the beginning. This authority was found a *bizarre and useless creature*, which was widely criticized on its independence[141] and decisions' effectiveness[142]. A constitutional amendment on establishing *défenseur des droits*, which replaces *médiateur de la république* was made in 2008. With this revision, ombudsperson became an independent constitutional authority[143]. But this new institution could not change the nature of ombudsperson, which is linked to executive by still being impartial and independent[144], which does not receive instructions from any authority in exercise of its power. *D*éfenseur des droits may not be prosecuted, investigated, arrested, detained or judged on occasion of opinions in exercise of his functions. This immunity is identical to that which Article 26 of Constitution defines for members of parliament.

Applications to *défenseur des droits* are not accepted as an administrative nor judicial remedy, and have no suspensive effect on filing period. Therefore, sometimes a choice has to be made between ombudsperson and judiciary, which does not contribute to the success of *défenseur des droits*[145]. It is not possible to file a lawsuit against his decisions[146].

*D*éfenseur des droits can be seized directly by individuals[147], whose scope of activity covers disputes between administration and individuals, but disputes between administration and its officers remain excluded[148]. Are within the field

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140 ibid 101.

141 Council of State Ass, n°5.130, 10/07/1981.

142 As in the English model, the *médiateur de la république* was appointed by the government and could receive referrals only from a member of parliament, not directly from individuals. He could not be dismissed by the parliament.

143 As for the efficiency of institution, in 2020, *défenseur* received around 96.894 complaints. (Defenseur des Droits (2020) Report, www.juridique.defenseurdesdroits.fr.)

144 Bousta and Sagar (n48) 77.

145 ibid 79.

146 Council of State 7th et 2nd Chambers, n°414410, 22/05/2019.

147 Article 5 of Organic Law.

148 In comparative law, ombudsperson has been given an active function in disputes related to

of competence of *défenseur des droits* disputes concerning: protection of rights of public services' users and children, implementation of security personnels' deontology, discrimination and equality[149]. *Défenseur* might be applied for disputes arising from public services carried out by private law persons[150].

Secondly, transactions in civil or criminal matters are also new prerogatives of ombudsperson in case of discriminations that did not lead to a court action. Here, *défenseur des droits* may directly intervene in settlement of disputes between individuals. He may suggest that individuals involved conclude a transaction to put an end to dispute but also be able to intervene before any jurisdiction for protection of rights and freedoms. He has the power to appeal before a court for disputes within this context. In this case, ombudsperson may decide a fine for individuals and legal entities. Here, transaction has to be homologated by public prosecutor. If transaction is rejected or not implemented, *défenseur des droits* can directly seize criminal court.

While executing his supervision, *défenseur des droits* has authority to investigate, gather evidences, expert opinions, negotiate and settle compromises between individuals and administration, change practices of public institutions, request disciplinary actions and express proposals for changes in existing law. In French law, investigative power of *défenseur* is empowered by sanctions prescribed in Law. All persons who reject demands of ombudsperson will be liable to penal sanctions[151].

Within its impowered relationship with judiciary, *défenseur des droits* may seize court if his order addressed to administration remains without effect. In this case, *défenseur des droits* may address to administrative court for an injunction to administration to order necessary measures[152]. But if this demand also remains without effect, all he can do is writing a special report. However, *défenseur* has also indirect influences on judiciary. In practice, in 68% of cases, judges confirm observations or advices of *défenseur*[153]. For example, in one of its decisions in 2019, *Conseil d'Etat* annulled administrative court of appeal's decision by considering recommendation of *défenseur des droits*[154].

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public personnel. In Sweden, according to article 7 of Act with Instructions for Parliamentary Ombudsmen, if an authority has decided against an official in a case, involving application of regulations in law and matters of discipline or dismissal, temporary deprival of office because of criminal acts, an Ombudsman may refer case to a court for amendment of decision. (www.jo.se/en/About-JO/Legal-basis/Instructions)

149 Gilberg (n1) 15.

150 Jean-Claude Zarka, 'Le Défenseur des droits' (2011) Rec. Dalloz.

151 ibid.

152 Bousta and Sagar (n48) 79.

153 ibid 80.

154 Council of State 4th et 1re Chamber, n°411132, 30/01/2019.

Finally, *défenseur* can seize competent disciplinary authority when in face of events which he deems sanctionable[155]. In this case, disciplinary authority must inform him of result of his referral and indicate reasons in absence of disciplinary proceedings. The Constitutional Council made it clear that competences of *défenseur des droits* in disciplinary matters must comply with rules guaranteeing independence of courts[156]. Here, ombudsperson has only authority to initiate disciplinary investigation[157].

In France, ombudsperson conserves his restricted status, that is promoted with judiciary, who may demand an injunction from administrative courts in case that his recommendations are not followed by administration. This possibility forms a bridge between ombudsperson and judiciary[158]. Indeed, administrative judge has power to give instructions to administrations. The purpose of this authority, which finds application without requirement of filing a lawsuit, is to prevent the occurrence of irreparable damages resulting from unlawful actions of administration[159]. In this respect, if administrative activity is found unlawful by ombudsperson, there is no doubt that this situation will force judge to give injunction to administration. Besides, there is a tendency in practice of *Conseil d'Etat* to use ombudsperson's decisions, unlike situation in Turkey.

However, there are important institutional deficiencies in terms of ensuring effectiveness. In case, decisions or requests of *défenseur* are not followed, he may only initiate disciplinary investigation by seizing competent authority, but here investigation is not carried out by ombudsperson, who does not have a direct disciplinary authority *vis-à-vis* public officials. In Sweden ombudsperson directly initiates disciplinary investigations against public officials who commit crimes[160]. Also pursuant to Article 6 of Act with Instructions for the Parliamentary Ombudsmen[161], ombudsperson has authority to begin a criminal procedure concerning disputes that can be defined as crime[162]. Experiences in Scandinavian countries show the coherence between degree of ombudsperson's

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155 Atay (n92) 58.

156 Constitutional Council, n°2011-626, 29/03/2011.

157 While preparation of Organic Law, one more competence was proposed to be given to *défenseur des droits.* Filing before administrative court a request favor of a group of people having same interest. which was abandoned by Senate. (Zarka (n150).)

158 Erdoğan Bülbül, 'Fransız İdari Yargılama Hukukunda İvedi Yargılama Usulleri Reformu' (2002) Danıştay ve İdari Yargı Günü 134. Yıl Sempozyumu 63.

159 René Chapus, *Droit du contentieux administratif (Montchrestien* 2008) 1485, Olivier Gohin and Florian Poulet, *Contentieux administratif*, (LexisNexis 2015) 401.

160 Kağıtçıoğlu (n103) 498.

161 www.jo.se/en

162 Swedish Ombudsperson devoted more and more time on problems about officials of administration. (Orfield (n84) 19.)

power over public officials and effectiveness of recommendations[163].

B. Looking for New Alternative Methods

In addition to alternative methods that find application in all administrative activities, procedures applied to certain public services or in a geographical area have been introduced to French law in recent years. Since generally experts in the field resolves disputes in these procedures, fair results are provided as a result of an examination that are similar to the judgment of court. Besides, since these internal mediation institutions also determine experts taking part in judicial proceedings, their decisions are also taken into account by courts. Internal mediation is applied in various public services: public transports, national railways, postal services, education, economy and finances, energy, municipal public services. These procedures are facultative before applying the court for cases within their authority, are difficult to list because their fields are quite diverse[164]. Since each procedure is subject to different rules, in this study, to give an idea, we will examine alternative methods applied in health services.

There are three main bodies for compensation of damages arising from execution of health services through non-judicial methods. They might be listed as Commissions of conciliation and compensation (*Commissions de conciliation et d'indemnisation*-*CCI*), National commission on medical accidents (*Commission nationale des accidents médicaux–CNAMED*) and Commission for compensation of medical accidents, malpractice and hospital infections (*Office national d'indemnisation des accidents médicaux, affections iatrogenes, infections nosocomiales ONIAM*)

Firstly, *CCI* operates at regional level with the French Community Health Law of 2002 (*Code de la santé publique* -CSP). There are currently seven *CCI* jurisdictions in France: Paris, South Lyon, North Lyon, West, North, Nancy and Great West which compensate damages arising from health services taking place within its jurisdiction[165]. *CCI* was established to reduce overload of judiciary through amicable settlement procedures. Application to CCI is free of charge.

Individuals suffered damage due to diagnosis, treatment activities, preventive health services and persons who are indirectly aggrieved as a result of their relations with them can apply to *CCI*. The Commission is authorized to resolve any dispute between health service providers and beneficiaries:

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[163] Orfield (n84).

[164] Bousta and Sagar (n48) 72.

[165] Claudine Bergoignan Esper and Pierre Sargos, *Les grands arrêts du droit de la santé* (Dalloz 2016) 541.

disputes between healthcare personnel, healthcare institutions, administration and manufacturers of medical products and beneficiaries. Application to commission is optional[166], which suspends filing period[167]. The Commission has to make a decision within six months from application which has power to carry out all kinds of examinations and researches, including expert report, on-site viewing, hearing of witnesses, collection of information and documents. The Commission decides on issues such as cause and scope of damage, regime and amount of compensation[168]. As a result, the Commission may take two types of decisions.

In cases of liability for fault, damage is requested from service provider. However, if service provider has no fault, compensation for damage will be requested directly from ONIAM.

ONIAM is a public legal entity related to Ministry of Health, which has financial autonomy and its own budget, whose main function is making payments to those suffered losses due to health services[169]. The main task of *ONIAM* is compensating damages incurred during execution of health services within principle of national solidarity. In initial version, *ONIAM* would only compensate damages incurred without fault. According to current legislation it operates in cases of fault liability, and liability without fault. Decision procedure between *ONIAM* and *CCI* differs depending on existence of fault[170]. *ONIAM* recourse to administration or public official if there is liability for fault. In cases of liability without fault, *ONIAM* is held primarily responsible.

In cases where there is a fault, compensation procedure differs according to amount of damage. It is possible for *CCI* to operate conciliation procedure or friendly settlement. These two procedures differ considerably in terms of role of administration and parties[171].

If more than 24% of physical integrity or psychology of aggrieved person is affected, if there is a decrease of at least 50% in working power of aggrieved person continuously for 6 months or intermittently for 12 months, or in case of a permanent inability or damage to private life as a result of visible and abnormal harms occurring during preventive, diagnostic or therapeutic activities. it is possible to operate a settlement procedure. In terms of lesser damages, only reconciliation procedure can be initiated[172].

166 Didier Truchet, *Droit de la santé publique* (Dalloz 2016) 543.
167 Cour administrative d'appel Bordeaux 1re Chambre, n°10BX00463, 03/02/2011.
168 Esper and Sargos (n166) 543.
169 Claudine Bergoignan Esper and Marc Dupont, *Droit hospitalier* (Dalloz 2014) 911.
170 Esper and Dupont (n170) 912.
171 Truchet (n167) 281.
172 Françoise Avram 'Présentation des commissions de conciliation et l'indemnisation' (2014) 4-5 Bulletin de L'Académie Nationale de Médecine 705.

CCI has a limited dispute resolution power in reconciliation procedure. Here, only instrument of the Commission is to invite parties for conciliation. Before the entry into force of *CSP*, conciliation procedure for damages arising from health services was carried out by commissions established within each health institution. Resolution of dispute with this method is carried out entirely upon initiative of parties[173]. If a settlement is reached, a protocol is drawn up in case of failure, parties may apply before the court.

If damage is above the specified level, *CCI* assumes an active role. In amicable settlement, contol of parties on procedure is reduced and *CCI* functions similar to a judiciary[174]. In this case, upon the appeal of aggrieved person *CCI* prepares an opinion within a period of 6 months whether administration or its personnel has fault and amount of damage. Here, events caused the damage, reasons for liability and type of compensation are examined. If necessary, file is communicated to a medical expert. It is not possible to file a lawsuit against this opinion until process is complete. If *CCI* determines that damage is below foresaid level, conciliation procedure is applied with a decision of non-competence. In case *CCI* finds out that health service provider has fault, it notifies public official who caused damage and his insurer and calls them to pay damage[175].

In this case, insurance company must submit an offer within 4 months. If offer is accepted by aggrieved party, an agreement is signed. Damage should be compensated within a month from offer's acceptance; in any case, within a year from the date of application. The text signed by health personnel or insurance company and aggrieved party is subject to private law[176]. Here, insurance company reserves right to file a recourse lawsuit against *ONIAM* or third parties if it is of the opinion that health personnel has no fault[177].

If insurance company does not submit an offer within stipulated time or amount insured by insurance company is lower than loss or personnel causing damage is not insured, *ONIAM* replaces insurance company and pays the loss. The contract signed between *ONIAM* and aggrieved party is subject to private law. Since *ONIAM* will be successor of aggrieved person, it can recourse to health personnel or insurance company[178]. During recourse proceedings, it is possible for judge to impose a penalty of 15% of damage amount.[179]. If insurance company accepts responsibility but offers a different sum, amount

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173 Esper and Sargos (n166) 543.

174 Truchet (n167) 285.

175 Avram (n173) 706.

176 Cour Administrative d'appel de Bordeaux 1re Chambre, nº10BX01629, 23/12/2010.

177 Truchet (n167) 286.

178 Conseil d'Etat, nº360280, 17/09/2012.

179 Truchet (n167) 286.

between loss determined by *CCI* and offered by insurance company will be covered by *ONIAM*. Here, *ONIAM* can follow the above recourse procedure with the same faculties[180].

In the last scenario, if applicant does not accept offer submitted by *ONIAM*, he may apply directly to court.

Second type of compensation exercised by *ONIAM* depends on administration's strict responsibility. If damage is greater than cetain amount and there is no fault, with principle of social solidarity, damage is covered by *ONIAM*[181]. In cases where damage on physical or psychological integrity of a person causes at least 25% loss of workforce or in case of death, damage is compensated by *ONIAM*[182]. Damages arising from compulsory vaccination activity; HIV transmission due to blood product transfer or injection carried out within French Blood Institute; damages caused by hepatitis B or C virus and T-lymphotorapique diseases are covered by *ONIAM*[183]. Also, damages occurred as a result of growth hormone treatment carried out by French Pituitary Society, radiological treatments or fulfillment of public health measures taken by Ministry of Health and hospital infections are compensated in the context of strict liability[184].

In the event of liability without fault, it is also possible to apply directly to *ONIAM*[185]. Aggrieved party can first apply to *CCI* and after decision of *CCI* or can directly apply to *ONIAM*. In this case, *ONIAM* is not bound by amount determined by *CCI*[186].

Acceptance of *ONIAM's* offer by aggrieved party is subject to private law. It is regulated that *ONIAM* should pay the amount within a month from the protocol; it is not possible to recourse to a certain public personnel or insurance company[187]. If *ONIAM* does not offer any compensation within 4 months or the offer is not accepted, legal action might be taken against *ONIAM*. In cases where liability in fault and strict responsability are combined, *ONIAM* is obliged to pay compensation in proportion to its own responsibility[188]. Here, *ONIAM's* secondary liability may be mentioned if health personnel or insurance company does not compensate damage proportainate to their liability.

180 Esper and Sargos (n166) 557.
181 ibid 546.
182 Françoise Avram, 'Dommage corporel et droit de la santé: l'avocat, une plus-value! Choix entre CRCI et juge' (2009) 108 Gaz. Pal 46.
183 Esper and Dupont (n170) 912.
184 Truchet (n167) 280.
185 Esper and Sargos (n166) 547.
186 Esper and Dupont (n170) 914.
187 Conseil d'Etat, n°355052, 12/12/2014.
188 Conseil d'Etat, n°327669, 30/03/2011.

CONCLUSION

Due to increase in administrative justice's workload and formalism of procedural rules, use of alternative dispute resolution methods has become a necessity in order to provide a fair judgment. In Turkish administrative law, as in French law, great importance is given to the scrutiny by the Council of State, which is accepted as the main authority that protects fundamental rights of individuals against administration. Also, because principles of legality and equality are applied strictly in administrative law, it is possible for administration, which has a very narrow margin of appreciation, to benefit from alternative methods to compensate damages arising from its activities in very limited situations.

This study demonstrates that in accordance with constitutional provisions, alternative methods cannot replace the judiciary, but it is possible to make use of them in pre-trial phase. Main alternative procedures in current legislation are administrative applications, mediation and application to ombudsperson. Since mediation is applicable only for private law disputes of administration, its use remains limited. Application to ombudsperson and administrative applications are quite advantageous methods compared to administrative judicial review in terms of subject and scope of control and procedures applied. However, problems related to impartiality in administrative applications and the fact that recommandations of ombudsperson are not binding have led to their failure. Besides, lack of legal protection and reluctance of public personnel who carry out these procedures is another reason of this failure.

Attempts to increase application of alternative procedures in French law, where *Conseil d'Etat* holds a high position, may also be indicative for Turkish law. Accordingly, offsetting forth compulsory mediation procedures to compensate damage before full remedy lawsuits may provide the plaintiff possibility to recover his loss faster; it will also reduce the amount of compensation paid by administration. Also, in order to ensure effectiveness of recommendations of ombudsperson, it would be beneficial to establish a direct link between institution and administrative judicial authorities or public personnel. Recognizing the authority to impose disciplinary sanctions on public personnel to ombudsperson may also be an effective solution.

The most effective and realistic one of these procedures is supervision by independent authorities. Having their own budget for indemnity payment and faculty to use experts in the field for their control make these methods a real alternative to the judiciary. This compensation procedure, which has not yet been implemented in Turkish law, is applicable within the framework of current constitutional system. Determination of public services to which this method will be applied and establishment of its organizational structure might be subject of a new study.

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