

ARTICLES OF ASSOCIATION OR A STANDART FORM OF DOCUMENT?

Two important pieces of legislation have been adopted within 2011 which attracted most of the interest by foreign investors. The first piece of legislation is the New Turkish Commercial Code (the “TCC”) and the second one is the New Turkish Code of Obligations (the “CO”) (together as the “Codes”). Since new structures were needed for newly-developing business transactions and relationships, especially in the area of corporate governance; legalization of the Codes has been deemed as a solution and a start point for a new era. However, soon after the passing of the new Codes through the Parliament and before its effective date, the provisions of the Codes have pulled to shreds and judicial and sector professionals have relayed their different approaches and thoughts to their concerned matters. As a result, soon after the legalization of the Codes, they both have faced with amendments on specific topics and it is expected that further amendments are to come even before their effectiveness.

One may agree that when compared to the changes promulgated by the CO, main legislation stipulating the law of contracts, the changes introduced by the TCC has far more impact on investors within the context of their relations with their existing and future partners.

In parallel, one of the major changes newly set forth by the TCC is the limitation of the provisions that may be adopted under the articles of association of a joint stock company. In the eyes of the most of the professionals,



the articles of association of a company is defined as a contract (i) between the shareholders and the joint stock company and (ii) among the shareholders themselves. By virtue of this definition, throughout the term stipulated by the Former Turkish

Commercial Code (the “Former TCC”), almost every articles of associations of a joint stock companies were drafted to reflect the relations and agreements between the shareholders. However; with the changes introduced by the TCC, an articles of association may not list any provisions other than those that are obligatory and prescribed in the TCC, unless the TCC specifically authorizes to the contrary.

This paper aims to briefly highlight the effects of the new changes introduced by the TCC in respect of the restrictions on the articles of associations of joint stock companies and its effects on the relations between the shareholders.

THE NEW SECURITY DILLEMMA: PRIVILIDGED SHARES vs. PRIVILIDGED SHAREHOLDERS

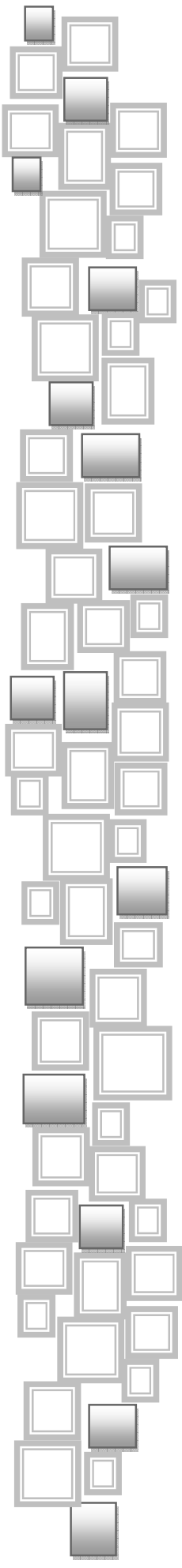
As per the statistical study conducted by the Turkish Union of Chambers and Exchange Commodities, each month aproximately three thousand to five thousand joint stock companies are being incorporated in Turkey. By virtue of these numbers, the relation between the shareholders of those companies and the future companies are being served as a hot plate by the TCC. Where, on the one side the effects of the TCC to the priviliges granted in the existing joint stock companies and on the other side new measures to be taken for granting priviliges in the future joint stock companies create a dilemma over the shareholders who would like to secure some priviliges over others.

The effective date and implimentation of the rules set forth under the TCC related thereto together with the comparision of the effects of the former and new

appliance will give a hilight to understand the new sytem and its fruits to the shareholders.

A. EFFECTIVE DATE AND IMPLEMENTATION OF THE TCC WITH RESPECT TO ARTICLES OF ASSOCIATION RESTRICTIONS

Although the TCC will become effective in July 2012; pursuant to the Law on the Implementation of the Turkish Commercial Code, articles of associations of the joint stock companies are required to conform to the TCC within one year from its publish on the Official Gazette. Therefore, all joint stock companies are under the obligation to amend their articles of association in order to get in line with the new provisions of the TCC, which restrict any provisions other than those that are obligatory and listed in it, before 15 August 2012, approximately one



month after the effective date of the TCC. It is expected that this one month adaptation period will be extended by the Ministry of Industry and Commerce.

Failure to abide by this obligation shall result in the invalidation of the contrary provisions stipulated under the articles of association of the respective joint stock company and the rules set forth by the TCC shall prevail.

However, the Law on the Implementation of the Turkish Commercial Code prescribes an exception for the privileges granted to a certain group of shares to nominate members of the board of directors of the joint stock companies. As per such exception, the above mentioned rights granted (i) during effective period of the Former TCC and (ii) before 13 January 2010 shall be deemed as a vested right and will remain effective even if it exceeds the limitations set forth under the TCC.

Finally the Law on the Implementation of the Turkish Commercial Code sets forth a different adaptation period and effective date for the provisions granting a voting privilege to the shares. Pursuant to the Former TCC privileges may be attached to a company's shares without setting a limit on the number of votes. However, under the TCC, voting privileges are limited to 15 votes per share and this number can only be increased by a court decision. As per such different approach, the final date of the adaptation period for the joint stock companies to amend their articles of association in order to get in line with the voting privilege restrictions is determined as 15 August 2014.

B. THE ARTICLES OF ASSOCIATIONS SHAPED IN THE FORMER TCC PERIOD

Since the Former TCC has no restrictions over the provisions of the articles of association of the joint stock companies, in practice, the shareholders mostly choose to adopt provisions to the articles of association to reflect their relations among each other. Together or instead of a shareholders' agreement, provision relayed in the articles of association of a joint stock company will aid to have privileged shares instead of privileged shareholders and thus transferee of a share in the joint stock company will receive such share with all privileges attached to it. This kind of appliance expands the relative nature of the shareholders agreement, if any, and allows the shareholder to attach its privileges to the shares owned by it. Although, some of the doctrine alleges otherwise and dictates that the provisions of the articles of association of a joint stock company only binds the shareholders and has no effect on the third parties, in practice, such provisions are used to remove the good faith from the third parties. This indirect approach vs. doctrine has resulted with the new changes introduced by the TCC. The approach of the doctrine has weighted way more and the relative nature of the shareholders relations has got an approval from the

TCC. Pursuant to the TCC, provisions which reflect a different relation between the shareholders other than those obligatory and listed in the TCC, will not be registered and deemed void.

In a nutshell, currently, privileges granted to a shareholder by the articles of association provide such shareholder to have that privileges attach to its shares and transfer such shares with that rights and privileges.

"All the best have something in common, a regard for reality, an agreement to its primacy over the imagination."

**WISLAWA
SZYMBORSKA**

C. THE ARTICLES OF ASSOCIATIONS TO BE SHAPED IN THE TCC PERIOD

A properly drafted articles of associations of the joint stock companies adopted during the term of the Former TCC are now facing amendments in order to clear out all privileges other than the ones permitted by the TCC. As a result, the relation between the shareholders is forced to be laid down to a table once again in

order to secure such privileges.

Besides the voting privileges that may be granted to the shares of a joint stock company, which also has its own restrictions (max. 15 votes per share), the TCC has not enough maneuver area with respect of privileges. In practice, this will force the shareholders to find other security mechanisms in order to secure their privileges over others and third parties. Since shareholders agreement is the one option, the shareholders hand is strong in the context of the CO but not the TCC. Shareholders agreement's relative nature will not create sufficient security over the third parties and thus once again the privileged shares vs. privileged shareholders dilemma will come into mind.

Briefly, as per the changes introduced by the TCC, as of July 2012, it is not possible to have various privileged shares (except for those permitted by the TCC), but yet such privileges may be solely granted to the shareholders by way of agreement.

CONCLUSION

As from July 2012, the Turkish corporate world will start to evolve with the implementation of the Codes and shareholders of the joint stock companies will secure their existing and future privileges by trusting the law of contracts instead of the articles of association of a joint stock company. The shareholders agreements will have the interest and be the main regulatory document of the shareholders relations since the articles of association has put on the shelf by the TCC. The CO has more importance than ever when compared to the period of the Former TCC. Protection from the third parties will be the issue over the upcoming term of the TCC and investors, shareholders and sector professionals are keen to protect the rights of the shareholders in a most adequate way.

In other words, the new era introduced by the TCC, foresees privileged shareholders rather than privileged shares and has impacts both advantageous and disadvantageous based on which side the person is on.