

# The New Turkish Code of Commerce Rules regarding the corporations in a nutshell



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# Message of the president

Following the global crisis, paradigm of competition is changing. We observe that the countries adapting to this new environment develop more quickly and get richer. In this regard, quality of regulations will be more decisive. Turkey is one of the most favoured investment destination for emerging markets investors. Because it is one of the few remaining markets in the world with solid growth potential, thanks to the stable political and economic environment of the last eight years.

Investment friendly environment of Turkey is further strengthening with the new Commerce Code, which will start a new era in the Turkish economy. International standards will rule the business life. Therefore we are urging companies, especially SMEs to act now and start preparing for the new code. Otherwise, they will have difficulty in global competition.

By publishing this book, we aim to help companies adapt to the legislative changes. Also we are organizing series of conferences all around Turkey to inform the businesses on this issue.

In cooperation with Deloitte, one of the most prestigious consulting agencies in the world, we also aim to inform the foreign companies that have already made or plan to make investments in Turkey during this period.



**Rifat Hisarcıkloğlu**

President, Foreign Economic Relations Board (DEİK) and Union of Chambers and Commodity Exchanges of Turkey (TOBB)  
Vice President, Eurochambers

As Foreign Economic Relations Board (DEİK), we are the leading business agency in Turkey that brings together foreign and domestic companies.

We organize investment conferences in New York, London, Madrid, Dubai, Abu Dhabi and Mumbai as a prominent agency that opens its doors for every local and foreign company. We have the largest business network with 33 founding members, 103 business councils and 108 chamber representatives worldwide.

I would like to address the foreign companies that have made or plan to make an investment in Turkey: the new Turkish Code of Commerce will rebuild the business life. Should you want to expand your business, you need to start preparing today. Don't forget the fact that luck comes along when you are prepared for it.

# Message of the CEO

Challenges regarding corporate governance has encouraged the Turkish lawmaker to introduce a new progressive commercial law system. The new Turkish Code of Commerce, reflecting this approach harbors new rules for traditional institutions as well as new institutions, such as scission, companies with a sole shareholder, group of companies, auditing, IFRS, proxy, cumulative voting and information society issues. Such institutions, which have been already settled in Turkish legal practice without legal regulations in the codes, have been regulated in TCC with a modern perspective. On the other hand traditional institutions such as unfair competition, agency contract, shareholders' rights and mergers have been reformed with respect to new challenges brought by European and Swiss Law.

TCC announces two cardinal reforms for Turkish Law :

1. Turkish Commercial Law practice until the preparation of this Code has not been put aside, whereas concrete solutions have been developed for prevailing legal problems.
2. Turkish Commercial Law has been harmonized with Swiss Law as well as EU Law.

In this context, certain legal institutions deprived of any legislative regulation have been appraised in the Code, whereas inadequate norms have been replaced by modern rules.

Principal characteristics of TCC

- 1) A Code which considers current commercial and economic developments and mechanisms,
- 2) A Code which conforms with several disciplines such as Banking Law, Securities Law, Competition Law as a part of Economic Law,



**Hüseyin Gürer**  
Managing Partner & CEO

3) A Code which may answer crucial legal questions raised by current conflicts thanks to its comprehensive reasoning,

4) A Code which constitutes the main discipline of Economic Law, particularly with its complementing regulations.

Viewed from these characteristics and its comprehensive reasoning, TCC is a distinguished Code, which reflects the tendency of Turkish lawmaker to harmonize its own legal system with modern Law. The enforcement of TCC will set out a legislation, which may propose dynamic mechanisms in line with international law and economics.

Hence, that the Turkish business atmosphere is surrounded by the urgency of TCC. Accordingly, the new Code necessitates the companies to adapt reform regarding the structure and the transactions of the enterprise. Companies effectuating this reform will enjoy many opportunities engendered by the new TCC in order to become more competitive by using the international business language. It is an accepted fact, that willing companies will acquire great efficiencies from this permanent adaptation of corporate governance rules.

# Introduction

The new Turkish Commercial Code (hereinafter "TCC" or "the new TCC") fosters new dimensions and perspectives for Turkish law as well as for the integration of Turkish legal system to the European Union. The new TCC shall enter into force as of 01.07.2012, whereas certain rules regarding new accounting standards and auditing shall take effect as of 01.01.2013 and whereas the obligation to operate a web site shall inure as of 01.07.2013. Thus, the current TCC is in force until the new TCC shall come into effect.

TCC consists of six main chapters: Enterprise Law, Company Law, Securities Law, Transportation Law, Maritime Commercial Law and Insurance Law. Compared with the current TCC, the new TCC treats Transportation Law with a separate chapter. Reviewing the characteristics of each chapter, it is very evident, that TCC challenges to put a comprehensive law reform into practice. The current TCC, enforced fifty years ago and formulated taking into account the modern developments in German and Swiss law, has not been mainly reformed within fifty years, despite many developments in European Law. As a consequence of this, Turkish Ministry of Justice has formed a commission for the preparation of a new TCC Code. This commission, consisting of academics, judges, attorneys, bureaucrats and experts, has carried out a in depth research on the European Economic Law doctrine and jurisprudence. In this research, solely main characteristics of the new legal regime shall be reviewed in brief.

New Company Law involves a comprehensive reform by TCC. First of all, the new system attaches great importance to restructuring mechanisms such as fusions, scissions and transformations. On the other hand, one man companies and group of companies appear as new figures of the Code. Particularly, joint stock companies face a broad new legal regime, which implements modern rules of Company Law and which regulates certain new legal institutions. On the other hand, the equity character of limited liability companies is reinforced thoroughly.

In addition, Transportation and Maritime Law rules have been reformed in line with international agreements relating to these disciplines. Particularly, the chapter of Insurance Law has been revised taking into account the actual problems of Turkish insurance sector and new developments as well as new institutions of Modern Insurance Law. In this framework, each chapter of TCC has been demonstrated with its main characteristics below. Regarding the scope and the concept of this research, each chapter may not be analyzed by all of the legal problems and institutions of the related chapter but a general view and a focus on new institutions has been aimed.

# Enterprise law

Preserving the characteristics of the current TCC, TCC is orientated to harmonize the Turkish Enterprise Law with European Law. Main points regarding this reform refer to accounting principles for enterprises, commercial books, commercial registry, unfair competition and further to agency contract.

## New Accounting Principles and Commercial Books

One of the most remarkable reforms of the TCC is enforcing modern accounting rules and new norms for commercial books. In this framework, TCC prescribes that all the accounting systems of Turkish enterprises shall be arranged in conformity with Turkish accounting standards, which have been and will be further enforced according to internationally accepted financial standards (IFRS). In addition to that, the enterprise shall document and file all of its commercial transactions, if necessary electronically, which means that electronic registry mechanisms shall be integrated within the accounting system of an enterprise (Art. 64/2 TCC). On the other part, any records to appear in the commercial books of a merchant shall be complete, correct, on time and systematic ( Art. 65/2 TCC). The most distinctive aim of the lawmaker is, as reflected in the Code, "to enable an expert to achieve a proper picture of the operations and of the financial situation of the enterprise within a reasonable period". In connection with this hypothesis, rules referring to commercial books, accounting systems and auditing shall be regarded as a whole and the practice shall be conducted in a manner to enable transparency and reliability.

**Commercial Registry** Establishing an electronically based registry system is one of the most crucial concerns of TCC. Electronic registry will serve to implement the principle of " true and fair view". Through the electronic registry, the transparency of the enterprise records will be reinforced, whereas positive and negative functions of the registry system shall be conducted in a more efficient manner. In addition, the State and the Chamber of Commerce, which shall hold the commercial registry, are successively responsible for the damages arising from the transactions carried out by the registry holder (Art. 25/2 TCC). With a global approach, the rules regarding the electronic registry and the rules in respect with the information technologies shall serve for a better implementation of the transparency.

**Business name** The rules referring to the business name have been reformed in order to enable a transparent and reliable system. In this system, the lawmaker aims to enable third parties to get proper information about the legal situation of the enterprise. Particularly, the TCC underlines the principles of transparency and true and fair view (Art.39 TCC ff.) In addition to that, Art. 39 TCC evidently demonstrates the correlation between the legal regime surrounding the business name and the rules related to information technologies.

**Unfair competition** Competition law and the regime concerning unfair competition are two disciplines, which are continuously treated with a modern view in European and Swiss law systems. The new legal regime concerning unfair competition defines the concept of unfair competition and demonstrates the connection between this legal regime and the competition law. Other dimensions of the reform shall be mentioned as the enumeration of several versions of unfair competition and further more efficient rules for the compensation of the damages arising from unfair competition. The Code enumerates and classifies many trade practices as unfair competition cases in conformity with the decisions of the European Court of Justice.

Some examples for unfair competition are as follows :

- Fraudulent sale and advertisement practices
- Procuring a person to invade or dissolve his contract.
- Benefiting from other's products in an inequitable manner
- Acquiring and declaring other's business secrets.
- Invading certain rules enforced for a certain branch of profession
- Utilizing inequitable general terms and conditions,

TCC pays special attention to preserve the Turkish jurisprudence evolved by the Turkish Court of Cassation up to date. Despite adopting the Swiss law reform in respect with unfair competition, the lawmaker intends to maintain the formation of Turkish law in this discipline. New rules for unfair competition distinguish themselves by safeguarding consumer rights. In spite of the existence of special regulations for consumer protection, TCC equivalently elevates the consumer value, since competition restrictions invade the consumer's legal status. The core of unfair competition law is orientated to protect all the market participators.

### **Agency contract**

As the focal point of foreign investment, the agency contract is very common in practice. For this reason, the legal regime concerning the agency contract faces an extensive legal reform. On the contrary, other similar agreements such as franchising agreement and exclusive sales agency agreement are not treated by TCC. Apparently, TCC seems to restrict the practice of these agreements solely with general principles of law and with certain regulations of Competition Law.

The most remarkable points of the new rules are as follows: The rule for the unauthorized agency has changed in a manner, that in the event that a contract has been concluded by an unauthorized agent and further in the event that the mandator does not assume this contract at once after he has been informed of the conclusion of this agreement, the unauthorized agent is responsible to fulfill this agreement (Art. 108 TCC).

On the other hand, TCC reinforces the agent's right to acquire the agency fee. Accordingly, the agent shall deserve a fee for each of his transactions, equivalently for the transactions not implemented by the agent but implemented in his geographic area. Art. 113 TCC preserves the right of fee, even in the case that the agency contract has been terminated. The agent deserves the claim for fee for the transactions started before the termination of the contract.

The obligations of the mandator have been equivalently enumerated in TCC, whereas TCC demonstrates which obligations shall be fulfilled by the mandator in order to urge the agent to effectuate his obligations (Art. 120 TCC). As mentioned in the preamble, TCC characteristically safeguards the rights of the agents, since Turkish enterprises appear as agents rather than mandators. As a consequence of this, the parties to an agency contract are deprived of replacing the rules in TCC to the disadvantage of the agent.

Another new dimension of agency contracts is portfolio management. In spite of the lack of regulation, Turkish Higher Court has implemented portfolio compensation for the agency agreements dissolved without the fault of the agent. Taking into consideration the regulation in Swiss Law and the decisions of Turkish jurisprudence, TCC enforces a specific norm for portfolio compensation, namely Art. 122 TCC. According to this regulation, in the event that 1. the agency contract has not been dissolved on the basis of the fault of the agent, 2. that the mandator acquires eminent benefits from this dissolution 3. that the agent is deprived of putting forward a legal claim, which he is entitled to put forward under normal circumstances and 4. finally that the principle of equity necessitates the payment of such a compensation, the agent may ask for a portfolio compensation, which shall balance the enrichment of the mandator thanks to the clients acquired by the agent for the mandator and the loss faced by the agent because of the dissolution of the contract without the fault of the agent. TCC advances to release a concrete norm which allows the portfolio compensation for other similar types of agreements such as exclusive sales agency agreements.



# Company law

## General aspects

Through TCC, Turkish company law experiences a comprehensive reform. In this research, we will solely focus on the reforms referring to general principles of company law as well as to joint stock companies and limited liability companies.

The first chapter of Company Law is dedicated to general principles. Considering modern developments in European and Swiss law systems, the Code proposes to enforce many principles and legal institutions which are to a large extent new to Turkish law. TCC encompasses detailed rules concerning mergers, scissions and transformations of enterprises (Art. 134-194 TCC). Existing rules are inadequate to meet the needs of the practice. Considering many decisions of Turkish Competition Authority, there is a very evident lack of rules with material law character, subject to regulate the transformation of enterprises. New rules of this discipline originate from European and Swiss law systems.

Another novelty of the TCC is the legal regime prescribed for the group of companies. Taking into account the academic acquisition of the “High Level Group of Company Law Experts”, TCC enforces a comprehensive legal system for the group of companies. First of all, TCC demonstrates main elements of the group of companies and enumerates fundamental instruments of control. By the means of these instruments, TCC equivalently raises a presumption of control, this means that the rules related to the group of companies will have a critical role in Turkish Company Law.

The new system implements special liability regimes for parent companies. Such liability grounds on the misuse of the control or on the confidence restored by the parent company in the view of third parties.

## Reforms on joint stock companies

Foundation Existing rules related to the foundation of the joint stock companies enable “gradual foundation”, which means that the founders, undertaking a certain part of the capital, may make announcements in order to raise capital. In this alternative, the company shall be founded upon the collection of the whole capital. It shall be recorded that this method of foundation has not gained currency in Turkish practice. As a consequence of this event, TCC renounces the method of gradual foundation and replaces this method with the method of public offer. In this new alternative, the company shall transform a certain part of the capital into pecuniary shares and execute the public offer of these shares within a period of 2 months from the foundation of the company. With this perspective, TCC elevates essential characteristics of joint stock company, by raising its anonymous character. Through this method, even private (not listed) companies may benefit from the advantages of capital markets.

### **Renouncing the “Ultra Vires” principle**

According to Art. 137 of the current TCC, any transactions of a company which fall outside the scope of the business activities prescribed in the articles of association are deemed as invalid. Such transactions are named as “ultra vires” transactions, since all the transactions referring to the core business activities stated in the articles of association of the company are valid and “intra vires”. In line with the 1st Company Law Directive of EU, TCC renounces this principle.

### **Joint stock company with a sole shareholder**

Considering the developments in EU Law, TCC launches the joint stock company with a sole shareholder (one-man company Art. 338/1 TCC). Three essential functions of this regulation are 1) to reconcile the legal regime with the economic truth 2) to establish a new model for investors who require limited liability 3) to constitute a model facilitating the launching and the conduction of group of companies, institutionalization of enterprises and further the establishment of foundations. On the other hand, this reform enables a shareholder to buy other shareholders’ shares and turn the company into a company with a sole shareholder. In the event of such a transfer of shares to a sole shareholder, the board of directors is bound to register this fact with the commercial registry within seven days from the transfer. Otherwise the board of directors shall be liable for the damages borne by third parties because of this transfer.

**Registered share capital TCC** allows the joint stock companies to adopt registered capital (Art.332 TCC). Particularly, it shall be stated that even joint stock companies which are not publicly-held may equivalently benefit from this system. This reform reflects TCC’s tendency to diminish the distance and differences between several kinds of joint stock companies. Even companies with a limited circle of shareholders, which consciously refrain from becoming publicly-held companies, may need to adopt registered capital. The start-up capital for the companies, adopting the system of registered capital amounts to 100.000 YTL.

### **New rules and limitations to qualified share capital**

Any property rights and property items may be submitted as a part of capital to a joint stock company (Art. 342 TCC). Considering the evolution of technology and implementing related modern rules, intellectual property rights are classified as a sort of qualified share capital, whereas it is enabled to propose a web site as a qualified capital instrument. TCC implements the general principle for qualified share capital, namely that the instrument shall be alienable and shall not be subject to any liens or legal executions. For preserving the assets of the corporation, TCC prescribes that credits which are not of due date, may not be submitted as a part of capital to the joint stock company (Art. 342/1 TCC).



## Challenges to the decision mechanism of joint stock corporations

### Board of directors

- **Board of directors may be constituted solely by one member** (Art. m. 359/1 TCC).
- **Legal persons may acquire the statute of a board member** (Art. m. 359/2 TCC).
- **The requirement to be shareholder is no more a must for the board members.**
- **Specialization** At least one fourth of the members of the board of directors shall have university degrees. Evidently, this norm serves to the principle of corporate governance, which raises professional skills. But paradoxically, in the event that the board of directors solely consists of a member, such member is not bound to have the same preference. (Art. m. 359/3 TCC).
- **Representation in the board of directors** The composition of the board of directors is normally determined by the majority. However, despite a lack of evident regulation, it is accepted that the articles of association may furnish several groups of shares to be represented in the board of directors under all circumstances. Such preferences may be attributed to several groups of shares or to the minority shareholders. The existing system, as well as TCC does not allow the direct appointment of the member, but the members may be nominated by a group of shares or by minority shareholders. With regard to private (not listed) corporations, there are no restrictions referring statutory representation at the board of directors, so that all the members of the board of directors may be elected through these mechanisms. On the contrary, maximally 1/2 of the directors in a public joint stock company may be elected on the basis of preference stocks (Art. 360/1).

- **Delegation of powers** TCC enacts a detailed legal regime for the delegation of management powers to CEO's and directors. As usual, the new regime classifies management powers as the administrative powers and power of representation (Art. 367 TCC). In the event that the power of representation shall be imposed on a sole person, this person shall be a board member (Art. 370/2 TCC). Contrarily, administrative powers may be delegated to a person, who is not a member at the board (Art. 367/1 TCC). As a consequence of this, all the members of the board may function as non-executive members.

For the delegation of management powers, an evident regulation in the statute is necessary. In case of delegation, the board of directors is obligated to release a directive of organization to enforce a management regime for the corporation, which includes the powers of each administrative subject as well as the hierarchical structure between the board of directors and CEO's and other management bodies. The obligation to release such a directive is in line with the evolution of Modern Company Law through corporate governance principles. Through these mechanisms, it is possible to achieve a more effective liability regime. On the other hand, in the light of the principle of transparency, it will be more evident for third parties, through which management mechanisms the corporation will advance to achieve its own purposes.

Even in case that all the members of the board shall function as non-executive directors; TCC underlines the need for an efficient corporation among the management units. The statute is the exact instrument to achieve this functional cooperation. Due to the management structure, TCC enables the monist as well as the dualist structure. In other words, the management structure may solely consist of the board of directors as well as of the board of directors and the supervision board.

**Quorums** Art. 330 of the current TCC refers to meeting and decision quorums of board of directors. As a consequence of the insufficient wording of this article, the practice has faced difficulties in determining whether a valid decision is formed in certain cases. The new formulation of the new TCC has a very definite and clear wording and underlines the principle of majority (Art. 390 TCC).

**Invalidity of BOD decisions** The current TCC does not include any articles referring the validity of board of director's decisions. The jurisprudence has evolved a theory of invalidity, based on the general principles of Civil Law. Regarding this fact, TCC adopts to enact a specific article for the invalidity of these decisions. In this respect, decisions invading the principle of equality, conflicting with the essential character of the corporation, invading the fundamental rights of the shareholders or further invading the definite allocation of powers between the general assembly and the board of directors shall be deemed invalid (Art. 391 TCC).

**Online BOD meetings** Due to the modern needs of business, TCC enables online meetings of board of directors (Art. 1527 TCC).

**Information Technology Services** Joint stock companies and LLCs shall arrange a web site and inform its stakeholders through this web site. It is the board of director's liability to arrange and conduct this web site and to renew its content continuously. Every joint stock company and limited liability company shall announce its audited statement of accounts in its web site. The corporate web site shall bear comprehensive information for its stakeholders. Benefiting from information technologies will help the corporation to review and reflect his own corporate governance performance.

#### **Division of powers between BOD and general assembly**

Confusion of authorities between the general assembly and board of directors threatens the efficient performance of the governance mechanisms. In order to prevent such confusion, TCC advances to enumerate certain powers of the general assembly and of the board of directors and to determine the mutual position of both decision mechanisms. According to these regulations,

- Absolute and inalienable powers of the board of directors have been enumerated in Article 375 TCC.
- Similarly, absolute and inalienable powers of the general assembly have been enumerated in Article 408 TCC and in some other articles.
- For decisions which are not within the absolute area of each organ, the statute may appoint the competent organ. In the absence of such a regulation, the board of directors is competent to resolve the matter.

### General assembly : A shareholder-oriented perspective

Articles 407-451 TCC, which are regulating the legal regime for the general assembly and obviously preserving the essence of TCC, evaluate shareholder's rights much more as a central point. In TCC, shareholder is not considered as an obligatory body for the existence of the corporation but it is evaluated as a "conditio sine qua non" for the effective conduction of the corporation. This new characteristics of the mentioned rules may be observed in the following mechanisms.

**Representation of the management in the general assembly** CEO's, at least one member of the board of directors and the independent auditor appointed for the inspection of a certain transaction such as mergers shall participate in the general assembly (Art.407 / 2 TCC). This regulation is oriented to enable an efficient coordination among several units of the corporation and to serve for a better information service to shareholders.

**By-Laws** The board of directors shall arrange by-laws referring the mechanisms and the conduction of general assembly and register these by-laws with the commercial registry ( Art. 419/2 TCC). The preparation of by-laws as a complementing source in addition to the statute of the corporation will serve to the establishment of a transparent and efficient corporate organization.

### Quorums in respect with the statutory amendments (Art. 421 TCC).

- a. As of the statutory amendments, TCC differs between listed companies and private (unlisted) joint stock companies. In listed companies, decisions such as capital augmentation, particularly the augmentation of the authorized share capital and the transformation of the company shall be formed with usual quorums (Art. 418 TCC).
- b. Statutory amendments which impose secondary obligations or the obligation to cover the balance losses on shareholders may be solely formed with unanimity (decision quorum).
- c. The amendment of the subject of the company, the creation of preference stocks, restrictions referring the transfer of the shares shall be decided and resolved with the votes of the shares amounting to 75 % of the whole capital (decision quorum).
- d. All other sorts of statute amendments shall be decided on a basis of 50 % of the whole capital (decision quorum).
- e. Contrarily to TCC, in the event that the statute amendment shall not be decided at the first general assembly, the quorums at the second assembly are the same as the ones at the first general assembly.

### **Representation of the shareholder in the general assembly**

For achieving a more efficient participation, TCC appraises a comprehensive regulation for the representation of the shareholder at the general assembly. In this context, the representatives are classified as corporate representative, independent representative and institutional representative (Art. 427 TCC). Besides efficient participation, the rules in respect with representation of the shareholders equivalently aim to draw the framework of the representatives.

**Right of Information** Existing rules in respect with the information right of the shareholder is not preserved satisfyingly. Considering this fact, TCC expands the scope of the information right in a manner to restrict the exceptions solely by commercial secrets and company benefits (Art. 437 TCC).

**Invalidity of general assembly decisions** The existing regime referring the validity of general assembly resolutions has been preserved to a large extent in TCC. However, the grounds of absolute invalidity have been enumerated in order to provide a more secure system of invalidity (Art. 447 TCC). The rules referring the invalidity of such decisions are adopted from Swiss law.

**General assembly online** TCC enables the arrangement of online general assembly meetings, where the shareholders may participate and vote online. In listed companies, the arrangement of online general assembly meetings is obligatory.

### **TCC In the light of corporate governance principles**

Corporate governance principles influence Modern Company Law in a very efficient manner. These principles have evident reflections in TCC. These reflections may be demonstrated as follows:

- TCC underlines an expectation upon the efficient, fruitful and responsible conduction of the board of directors. The economic reality, that directors representing the interests of the controlling shareholder might participate in the board, has been perceived in TCC, whereas the obligations of prudence and fidelity of these directors have been underlined in TCC. TCC elevates the professional management of the corporation.
- The concrete differentiation in TCC between executive and non executive directors enables the corporation to establish a monist- or dualist- structured management organization.
- Specialization At least half of the directors of the board or the sole director shall have graduated a college (Art. 359/3 TCC). This is a clear indication that TCC regards generally accepted corporate governance principles.
- Shareholders rights Shareholders rights have been thoroughly reinforced in TCC. The participation at the general assembly and the utilization of administrative rights has been facilitated through several mechanisms. The representation of the shareholder at the general assembly has been treated with an institutional view. Principle of equality has been safeguarded by an evident regulation (Art. 357 TCC).



- Besides the concept of shareholder, the concept of stakeholder is equivalently taken into account by TCC. The rights of the stakeholders, such as creditors, bond holders, etc. have been safeguarded in TCC.
- Enterprises and corporations are classified as small- big enterprises/ small- big corporations. Such a classification will determine the legal regime applicable to financial accounts and to the auditing process of the enterprise or corporation.
- Information Technologies Every joint stock company is obligated to involve information technologies in order to reflect the corporate governance level of the company. Information technologies serve to the transparency of the corporation, which is one of the most eminent dimensions of corporate governance.
- Economic relations between the corporation and the shareholder, out of the scope of the shareholder status constitute an eminent concern. Such relations may probably invade the corporate governance structure of the corporation, since controlling shareholders may misuse the assets of the company through these mechanisms. In this respect, apart from the contracts related with the activities of the company, a shareholder may not benefit from the assets of the company. Particularly, the shareholders may not borrow money from the company (Art. 358 TCC). This is a consistent reform for Turkish trade practices, which widely rely upon financial relations between the company and major shareholder
- Insurance Against the Damages Caused by Directors Such insurance is not mandatory. Despite this fact, arrangement of such insurance serves to the conformity with corporate governance principles (Art. 361 TCC).
- Committee for Early Inspection of Risks Listed joint stock companies whose shares have been registered with the stock exchange, are bound to constitute such a committee in order to detect current risks in an early stage (Art. 378 TCC). The logic of this regulation is to secure the existence and the development of the company by involving experts to the mechanisms of the company.

#### Challenges for auditing companies

Realizing corporate governance principles necessitates continuous and effective auditing of the corporation. In this regard, independent auditing companies shall play a very efficient part in the new system. It shall be stated, that independent auditing companies are expected to be the real guards of corporate governance in the new system.

Current TCC prescribes that joint stock companies shall be audited by one or more auditors, who shall be elected by the general assembly. It is an accepted fact, that the majority appoints certain persons, who are not in economic conflict with the majority. As a result of this, auditing in joint stock companies is not an objective and efficient process actually. Regarding this event, TCC advances to abandon the institution of internal auditing in joint stock companies. The new system obligates the companies to involve an independent auditor to audit the financial structure of the company. The legal status of the auditor shall be prescribed by complementing regulations. TCC differentiates between small and big joint stock companies. Such differentiation refers to the fact, whether the auditing process shall be carried out by an independent auditing company or by certified auditors. Principally, independent auditing companies may conduct this auditing process, but small joint stock companies may equivalently appoint two certified auditors in state of an independent auditing company (Art. 400/1 TCC).



Persons holding shares at the corporation or at affiliated companies, appearing as employee at these companies, performing for the preparation of the financial tables or for the arrangement of commercial books of these companies or persons employed by other persons who are deprived to serve as auditors, may not serve as auditors.

An auditor may serve a corporation maximally six times within a period of ten years (Art. 400/ 2 TCC). This regulation will enable the rotation of auditors, which will serve to preserve the objective character of auditing process. In this regard, a corporation shall be observed and reviewed by two independent auditors within a certain period of time.

The statement of accounts and annual report shall be audited by the chartered auditor. Statements of accounts or annual reports which have not been approved by the auditor shall be deemed as invalid (Art. 397/1 TCC). Any amendments referring this statement and report shall similarly be audited properly.

Article 398 TCC prescribes the subject and the scope of financial auditing. This subject and scope may be summarized as follows:

- a. **Specific Subject of Auditing:** This subject encompasses the inspection of the statement of accounts and the annual report of a company or of a group of companies. Evidently, this inspection equivalently covers the auditing of the whole accounts of the company or the group.
- b. **Criteria:** As criteria, TCC introduces Turkish accounting standards which shall be further formed in line with internationally settled accounting standards. The auditor shall inspect whether the accounts of the company or of the group have been conducted in line with these standards.
- c. **Comparison:** The auditor may not be satisfied solely by analyzing the statement of accounts and the annual report. Evidently, the auditor shall collect necessary data for auditing and additionally compare the results acquired by these data with the statement of accounts and annual report.

The board of directors is bound to support and facilitate the performance of the auditor (Art. 401 TCC). In this context, the board shall submit all the records of the company. This obligation serves to a careful conduction of the auditing activity.

Principal rules related to the content of the auditing report are as follows (Art. 402 TCC) :

- a. The auditing report shall be definite and clear, whereas its content shall be express and intelligible. The report shall contain a comparison of the last two years' financial status.
- b. The auditor shall equivalently evaluate the assessments of the board of directors and announce its own attitude referring the current situation of the company.
- c. Further, the auditor shall evaluate whether the board of directors have acted in line with law, whether there were events threatening the financial situation of the corporation, whether the commercial records are held in accordance with mandatory rules and internationally settled financial standards, whether further the statement of accounts presents a true and fair view of the corporation.

Obviously, the final evaluation of the auditor is of critical importance. Particularly, the approval or abstention of the auditor exercises an essential function: In the event that the auditor arrives at the conclusion that the corporation acts in line with mandatory rules, whereas the accounts of the corporation have been held in conformity with internationally settled standards, the auditor shall announce an approval for the financial statement of the corporation. This approval shall reflect the auditor's argued opinion, whereby the auditor shall evidently record possible risks threatening the corporation.

On the other hand, the approval may be limited or may contain certain drawbacks. In the event that the auditor declares an approval with drawbacks or an abstention and in case that these drawbacks or grounds for abstention refer for the misuse of control by the parent company on the subsidiary company, which results in a damage of the subsidiary company, the commercial court may decide for a specific auditing.

Finally, auditors shall conduct a specific auditing process in case of fusions, scissions or transformations.

#### **Shareholder rights as the central point of TCC**

TCC encompasses several rules reinforcing shareholders' legal situation. These rules may be summarized as follows :

1. TCC prescribes the right of information and the right to attend the general assembly in a very efficient manner. First, several obligations of declaration and reporting imposed on the board of directors serve for a functioning participation of the shareholders to the decision mechanisms of the company. Moreover, the representation of the shareholder in the general assembly has been treated with detailed rules.



2. Shares with restricted transfer are appraised with a progressive view. In this aspect, TCC treats usual shares and shares with stock exchange quotation differently. In brief, TCC restricts the restriction of the transfer and enforces a very definite system for the restriction and its exceptions. Actually, the transfer of the files may be solely restricted for the interests and independency of the company.

3. Preference Stocks First, TCC specifies that the right to be represented at the board of directors shall no be deemed as a preference (Art. 360/2 TCC). Secondly, preference in votes is restricted to 15 votes per share (Art. 479/2 TCC). The assembly of shareholders with preference stocks has been regulated with consistent rules (Art. 454 TCC).

4. Rule of Agenda Existing law approves the principle of "rule of agenda". This principle commands that shareholders may solely discuss certain subjects, which have been announced by the board of directors within a certain period before the general assembly, Whereas the right of objection is limited, such objections do not yield effective results in practice. TCC advances to restrict this principle with evident exceptions. Such a progress will surely serve for a more efficient general assembly. Moreover, the right to require for the appointment of a special auditor for the inspection of particular issues is reinforced (Art. 438- 440 TCC) corporation.

5. TCC furnishes the minority shareholders with a new category of shareholder rights. In the event of fair reasons, minority shareholders may ask claim for the dissolution of the company on fair reasons. Certainly, the dissolution on fair grounds is a last resort. In case of such a claim, the judge shall attempt to find out other solutions. For instance, the judge may ex officio decide for the discharge of the applicant, whereby the applicant shall be paid for his shares as of the actual value. In the event that no other solution shall be convenient, the judge may decide for the liquidation of the corporation.

6. Moreover, the list of shareholders' rights has been extended in a manner to encompass new kinds of shareholders' rights. Apart from the right to claim for the dissolution on fair reasons, the minority shareholders are further furnished to ask the board of directors to print the shares, further with the right to leave the corporation in case of a merger, with option rights in the event of conditional capital augmentation and the right to revoke the merger, the scission or the transformation.

#### **Structural changes proposed for joint stock companies**

Considering the new legislation regarding the transformations, mergers and scissions in Swiss law, further considering the progressive legislation in EU Law, TCC attaches importance to these legal institutions and enforces a comprehensive legal regime for restructuring of the corporations. Particularly, until TCC, scissions are deprived of a proper legislation. New legal regime brought by TCC reflects many challenges for the commercial law practice in Turkey.

#### **Mergers**

In the last decade, Turkish commercial law practice faces a wave of mergers and acquisitions. In this respect, material rules regarding the merger process were urgently needed. In this regard, TCC inaugurates a new system. First of all, the content of the merger agreement has been formulated in a very concrete manner. The new system comprises the concept of "merger project". The arrangement of this project is obligatory. In the light of this project, beneficiaries shall be enabled to observe the merger process in an efficient manner.

Rules referring the exchange unit in mergers appear for the first time in a regulation and the persons concerned are furnished with the right of objection against this unit. TCC prescribes that any conflict referring this unit shall be resolved by the court, so that any benefits of the creditors and shareholders shall be preserved properly. Actually, the claim referring the revocation of the general assembly resolutions is not a sufficient mechanism to achieve this result. Contrarily, the intervention of the court is an efficient mechanism, where the corporation is bound to declare the logic of the exchange unit. In addition, the merger process shall be audited by an independent auditor. All these new rules are orientated to carry out a legally secure mechanism of merger.

#### **Scissions**

Scission of corporations deprives of any legislation except from the tax legislation and certain decrees enforced for covering the needs of the practice's minimum needs. Taking into account EU's legislation, TCC enacts detailed rules for scissions, whereby special attention has been paid to secure the rights and benefits of the creditors. Obviously, the role of the auditor during the division process shall be underlined.

### **Fundamental changes referring the capital augmentation of joint stock corporations**

Capital share augmentation has caused many legal conflicts in the TCC practice. TCC advances to facilitate and effectuate the augmentation process with dependable rules as follows:

1. According to the principle of capital maintenance, the company may not augment its share capital unless the whole capital subscriptions have been fulfilled. Despite preserving this principle, TCC enacts a rational exception: Minor failures in fulfillment of these subscriptions shall not deprive the company from augmenting the capital (Art. 456/1 TCC).
2. The powers of the board of directors has been determined considering the fact that even private corporations may involve registered capital
3. The decision referring capital augmentation shall be registered with the commercial registry within four months from the decision of the general assembly (Art. 456/3).
4. In order to implement the capital augmentation, the auditor shall examine the conditions of the company and approve the augmentation (Art. 458 TCC).
5. TCC enacts a new sort of augmentation: The share capital may be augmented on conditions. Such an augmentation shall not exceed the half of the share capital (Art. 463 TCC). Conditional share capital augmentation serves to enable the exchange of loan stocks issued by the corporation with the shares of the corporation.

TCC renews the system referring the termination of the corporation considering concrete legal problems of Turkish practice, as well as the reform in Swiss Corporation Law of 1991. Besides many new rules, the novelty in respect with the dissolution on fair grounds is quite remarkable. The termination rules of TCC do not allow the dissolution of the corporation on fair grounds. Contrarily, TCC releases a new rule (Art. 531 TCC). TCC treats the rights to claim for dissolution on fair grounds as a minority right. In the event that there exist certain objective grounds such as the demolition of the confidential relationships between the shareholders or the fact that the corporation is not profitable for a long period may cause the dissolution of the corporation. The dissolution may be claimed through an action versus the corporation. Evaluating such an action, the judge shall carefully examine the concrete situation of the corporation. In the event that the judge comes to the conclusion that there exist objective grounds enabling the dissolution of the company, the judge may not immediately decide for the dissolution, but examine other alternatives which may replace the dissolution. The dissolution is a "ultimo ratio", which means that a decision for dissolution may solely be formed in the event that there are no other legal alternatives. As a result, the dissolution on fair grounds is an institution, which grants the judge a wide and creative area of judicial discretion.

# Limited Liability Companies (LLC)

LLC is a hybrid company, which harbors several elements of equity corporations, as well as certain characteristics of other sorts of companies. TCC prescribes a facilitated procedure for the foundation, whereas the minimum capital requirement is quite low. For this reason, many undertakings have been organized as LLC, which may not be organized as an equity company under normal circumstances. On the contrary to the intention of the lawmaker, LLC has become the default company for any undertakings in the course of time. This fact equivalently means that LLC's in the practice are deprived of a corporate organization with efficient decision mechanisms and transparent structure.

Taking these facts into consideration, TCC's view of LLCs is the exact opposite of the LLC in the actual practice. Obviously, TCC intends to treat LLC as the useful substitute of joint stock corporation. As a consequence of this perspective, LLC in TCC has been formed as a proper equity corporation.

**Foundation** The statute of LLC is treated as an essential instrument for the organization of the LLC. Whereas the mandatory content of the statute is regulated by TCC, the Code equivalently enumerates certain regulations, which shall appear in the statute in order to be validly enforced in the corporate sphere (Art. 577 TCC).

**LLC with a sole shareholder** The idea to reconcile the economic truth with the legal regime equivalently plays an important role for the new legal regime of limited liability companies. LLC with a sole shareholder is an evident reflection of this idea. Through this mechanism, the entrepreneurs shall not be bound to pick other persons in order to fulfill the minimum number of shareholders. Secondly, the sole shareholder will act consciously as the sole controlling subject in order to prevent the application of the theory of "piercing the veil". In other words, the sole shareholder shall manage the company in bona fides in order to prevent third parties to claim for the sole shareholder's personal liability. Thirdly, the fact that all the shares of the company shall be transferred to a sole shareholder, shall no more be a ground for dissolution.

**Capital structure** In the new system, LLC requires a minimum capital of 25.000 YTL. Compared to the actual legal regime, the minimum standard specified in TCC is quite high. The purpose of this regulation to reinforce the warranty functions of the share capital for the creditors of the company.

**General assembly** Actual regulation due to the decision making process in LLCs prescribe that at least more than half of the votes is necessary for forming a usual decision at the general assembly. Evidently, the articles of association may prescribe a higher proportion of votes for forming a decision. In this context, it is an accepted fact that this quorum causing deadlocks in many LLC, particularly in LLCs with two equal shareholders. Even in the absence of shareholders disposing on the half of the share capital, the company may not conduct its own decision mechanisms and such situations result in deadlocks. TCC releases a new rule and enables that decisions in the general assembly shall be formed upon more than half of the votes, which are represented in the general assembly (Art. 620 TCC). It is clear, that TCC prescribes higher proportions of votes and that the articles of association may equivalently enforce higher proportions. Consequently, certain eminent decisions may only be formed upon 2/3 of the votes represented in the general assembly. Creation of new preference stocks, share capital augmentation, amendment of the commercial activities of the company are examples for eminent decisions ( Art. 621 TCC).

As of the validity of general assembly resolutions, the rules relating to joint stock corporations shall apply (Art. 622 TCC). The new system serves for the certainty and predictability of law.

**Organization of LLC** TCC advances to cover the lack of a detailed organization of LLC. At the first step, TCC enumerates absolute and inalienable powers of the general assembly (Art. 616 TCC) and equivalently of the directors (Art. 625 TCC). In respect with the decisions within the authority of the directors, the directors may apply to the general assembly for its approval, but such an application does not exclude the directors from the liability arising from the relevant transactions (Art. 625 TCC).

#### **Financial tables, reserves and auditing**

Considering the fact that LLCs in Turkey are to a large extent deprived of a systematic financial structure, TCC challenges a tough system for LLCs. According to new rules, LLCs are subject to the regulations prescribed for joint stock corporations in respect with the statement of accounts and the reserves ( Art. 514-527 TCC). Consequently, the statement of accounts of a LLC shall be arranged in conformity with Turkish Accounting Standards and further with International Financial Accounting Standards. Moreover, this conformity shall be examined by an independent auditor (Art. 635 TCC). This regulation has innovative effects on LLCs and even on the auditing activity in Turkey.

#### **Accessory obligations and obligation of additional payment**

LLC is not a pure equity corporation. The most evident characteristics of the LLC are that this company depends on the personal relationships between the shareholders and the company in most cases. Many LLCs survive and function thanks to the contributions of the shareholders. Considering the practice, TCC enforces a detailed regime for accessory obligations and obligation of additional payment (Art. 603-607 TCC). Accessory obligations are obligations, which may arise provided that such obligations are regulated in the articles of association. The scope of such obligations depends on the specific preferences of the company. On the other hand, obligation of additional payment may arise in the event that the assets of the company are not adequate to cover the obligations of the company (Art. 605 TCC). Regulating these two exceptions of the limited liability, TCC intends to formulate a secure legal regime for the shareholders.

**Dissolution** Preserving the current legislation in some aspects, TCC introduces certain new rules regarding the dissolution of LLCs. For instance, the absence of a corporate organ for a long period, has been handled with detailed rules (Art. 636/2 TCC), whereas the principles of “proportionality” and “subsidiarity” have been underlined for the dissolution on adequate grounds (Art. 636/3 TCC). Apart from the dissolution on adequate grounds and in the event that a shareholder intends to leave the company through an action before the court, other shareholders may equivalently declare to leave the company (Art. 642 TCC). In such a case, TCC regulates the conditions of the payment of the share price to the shareholders.

# Securities law

TCC preserves the legal regime of TCC in respect with the securities to a large extent and does not enact an extensive reform in this area. TCC solely reform several articles which contain translation failures. Evidently, Company Law reform and the expected Stock Exchange Law reform will indirectly influence this legal discipline.



# Transportation law

Regulating Transportation Law as an independent chapter is one of the fundamental reforms implemented by TCC. Originating from the former TCC, the rules of TCC regarding this discipline were not in line with modern transportation rules and did not meet the needs of the practice. TCC is orientated to enact a modern transportation law regime based on general principles of international transportation law. First subchapter includes general principles, whereas the second subchapter is assigned to the transportation of goods. Consequently, the third subchapter encompasses the legal regime formed for relocation goods. Whereas the fourth subchapter concerns with multimodal transportation, the fifth subchapter includes detailed rules for passenger transportation. Finally, freight forwarding is regulated in the last subchapter.

## General principles

General principles reflect the main characteristics of a code or of a chapter. General characteristics of Transportation Law, as accepted in TCC, have been formulated by CMR and by German Transportation Law Reform.

In this framework, CMR has a very eminent influence on the new rules regarding transportation. Although CMR is mainly an international convention subject to regulate cross border transportations, this legal source has been adopted even for internal transportations, since this Convention equivalently includes several rules for internal transportation. Such rules refer to material rules as well as rules referring to conflict of laws. This approach of TCC reflects the tendency to harmonize the Turkish law system with international transportation law.

The chapter dedicated to general provisions includes common rules applicable to carriages of goods by road or railway, which fall outside the scope of international conventions, further to transportations of passengers, carriage of relocation goods, to multimodal carriages and freight forwarding.

The definition of the carrier reflects a wide perspective and includes any persons carrying goods, passengers, relocation goods and any persons involving a part of multimodal carriage. This definition is similarly applicable to carriages by railway. On the other hand, this definition underlines that the carriage shall be conducted according to a carriage contract. Actually, this rule is a clarification for the carriages performed on the grounds of personal relationships in state of a professional agreement. Evidently, a carrier, who carries goods or persons on the ground of a non- professional relationship, is not a carrier with respect to TCC. As a consequence of this, general principles related to transportation are not applicable to such transportations.

Another reform to be mentioned in this context is that the railway transportations are subject to the rules of the first and second chapters of this book. On the contrary, maritime and air transportations which are handled by separate regulations, are not subject to these rules. Transportations on inland waters are equally subject to the rules of maritime transportation.

All claims arising from transportation transactions are subject to a prescription period of one year.



## Transportation of goods

In TCC, the rules regarding the transportation of goods are enacted in consideration of CMR and the new German Commercial Code. According to TCC, the arrangement of a bill of lading is not necessary for the validity of the transportation contract. The bill of lading shall be arranged upon the request of a party. Usually, the bill of lading shall be arranged by the sender upon the request of the carrier, whereas the sender may arrange the bill of lading without such a request. On the other hand, the delivery of the goods to the carrier shall be evaluated as a presumption for the existence of a transport contract. Respectively, in the event that the parties have not undersigned any written agreement, the delivery of the goods may serve as evidence.

In this framework, bill of lading is not classified as a security, but it serves as an instrument of the transportation contract. The burden of proof, achieved by the bill of lading is effectuated by the delivery of the goods and functions on behalf of the carrier. The bill of lading may be classified as a delivery receipt provided that the carrier has undersigned this document.

TCC restricts the liability of the carrier. Gross weight of the shipment shall be taken into account as of the calculation of the limits, whereas the freight fee shall be considered in case of delay. In the event of demolition or damage, the carrier of the liability is limited to 8.33 calculation unit per each kilogram. On the other part, the liability is limited to three times of the freight fee, in case of delay. Damages arising from other reasons shall be limited to three times of the compensation, which shall be paid in the event of whole damage.

Due to the restriction of the liability, the concept of fault is defined and approved in line with international conventions. This concept shall be defined as acting incautiously and acting in a conscious manner of the fact that the damage may probably arise". This concept of fault shall be deemed equal to the concept of animus.

TCC equivalently regulates the legal situations of "contractual carrier" and "de facto carrier" in the event that the carriage is conducted partly or wholly by a third party in spite of the existence of a contractual carrier. On the other hand, the right of retention has been apprised in conformity with the general rules in Turkish Code of Obligations and with the general theory in respect with the property rights on ships.

## Transportation of relocation goods

TCC assigns a separate chapter for the transportation of relocation goods. For a proper application of these rules, TCC defines the relocation goods as "any goods to be transported from a house, an office or production unit to another, provided that these goods are utilized in a lodgment or for business related purposes".

These rules originate from German Commercial Code. The reason to enact special rules for relocation goods depends on the specific nature of these goods. Actually, packaging, unpacking, mounting and dismantling of these goods necessitate specialization.

In the event that the sender is a consumer, TCC enforces a different system for the transportation of relocation goods. In such a case, the obligations of the sender are moderated, while the obligations of the carrier are expanded. Under these circumstances, TCC intends that the carrier may not to easily achieve the liability exclusion. Carriers and his assistants, who do not fulfill certain conditions, may not benefit from liability exclusion.

## Multimodal transportation

The articles of this chapter originate from the German Law of Transportation Reform. Multimodal transportation means that the transportation shall be conducted on a basis of a transportation contract and at least by two different vehicles. To resolve legal problems arising from multimodal transportations, relevant norms shall be applied in this order : Specific norms of this chapter, relevant international conventions, general principles specified in the first two chapters of this book. This order is similarly applicable for maritime transportations. With respect to this fact, for multimodal transportations encompassing equivalently maritime transportation as a part, the rules in the first two chapters of the Fourth Book of TCC are applicable in state of the rules imposed for maritime transportation in TCC.

This general principle has an exception: This exception is solely applicable in the event that the place of damage is already known. For determining the place of damage, TCC enforces a presumption, whereby the specific law is applicable, which is the certain law applicable to the liability of the transporter, which would be applicable as if the parties would intend to undersign a sole agreement for the certain part of the transportation, at which part the loss has arisen.

As a consequence of this, in the event that it is determinable, whether the loss has come true at a certain part of the transportation, the specific legal regime which is normally applicable to this certain part shall be applied as of the liability of the transporter.

Finally, in case that the multimodal transportation concerns with the transportation of relocation goods, specific rules for the relocation goods in the third chapter shall be applicable. In this context, even if the place of damage is determinable, mentioned rules in the third chapter shall govern the legal conflict. Contrarily, in the event of an international contract, the exception specified above shall take place.

## Transportation of passengers

The rules regarding the transportation of passengers have been delivered from TCC to TCC to a large extent. In addition to that, TCC prescribes that complementary regulations shall be enforced in order to safeguard passenger's rights.

## Freight forwarding

For the rules regarding freight forwarding, German Commercial Code has been considered as the model act. Firstly, TCC perceives a new terminology. TCC mentions "freight forwarder" in state of "commissioner". Through this terminology, TCC aims to underline that the forwarder organizes the transport. Evidently, the forwarder is the exact subject, who shall determine the scope and the manner of transportation and exactly the conductor of the carriage. In this framework, the freight forwarder shall conclude any agreements with the carriers on behalf of himself or on behalf of the sender. Further, the freight forwarder may have to conclude other agreements referring storage, loading and discharge.

According to TCC, the freight forwarder may conduct the carriage solely in the event that the parties have concluded this right in the agreement. Contrarily, TCC does not necessitate such an agreement between the parties, so the freight forwarder may equivalently act as carrier. In such cases, the contracts referring freight forwarding or carriage will exist together and the freight forwarder may claim for freight forwarding and freight fees.

# Maritime commercial law

Throughout TCC, Turkish maritime law faces a challenging reform. On one part, existing institutions have been revised, whereas modern institutions have been integrated to TCC. TCC advances to remove inadequate rules and to replace these rules with new norms in the light of modern maritime law.

One of the most important aims of TCC is to reform Turkish maritime law in line with international agreements. For this reason, Visby London Rules of 1968-1979, London Convention of 1976 on Limited Liability of the Carrier, London Convention of 1989 on Maritime Assistance, Geneva Convention of 1993 on Liens, London Convention of 1992 on Oil Pollution, Geneva Convention of 1992 on the Arrest of the Ships and finally Athens Convention of 2002 on the Transportation of Passengers have been implemented in TCC.

Many institutions which have fulfilled their function, such as disciplinary powers of the captain, seamen's obligation to comply with orders, crimes conducted abroad, maritime loans are not regulated in TCC.

## The ship

**General principles** In TCC, many institutions and relevant definitions have been amended in consideration of the opinions demonstrated in the doctrine. As the legal nature of the ships is one of the most problematic concerns of Maritime Law, TCC emphasizes that the ship is a movable. The exceptions of this rule have equivalently been demonstrated in the TCC.

**Identity of the ship** The rules related to hoisting Turkish flag have been preserved in TCC to a large extent. However, the rules referring to acquire Turkish identity have been treated more flexibly. In respect with ships subject to joint property, TCC prescribes that for acquiring Turkish identity, the shares relating to a ship shall be owned 100 % by Turkish personalities. TCC treats this rule more flexible in a manner that for acquiring Turkish identity, it is sufficient that more than half of the shares belong to Turkish personalities whereas most of the controlling shareholders shall be of Turkish identity. For the ships owed by corporations, it is required that more than 50 % of the shares belong to Turkish personalities.

**Maritime registry** TCC intends to establish a more transparent and systematic registry system. This system is completed by the legal regime enacted by a specific code (Code Number: 4490) in respect with international maritime registry.



**Property rights** The rules regarding the property rights on ships have been retreated and systematized in TCC. Acquiring and losing the property of the vessels, which is not thoroughly treated in the former TCC, have been appraised with detailed rules. In state of the TCC's system, the new TCC requires a transfer agreement and the transition of the ship's possession for the alienation of the ship. For other rules related with the sales agreement, general rules in respect with sales contract in Turkish Code of Obligations shall apply.

TCC enacts a new regulation for the demolition of the property on the ship. In principle, the demolition of the ship gives rise to the demolition of the property. Contrarily, there may exist a property right on the ship despite the demolition. Evidently, in the event that wreckage is remained, it is possible to conclude the existence of property rights. Moreover, TCC underlines that the existence of wreckage shall be evaluated in respect with the rules referring to the removal of the wreckage and environmental pollution.

Finally, regulations referring maritime lien (pledge) and construction lien have been treated in the framework of a new systematic whereas the wordings of several rules originating from German Law in this chapter have been corrected carefully.

### **Ship-owner and affreightment consortium**

In this chapter, the legal status of the ship owner and of the affreightment consortium have been appraised with an innovative approach. Particularly, the definition of "ship-owner" has been amended in a manner that the element of "conducting the ship in maritime commerce" by the element of "conducting the ship on waters for acquiring benefits".

Art. 948 of the former TCC, regulating the restriction of the ship owner's liability is tacitly abrogated by the "International Convention on the Restriction of Liability versus Maritime Loans" of 1976. For this reason, TCC records a reference to international conventions, whereas it enforces a detailed regime in conformity with international conventions on the restriction of liability (Art. 1328-1349). These rules originate from the former TCC to a large extent.

### **Captain**

This chapter has been renewed in respect with its wording. Since maritime loan is no more treated in TCC and since maritime loan is appraised with a new system, certain rules in respect with the captain do not appear in TCC.

On the other hand, the "International Convention of Liability Restrictions Versus Maritime Claims" of 1976 have been reserved in TCC with a reference. As a consequence of this, the captain's liability may be restricted in conformity with this Convention.

TCC contains several regulations related with the maritime labor law. Since Turkey has undersigned several international conventions in the area of Labor Law, labor relations, such as the relation between the captain and the employees are not treated in TCC.

## Maritime commercial agreements

TCC inaugurates a new legal regime for maritime commercial agreements. First, maritime loan agreements do not appear in TCC contrarily to the former TCC. However, two new contract models, namely, time charter and bare boat charter contracts have been incorporated to TCC. On the other hand, the rules regarding the freight contracts originate from the former TCC. Compared to Art. 1020-1060 TCC, TCC enacts a distinct and advanced legal regime for these agreements, particularly with respect to new rules related to lading, discharging and dead freight.

In addition, many rules in respect with the liability of the carrier are manifested in TCC. These new rules originate from Visby Rules of 1968 revising Bruxelles Convention of 1924 and London Convention of 1978. On the other hand, the rules in TCC are completed with Hamburg Rules of 1978. In this framework, non-liability grounds arising from technical failure and fire have been preserved, whereas the following institutions have been reformed in line with international conventions: Liability arising from delay, liability of the de facto carrier, the extension of the prescription periods by contract, liability per package or unit restricted with the right of towage, application of liability limits on torts.

Regarding the rights of the carrier, TCC specifies the freight debtor and the due date of the freight. On the other hand, TCC leaves the system of abstention from delivery or right to mortgage but bases its new system on the right of detention in the event of the default of the debtor. In addition, the liabilities of the freight forwarder and of the loader have been enforced in TCC for the first time in Turkish Law

Regulations Referring Bill of Ladings Regarding these regulations, Bruxelles Convention of 1924, Visby Rules of 1968, London Convention of 1979 and as a complementary source Hamburg Rules of 1972 demonstrate the main rules.

Certain reforms may be enumerated as follows: (1) The arrangement of the bill of lading on mechanical and electronic instruments has been enacted. (2) The validity of the incorporation clause has been safeguarded (3) In the event that the carrier is not identifiable through the bill of lading the ship owner shall be deemed as the carrier, whereas a new rule has been enforced enabling the claim for the compensation arising from the delay of the announcement of the carrier's identity. (4) Letter of guarantee on clear bill of lading has been imposed regarding the model of Hamburg Rules. (5) Another article has been incorporated to TCC which enacts the arrangement of other valuable papers apart from the bill of lading.

In state of enforcing general rules for prescription, the lawmaker prefers to determine each prescription date specifically in the certain article dedicated to the related institution. Apart from this, all the prescription periods due to maritime commercial agreements last one year. Considering that maritime transportation is rapidly growing in Turkey, TCC is predicated on the "International Athens Convention on the Maritime Transportation of Passengers and Baggages" of 2002.

## Sea accidents

This chapter consists of three subchapters, namely general average, stacking and maritime assistance. Each subchapter comprehends extensive reforms.

General Average Despite the lack of an international convention on general average, York Antwerp rules have become the relevant legal source applicable on general average cases. In order to keep the legal regime update, TCC refrains from incorporating these rules but prefers to regulate general average by complementing regulations to be issued by a higher council of experts to be constituted by Secretary of Maritime Affairs, International Law Association and General Office of Insurance in Turkey. Thanks to this approach, any amendments in the mentioned rules may be easily reflected to Turkish law. The above mentioned institutions shall implement these amendments ex officio or upon a request of any persons.

On the other hand, certain issues which are not treated in York Antwerp Rules, have been enacted in TCC.

Stacking Turkey is a party to the "International Convention on the Harmonization of Certain Rules on Stacking on the Sea" of 1910. TCC has revised certain rules adopted from this Convention and enforced an article regarding the relation between the rules on stackings with the rule regarding the nonliability of the carrier in the event of technical failure. In this context, the carrier may use the technical failure exception, equivalently in case of stacking. Moreover, the legal status of the guide has been treated with more evident rules and the collection of evidence in case of stacking and the arrangement of the relevant report has been enacted with distinct rules.

Maritime Assistance TCC includes certain rules referring maritime assistance originating from an international convention of 1910. However, these rules do not cover current needs of the practice. Taking into account this legal fact, TCC enacts certain rules on maritime assistance originating from the "International Convention on Maritime Assistance" of 1989.

### **Vessel liens**

Resembling TCC, TCC equivalently encompasses certain rules on vessel liens. In this regulation TCC considers the "International Convention on Preferences and Mortgages on Vessels" of 1993. Since this convention is in line with the "International Convention on the Sequestration of Vessels", both conventions complement each other. In this framework, short prescription periods have been prescribed for vessel mortgages. On the other hand, TCC does not include any rules regarding the right owed by the creditor of freight.

### **Limitation of the liability and compensation of losses arising from oil pollution**

As already mentioned above, Turkey has undersigned the "International Convention on the Limitation of the Liability versus Maritime Creditors" of 1976.

Accordingly, the rules of TCC, restricting the liability of the ship-owner solely with the vessel and the freight have lapsed wholly. In addition to that, Turkey has equivalently undersigned the "International Convention on the Liability Arising from Oil Pollution" and the "International Convention on the Compensation of the Damages Arising from Oil Pollution" enforced in London in 1992.

These conventions encompass certain norms, which are directly applicable. For this reason, these rules have not been incorporated to TCC, whereas solely complementing rules have been enforced in this draft.

Moreover, two other international conventions on liability have been incorporated in TCC: First of these conventions is the "International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and noxious Substances by Sea" of 1996. The second convention is the "International Convention on Civil Liability for Bunker Oil Pollution Damage". In the event that these conventions shall be valid and binding for Turkey, new regulations referring these conventions will be incorporated to TCC.

### **Legal executions**

One of the most troubling matters in maritime law is the legal execution on vessels. Whereas material maritime rules originate from German Law, Turkish Procedural Law and Turkish Execution Law base on Swiss law. This differentiation as of the source of two legal regimes has caused many problems in practice. As a consequence of this, a new chapter referring legal executions has been incorporated to TCC. This chapter consists of four subchapters: Applicable law, complementary rules, special rules for the execution on vessels and special rules for the execution on the freight. In state of enacting an independent regulation for maritime executions, TCC solely enforces necessary specific rules, which shall equivalently complete by general rules of Turkish Code of Execution and Bankruptcy.

# Insurance law

Current regulations regarding Insurance Law are not eligible to answer actual legal problems in practice. Moreover, originating from the former TCC, Turkish insurance rules are deprived of satisfying the needs of the insurance sector. For this reason, Turkish Insurance Law experiences a fundamental reform by TCC. As referred in the preamble, international theory and practice constitutes the orientation and the concept of this reform. Since mostly all the insurance rules are of mandatory character, the developments of contract law have been disabled in TCC. This fact makes it indispensable to enact a comprehensive reform on insurance rules. Moreover, TCC rules on life insurance do not conform to the characteristic of the life insurance to be an investment medium. Considering that life insurances create extra funds for the economic system and constitute an assurance for a person's property, the rules regarding life insurance had to be reformed to a large extent. The tendency of the practice to overcome this problem by utilizing general terms and conditions in the agreements, did not involve positive results.

Actually, the reform regarding the insurance rules are based on four main grounds :

**Obligation of Instruction** Since EU has not enforced any directives on insurance contract law but solely on insurance supervision, TCC has not considered EU law as a main source. Despite this fact, EU Law has influenced TCC in two main points: First, the insurance company shall inform and instruct the insurance holder and regard his legal position as consumer. Secondly, TCC enables the establishment of tontines.

**German Contract Law** Regarding the rules on insurance agreements, TCC is mainly influenced by German Code of Insurance Contracts. The influence of German law on Turkish transportation law and maritime law have caused that the mentioned code has been evaluated as the main source for the insurance rules of TCC.

**General Terms and Conditions** TCC has equivalently taken into account the general terms and conditions, which are widely used in English and German law practice. Particularly, general terms and conditions of English law have a great influence on international practice. In this context, current insurance practice is either orientated by insurance agreements formulated according to English law or more conservatively by German Law. In this respect, the insurance regulations worldwide are equivalently under the influence of these systems. As a genuine regulation, TCC advances to harmonize the more liberal approach of English system with the realist approach of German law, which attracts more attention to the balance of interests.

**Critics in Turkish Doctrine and Material Rules in Turkish Insurance Law** These two final grounds have similarly influenced the new rules in TCC, particularly in implementing evident and systematic rules.

**Terminology of Insurance** The formulation of the insurance rules in TCC is not based on a definite conception. Particularly, the concepts such as policy holder, insurance holder or beneficiary have not been used for correct terms. TCC is orientated to resolve the problems arising from the failure of terminology.

## General principles

The chapter dedicated to general principles in the former TCC is indisputably insufficient. It shall be stated that many general principles of insurance law have been demonstrated in the chapter of property insurances. On the contrary, TCC includes 50 articles dedicated to general principles. Regarding general concepts, the rules in respect with the insurance agreement include the legal regime to be applicable to the agreement and the rules regarding the mutual obligations of the parties.

General concepts of this chapter cover insurance agreement, mutual insurance, reinsurance whereas the invalidity of this agreement has been regulated in line with the general principle in Turkish Code of Obligations. Particular issues enacted in the framework of insurance agreement are representation, lack of interest, scope, insurance period, notifications regarding the abrogation of the agreement and insolvency of the parties, as well as the bankruptcy of the insurer. The new system obliges the insurer to inform the consumer thoroughly. Before the conclusion of the agreement by the parties, the insurer shall inform the consumer about the important aspects of the agreement, about the rights of the insurance holder, about the periods regarding the termination. After the conclusion of the agreement, the insurer shall inform the insurance holder about the developments influencing the insurance. The obligation to issue a policy is treated in line with TCC. Despite this, there is no regulation in TCC, which resolves the probable legal problems in the event that the content of the agreement differs from the offer.

## Specific rules regarding several sorts of insurance

### Loss insurances

TCC particularly considers that insurance law involves mercurial dynamics. As a consequence of this, TCC initiates to enforce flexible insurance rules. Since TCC intends to demonstrate separate rules for different kinds of insurance, many new insurance subjects such as insurances for fire, agriculture or theft have been specifically enacted in TCC.

Most of the insurance rules incorporated in TCC are of mandatory character. This character of the rules has prevented a progressive approach and disabled flexible solutions for legal conflicts. As it is generally known, law of contracts necessitates a certain degree of flexibility in order to enable the parties to formulate the content of the contract. Considering this fact, TCC tends to evaluate the insurance as a medium of investment. For this reason, TCC enforces rules which are not of mandatory character to a large extent, in order to safeguard the freedom of contract. Mandatory rules have been solely released for safeguarding necessary interests.

As it is thoroughly known, insurance has a technical dimension. In this respect, TCC enacts several regulations in conformity with the technical dimension of the insurance, such as actuarial rules and the measurement of risks.

# Conclusion



TCDD announces two car  
Turkish Law :

1. Turkish Commercial Law practice until the preparation of this Draft has not been put aside, whereas concrete solutions have been developed for prevailing legal problems.

2. Turkish Commercial Law has been harmonized with Swiss Law as well as EU Law.

In this context, certain legal institutions deprived of any legislative regulation have been appraised in the Draft, whereas inadequate norms have been replaced by modern rules.

# How Deloitte can help

## Financial accounting and reporting

- Design of chart of accounts
- Assistance with IFRS accounting policy and principle selection
- Designing of financial reporting structure in accordance to New Turkish Commercial Code (TCC) and IFRS
- financial planning and reporting
- Calculation of the taxable income from IFRS financial statements
- Analysis of tax effects of structural and operational changes performed in accordance to new TCC
- TFRS trainings

## Information society services

- Document management and document warehousing management
- Online applications
- IT Systems ,infrastructure and security management

## Independent audit

- Transaction audit
- Annual report audit
- Internal audit

## Holding companies

- Development of the consolidation systems
- All the Deloitte services mentioned herein are applicable for holding companies.

## Legal structure and shareholders' rights

- Re-arrangement of legal structure
- Changes in articles of association
- Re- arrangement of relationship between shareholders and the company in accordance to New TCC
- Restructuring company's important and significant documents in accordance to new TCC
- Re- arrangement of the responsibilities of board of directors and management
- Re- arrangement of the commercial transactions

## Principles of corporate governance

- Re-structuring of upper management in accordance to new TCC
- Improving the internal audit system and documentaiton of the control procedures
- Internal audit
- Design of the authorization matrix and documentation of the of roles and responsibilities of the employees
- Design of process in order to early identify the risks by the cpany management

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# Foreign Economic Relations Board (DEİK)

Formed in 1988, the foremost purpose of Foreign Economic Relations Board of Turkey (DEİK), is to develop Turkey's economic, commercial, industrial and financial relations with foreign countries as well as international business communities. DEİK believes that increasing industrial cooperation, widening the foreign trade network and opening the Turkish service sector up to the global economy are essentials in achieving this target.

DEİK mainly operates through Bilateral Business Councils. DEİK's Bilateral Business Councils are established by a cooperation agreement signed with foreign counterparts with the purpose of promoting business relations. These Business Councils ensure an effective follow-up mechanism and a continuous flow of information to member companies on trade and industrial cooperation possibilities.

Business Councils consist of two sides, one is the Turkish side and the other one is a counterpart institution in the relevant country, which is usually a representative body of the country's private sector. The Councils meet regularly each year. As of October 2011, there are 103 business councils operating under DEİK in which 1400 representatives from more than 700 member companies participate.





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