THE MANAGERS’ DECISIONS SUBMITTED TO THE APPROVAL OF THE GENERAL MEETING: REVIEW OF TURKISH COMMERCIAL CODE REGULATIONS

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Abstract

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Article 625/2 of the Turkish Commercial Code (TCC), adapted from the Swiss Code of Obligations (Obligationenrecht 811, hereinafter referred as OR 811), allows managers to submit certain decisions and individual matters to the approval of the general meeting. This paper purports to reveal how this article could be interpreted and the regulations to be made in the agreements of limited liability companies in Turkish law. To do that, an interpretation of article 625/2 of TCC is developed. In addition, the effect of this article on the liability of the managers and the references made to articles 51 and 52 of the Turkish Code of Obligations (TCO) are explained. With a regulation added in the agreement of the company, the managers would either be required to submit or they would be free to choose to submit certain decisions and individual matters to the approval of the general meeting. Considering that the submission slows down the decision-making process and causes additional costs, granting the managers the right to choose becomes an important issue. However, the approval of the general meeting does not remove the liability of the managers. So when a lawsuit for liability is filed against managers, the approval of the general meeting may decrease the payment for compensation (articles 51 and 52 of TCO).

Keywords: Limited Liability Company, Manager, General Meeting, Separation of Functions Principle, Liability of Managers

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1. INTRODUCTION

Limited liability companies are regulated by article 573 and the rest in the Turkish Commercial Code (TCC) numbered 6102. A limited liability company contains two organs: a general meeting and a manager (or board of managers) as TCC rules it. The decisions are taken by the general meeting and implemented by the manager who is also responsible for managing and representing the company in the face of the partners and third persons (Ekşi, 2019). The independent auditor auditing the company is not qualified as an organ. The TCC removes the auditors from the organization of the company by leaving the power of auditing to the independent auditors (Bahtiyar, 2019; Çebi, 2019; Tekinalp, 2015; Yıldız, 2007).

As a limited liability company enacts its operations through its organs some problems may arise such as how and by whom the power of authority is used. Every organ uses its authority acknowledged by the legislator based on its
expertise. However, the limits of this authority can change with a provision added in the agreement of the company (Poroy, Tekinalp, & Çamoglu, 2019). Article 625 of TCC allows it and with the agreement of the company the managers are entitled to submit certain decisions and individual matters to the approval of the general meeting. If there is such a regulation in the agreements of the company, the managers are to submit a certain decision or the individual matter to the approval of the general meeting.

The fact that in Turkish law, the articles regarding limited liability companies are adapted from the Swiss Code of Obligations (OR 772 and the rest) except for a small number of them, the articles of TCC are almost in the form of translations of the articles of OR. The focus of this research, which is article 625/2 of TCC, is also grounded on the OR 811. However, there are essential differences between these articles. OR 811 allows two different regulations to be made in the agreement of the company. It can be regulated that the managers are “obliged” to submit certain decisions to the approval of the general meeting and that they “may choose” to bring individual matters to the approval of the general meeting. As opposed to that in Turkish law the text of article 625/2 of TCC rules that the managers are to be obliged to submit certain decisions and individual matters to the approval of the general meeting. This is a fundamental difference that leads the interpretation of article 625/2 of TCC to deviate from OR 811.

When a company chooses to adapt and put into practice the articles in the law of another country, it is important to look at the differences that emerge with their legal consequences. If the adapted article directly influences the work of a company giving a direction to its decisions, then it becomes all the more important. This is why a company’s activities in its management and the process of its decision-making have largely become an area of interest and study of the academicians who work in the field of company law. This paper, which juxtaposes OR 811 with the article 625/2 of TCC as the origin of it, concerns academicians and practitioners as well as limited liability companies.

The major question of the research in this paper is how to interpret article 625/2 of TCC in Turkish law. In order to answer this question, we have tried to see two things. First, we have identified the differences between the two articles. It must be noted that since the focus of this research is not OR 811, our comments on Swiss law are given in a limited manner. Second, we have explained the content of article 625/2 of TCC. Considering the features that differ from OR 811, we develop an interpretation of this article in terms of its application in Turkish law. To do this, our focus is to clarify whether or not article 625/2 of TCC could be interpreted broadly regardless of the text of the article. If the answer is against a broad interpretation, then the managers’ freedom of action is somehow limited. That means they have to submit certain decisions and individual matters to the approval of the general meeting due to the provision in the agreement of the company. If a broad interpretation is possible, then the managers would be free to submit them to the approval of the general meeting. The provision included in the agreement of the company also affects the liability of the managers. This is why the influence of submission of certain decisions and individual matters to the approval of the general meeting on the decision-making process and the liabilities of the managers are clarified. In addition to that, the results of the references made to articles of TCC with regard to the compensation are also explained.

We hope this paper will contribute to an understanding of the kind of provisions to be made in the agreements of the limited liability companies together with the liabilities of the managers stemming from this provision. Two points are important here. First, if article 625/2 of TCC is misinterpreted and an unlawful provision is added to the agreement of the company, this provision will be invalid and not applicable. Second, if a certain decision or an individual matter is not submitted to the approval of the general meeting in defiance of the agreement of the company, a lawsuit for liability should be filed against the managers for not fulfilling their obligations arising from the agreement of the company.

The structure of this paper is as follows. Section 2 reviews the relevant literature. Section 3 analyses the methodology that is used to research article 625/2 of TCC. Section 4 introduces a closer look into the content of article 625/2 of TCC. Section 5 presents the conclusions we reached in this paper.

2. LITERATURE REVIEW

In Turkey as of September 2020 limited liability companies which total number reached 900,548 have become a subject of interest for practitioners and academicians. However, article 625 of TCC and the submission of certain decisions of the managers and individual matters to the approval of the general meeting are the two topics that have not been thoroughly studied yet. The books written on the characteristics of limited liability companies in general very inadequately touch on this topic. Many of the writers of these books just mention the authorities of the managers to submit certain decisions and individual matters to the approval of the general meeting by making a short reference to the text of article 625/2 of TCC. They also mention that the approval of the general meeting does not eliminate the liabilities of the managers (Çebi, 2019; Ekşi, 2019; Altaş, 2021; Dedeağac, 2021; Yildız, 2007).

Article 625/2 of TCC was scrutinized in two books in detail, Şener (2017) and Tekinalp (2015), with differences between OR 811 and article 625/2 of TCC. However, their interpretations differ. Şener (2017) states that the article was translated incorrectly and it could be misunderstood. Thus, article 625/2 of TCC ought to be interpreted within the discipline of the OR which rules that through the agreement of the company certain decisions of the managers must be submitted to the approval of the general meeting while individual matters, when necessary could be submitted to the approval of the general meeting. Tekinalp (2015), on the other hand, states that TCC does not make such a distinction between certain decisions and individual matters unlike OR 811, so the agreement of the company can force the submission of both of
them to the approval of the general meeting. We, however, interpret this article differently from both authors in the following manner.

Other than the books mentioned, the only paper by Yurtman (2017) that specifically examines article 625/2 of TCC, discusses the issue in terms of the liability of the managers. Here, too, the author touches on the differences between article 625/2 of TCC and OR 811. Yurtman (2017), however, focuses on how the lawsuit for liability can be filed—despite the approval of the general meeting—against the managers rather than how regulation can be made in the agreement of the company.

3. METHODOLOGY

As we try to explain how article 625/2 of TCC is interpreted in Turkish law, the starting point of this paper is to make a comparison between article 625/2 of TCC and its source, OR 811, listing the differences. If it were not for the differences, Turkish law would force the managers of the limited liability companies in their agreements to submit certain decisions to the approval of the general meeting, while the individual matters would be left to the choice of the manager to decide. Article 625/2 of TCC deviates from OR 811 in its translation so certain decisions and individual matters are held on equal terms.

It is our conviction that this comparison could influence the regulations to be made in the agreements of the companies with regard to article 625/2 of TCC and therefore, it is critical. This comparison is based on the texts of the articles. In other words, the comparison is made based on every single word and sentence used in the articles. Since each word and each sentence is capable of producing a deviation, the legal consequences of these deviations would necessarily be different calling for a comparison. In our interpretation it must be noted, however, that article 625/2 of TCC is broadly interpreted to protect the interests of the managers granting them a flexible course of action.

4. RESULTS AND DISCUSSION

4.1. The relationship between the general meeting and the managers

In Swiss law, the general meeting of a limited liability company is distinctly defined in OR 804/1 as the supreme organ which states “the supreme governing organ of the company is the members’ general meeting”. Despite the clarity of this article, the relationship between the general meeting and the managers is designed based on “the principle of separation of functions” (Yurtman, 2017; Erdoğan, 2013). OR 804/1 is there to ensure that the general meeting of the company is entitled to make crucial decisions such as changing the agreement of the company, electing the managers, etc. In addition, OR 810/2 makes a list of untransferable authorities and duties of the managers and sees to it that the general meeting cannot take any decisions within the area of authority of the managers. That is to say, the fact that the general meeting is the supreme organ of the company does not eliminate the principle of separation of functions (Yurtman, 2017).

OR 804/1 is eliminated in the TCC. The TCC explicitly negates the precedence of the “general meeting” over the “board of managers” and rules “the principle of separation of functions” (Tekinalp, 2015; Yurtman, 2017; Yıldırım, 2008) authorizing each organ to use both transferable and untransferable duties within their limits forbidding them to interfere and dictate each other duties (Tekinalp, 2015).

The principle of separation of functions legally rises on the untransferable and inalienable duties of the general meeting (article 616 of TCC) and those of the managers (article 625/1 of TCC). Both the general meeting and managers use their authorities acknowledged by the legislator as a result of which one organ can neither dictate nor interfere in the other's field. In other words, they do not rise in a hierarchical order (Tekinalp, 2015; Yurtman, 2017; Yıldırım, 2008).

The principle of separation of functions, however, is not absolutely essential. Article 625/2 of TCC puts forward an important exception to that and rules that certain decisions of the managers and individual matters could be submitted to the approval of the general meeting. This means the article somehow rules out the principle of separation of functions (Sener, 2017; Tekinalp, 2015). It is because the article enables the general meeting to interfere with the duties and authorities of the managers. In both Swiss and Turkish laws, a limited liability company is characterized as a stock corporation with features of an unlimited liability company (Yurtman, 2017). Since article 625/2 of TCC allows the partners to have a louder voice in the management of the company, as in OR 811, this article characterizes the company as predominantly an unlimited liability company. It is because the management of the unlimited liability companies is not left in the hands of the managing organ but is executed by the partners collectively as we all know it.

4.2. A comparison of OR 811 and article 625 of TCC

According to OR 811/1, “the articles of association may provide that the managing directors:

1. Submit certain decisions to the members’ general meeting for approval;
2. May submit individual matters to the members’ general meeting for approval”. The article concedes that under the binding provisions of the agreement of the company certain decisions must be submitted to the approval of the general meeting, whereas it is optional to submit the individual matters.

In the second case, the managers are free to choose to submit (or not to submit) these matters to the approval of the general meeting. This means that the OR differentiates “certain decisions” and “individual matters”, thereby enabling the agreement of the company to make two kinds of regulations. “Certain decisions” must be clearly and openly stated in the agreement of the company. As for the “individual matters”, however, since they do not have to be brought to the general meeting to be approved, they do not necessarily appear in the agreement of the company. It is for the manager to decide which ones are to be brought before
the general meeting (Gasser, Eggenberger, & Stäuber, 2016).

OR 811/2 says “approval by the members’ general meeting does not restrict the liability of the managing directors” and this appears in article 625/2 of TCC.

On the other hand, as opposed to OR 811/1, article 625/2 of TCC does not allow the company to regulate in two different ways in the agreement. Article 625/2 of TCC regulates that “in the provisions of the agreement of the company the manager (or managers) should submit:

a. the certain decisions they take and
b. the individual matters they face to the approval of the general meeting. The approval of the general meeting neither removes nor restricts the liability of the managers. Articles 51 and 52 of the Turkish Code of Obligations are to be reserved”.

It is clear that the article concedes the managers’ certain decisions and individual matters should necessarily be submitted to the approval of the general meeting by way of the agreement of the company.

A conspicuous difference between OR 811 and article 625/2 of TCC is the last sentence of the latter which reserves articles 51 and 52 of TCO, so we will also try to explain the consequences of it.

4.3. The content of article 625/2 of TCC

It is our contention that article 625/2 of TCC, with its statement in the binding provisions of the agreement of the company of “the manager (or managers) should submit... to the approval of the general meeting” may lead us to draw the inference that the managers should their certain decisions or individual matters necessarily submit to the approval of the general meeting. In other words, one may infer that the text of article 625/2 of TCC does not give managers any options to do otherwise and that as an outcome of this provision in the agreement of the company any decision or matter in question must be submitted to the approval of the general meeting. However, since certain decisions and individual matters should be submitted to the approval of the general meeting by way of the agreement of the company, regulation can be made stating that these may be submitted to the approval of the general meeting. It is because, based on the principle of “in toto et pars continetur” (the majority also contains the few), the managers are entitled to choose between to submit and not to submit the certain decisions and individual matters to the approval of the general meeting. Thus, the managers, with regards to the then-state of the company, will be granted a more flexible course of action in their choices.

In this context, this argumentation should be discussed from two perspectives.

4.3.1. Submission to the approval as a "must"

If in the binding provisions of the agreement of the company it is articulated that certain decisions and individual matters must be submitted to the approval of the general meeting there is no question about submitting those to the approval. Even then article 625/2/a of TCC dictates that those “certain decisions” to be submitted to the approval of the general meeting should be defined in a clear-cut manner. This means that all the responsibilities and duties of the managers should not be brought to the approval of the general meeting (Sener, 2017; Tekinalp, 2015; Yurtman, 2017). The decisions on such issues may, for instance, appear in the agreement of the company: making certain investments that could exceed a certain amount, selling and buying real estate, deciding to file or not to file a lawsuit, appointing somebody to an important position or deciding on the rate of a salary to be paid to a senior manager (Cebi, 2019; Yurtman, 2017). On the other hand, the legislator in article 625/2/b of TCC prefers the term “individual matters”. It is our contention that these individual matters should just as well be defined in clear-cut terms. Instead of stating that “those problems that arise within the scope of activity of the company must be submitted to the approval of the general meeting”, a regulation must define, in a concrete manner, which problem should be submitted to the approval.

Article 625/2 of TCC does not transfer the power and authority of the managers to the general meeting which means that the general meeting does not make the decisions (Tekinalp, 2015; Yurtman, 2017). Article 625/2/a clearly defines “the certain decisions they take”, as the decisions must be taken by the managers, and then they should be submitted to the approval of the general meeting. The same is true for the “individual matters” in article 625/2/b. If the manager or managers, for instance, submit the plans and alternative strategies of the production policies of the company to the approval of the general meeting, the approval is not to be taken as a substitute for the decisions of the managers (Sener, 2017). Since the authority of the managers is not transferred to the general meeting, the decision must be taken and put into effect by the managers after the approval of the general meeting.

The general meeting is free to approve or to disapprove the decisions or solutions of the individual matters. In the case of disapproval, the managers are not entitled either to execute the decisions or make decisions related to an individual matter in question. Those managers who refuse to comply with the decision of refusal of the general meeting, have no options other than cancel this decision or take action for the nullity of this decision or as a last resort resign (Sener, 2017).

In the case of the approval, on the other hand, the managers will act on the decisions of the general meeting. Thus, the managers will enact the decision and decide on the same direction. Article 625/2 of TCC does not impose a quorum of a certain number of votes for the approval of the general meeting. Thus, the quorum stipulated in article 620 of TCC is applied and the decision must be taken by the absolute majority of the votes represented in the general meeting. The quorum might be changed by the agreement of the company (article 620 of TCC).

In Turkish law, the untransferable and inalienable authorities and duties of the managers which are listed in article 625/1 of TCC cannot be submitted to the approval of the general meeting. Those which are not within the limits of these
authorities and duties of the managers may be submitted to the approval of the general meeting (Şener, 2017; Yurtman, 2017; Yıldırım, 2008; Çebi, 2019). It is because the managers are bound by the decision of the general meeting to approve or not to approve. If the general meeting does not approve, managers cannot execute this decision. Thus, submission of such authority to the approval of the general meeting means that the untransferrable authority of the managers is subordinated to the decision of the general meeting.

On the other hand, in Swiss law, it is being disputed that if certain decisions or individual matters are within the managers’ untransferrable and inalienable duties and authorities which are listed in OR 810/2, the managers could submit these certain decisions or individual matters to the approval of the general meeting. What makes it disputable is that OR 810/2 also reserves OR 811. Based on this, in Swiss doctrine, some critics hold that certain decisions and individual matters of such nature can be submitted to the approval of the general meeting (Kratz, 2016). That would enable the partners to have a louder voice in the management of the company. However, it is not possible for the managers to submit some of their untransferrable and inalienable duties to the approval of the general meeting due to their nature. It is not possible, for instance, to submit the decisions regarding the preparation of the general meeting or the execution of the general meeting resolutions or the company’s supreme supervision to the approval of the general meeting. As opposed to that, decisions like the strategies of the company or the organization of the management together with the financial planning of the company can be submitted to the approval of the general meeting (Yurtman, 2017).

One might ask if the decision submitted to the approval of the general meeting could be changed. Yıldırım (2008) holds that the general meeting could not only approve the certain decisions or the individual matters but also accept them by making changes. It is our conviction that the answer to this question should be “no”. The general meeting is not authorized to make changes on the decisions submitted to be approved; only it will decide either to approve or to disapprove. It would be against article 625/2 of TCC to think, contrariwise. As it is argued above, the decision first should be taken by the managers and submitted to the general meeting afterward (Şener, 2017). The same is true when an “individual matter” is submitted to the approval of the general meeting. It is because the individual matter submitted to the general meeting is to be dealt within the power of the management and if the general meeting should be given the authority to make a change, then it should be taken over the authority to use the power of management. This, however, is not the case of a transfer of the authority but the general meeting, exceeding the limits of its power. If the general meeting disapproves of the decision or the matter, it would assuredly be reevaluated and improved by the managers to be submitted to the general meeting again (Şener, 2017; Tekinalp, 2015).

4.3.2 Submission to the approval as an “option”

The partners in the agreement of the company may have made it possible for certain decisions and the individual matters of the managers, to be submitted to the approval of the general meeting. In this case, the managers are free to choose to carry or not to carry them to the general meeting. It is, therefore, possible for the managers to submit a certain decision or an individual matter to the approval of the general meeting based on the related provision in the agreement of the company. It is also possible for the managers to act on their own free will without taking any approval from the general meeting. If they carried them to the general meeting, however, the managers have to act within the authority of the general meeting to approve or not to approve (Şener, 2017).

The decisions and individual matters to be submitted to the approval of the general meeting must be clearly and concretely defined with regard to their contents in the agreement of the company even when the agreement endorses the managers with an option to submit or not to submit them to the general meeting.

On the other hand, it should be noted that there is a difference between the authority of the managers to carry certain decisions or the individual matters to the general meeting for optional approval and consultation. The managers may choose to submit a disputable topic to the general meeting and ask for partners’ vote and they do not need to be justified by the agreement of the company (Kratz, 2016; Şener, 2017). What is more, a topic submitted to the general meeting for consultation gives the manager freedom to implement or not to implement it, with or without the approval of the general meeting, which means voting has no binding effect (Gasser et al., 2016; Şener, 2017).

4.4 The effect of article 625 of TCC on the company’s decision-making process

As in joint-stock companies, also in the limited liability companies with comparatively fewer partners, a partner can be defined as somebody who owns some of the shares of the company which economically makes him also the owner of the company (Paslı, 2005). The fact that managers submitting certain decisions and individual matters to the approval of the general meeting means that the decisions are being made by the very owners of the company. Article 625/2 of TCC intends to provide the managers with support in such cases where the partners are concerned and that when the management needs to get support from them. This is an article with the intention of establishing a rapport between the partners, that is to say, between the general meeting and the managers in the case where the decisions are met with hesitation. This article, in other words, is an important requirement in satisfying wants and needs in big limited liability companies (Şener, 2017).

Article 625/2 of TCC ensures the establishment of good corporate governance in a company. Good corporate governance, by definition, is a system in which the managers protect the interests of all stakeholders and work for the long-term success
and economic growth of the company. At the same time, it is a system in which effective surveillance is performed on the management of the company. Corporate governance also includes the division of roles and responsibilities, communication channels, and behaviors between partners, managers, and the CEO (Khan, Nijhof, Diepeveen, & Melis, 2018; Meier & Meier, 2013). Article 625/2 of TCC provides, on top of everything else, the communication between the managers and the partners when the partners are discussing in the general meeting whether a decision taken by the managers or an individual matter within the authority of the managers. In addition, it enables the partners to participate in managerial decisions which are beyond the authority of the general meeting. The doctrine indicates that a good corporate governance system must encourage all the partners and stakeholders to communicate actively with the managers and participate in the decision-making process of the company (Gunay & Heves, 2011). It also indicates that the surveillance on the management of the company contributes to its better performance (Khan et al., 2018; Kanagaratnam, Lobo, & Whalen, 2013). The submission of certain decisions of the managers and individual matters to the approval of the general meeting actually means the managers are under the surveillance of the partners. In other words, it compels managers to work for the interests of the company. It is another way of forcing them only to make decisions that are very likely to be approved by the general meeting because they are in the best interests of the company.

On the other hand, one has to remember that if the managers submit certain decisions and individual matters to the approval of the general meeting it would increase the expenses of the company. It is because, in such a situation, it could be costly for the company to call the partners and actualize a meeting. For instance, that invitation of the partners needs to appear in the Turkish Trade Registry Gazette, and that the company needs to send registered and reply-paid letters to the partners declaring the date, the hour, the place, and the agenda of the general meeting (article 617/3 makes reference to article 414/1 of TCC). All these are extra expenses to be considered. Also, the partners should bear with the expenses of the trip, the accommodation, and the like, together with the time they will have to give to the actualization of the general meeting (Sener, 2017).

Moreover, it would prolong the period of the decision-making process of the managers to submit certain decisions and individual matters to the approval of the general meeting. It is unreasonable to resort to the approval of the general meeting when the manager has to take and make quick routine decisions (Sener, 2017; Yurtman, 2017). This is why it is important to make a regulation in the agreement of the company that gives managers the right to choose whether or not to resort to the approval of the general meeting. This discretionary power of the managers enables them to make quick decisions in the face of situations that need prompt action without the approval of the general meeting. In fact, the duty of loyalty of the managers to the company also requires it.

As it is mentioned above, the decisions and individual matters which are submitted to the approval of the general meeting should be clearly demonstrated in the agreement of the company. Otherwise, the decision-making process of the company should slow down and be impeded (Yurtman, 2017). A regulation, for instance, which rules that TCC provides — except for those on daily routine activities — to the approval of the general meeting impedes the functioning of the company. In order to avoid the risk of impediment, these decisions should be very clearly defined and limited in the agreement of the company ensuring the company against any interruptions in its functions.

Despite its contribution to the establishment of a good corporate governance system, in the light of the reasons listed above, article 625/2 of TCC should be applied to the important and controversial decisions of the managers rather than their decisions as they conduct routine managerial activities.

4.5. The effect of the approval of the general meeting on managers’ liabilities

Article 625/2 of TCC as it originates from OR 811/2 states that “the approval of the general meeting neither removes nor restricts the liability of the managers”. This statement is valid when certain decisions and individual matters are approved by the general meeting. Even if the managers are bound by the approval of the general meeting, they hold the liability in all circumstances. The legislative intention of the statement imposes to act on the principle of “the liabilities are grounded on authority” and that a nonobligatory approval will not remove the liability grounded on authority.

It must be clarified that the articles with regard to the liabilities of the board of directors in joint-stock companies also apply to the managers of the limited liability companies in the TCC (article 644/1/a makes reference to articles 553 and the rest of TCC). According to article 553 of TCC, unless they can prove their faultlessness, the managers are liable to the company, partners, and creditors for any damages stemming from any form of violations of their obligations found in the law and the provisions of the agreement of the company. However, article 556/1 of TCC, as it is based on OR 757, decrees that in case of the company going bankrupt, the creditors can claim the right of litigation. If the company goes bankrupt, the insolvency administrator will first claim the demands of the partners and creditors of the company. In case of the insolvency administrator files a lawsuit for liability, the partners and creditors of the company cannot take any action (article 556 of TCC). Consequently, when a certain decision of the managers or an individual matter gets the approval of the general meeting within the context of article 625/2 of TCC, the managers who cause any losses or damages to the company stay liable to the company, partners, and creditors in the face of bankruptcy.

The decision or the individual matter submitted to the approval within the context of article 625/2 of TCC is, in fact, that which is discussed or negotiated by the managers. Since the managers have made this particular decision and
they have taken it to the general meeting, we should think that it is a decision which can be implemented. It is, indeed, not the slightest possibility that the managers should intend to submit a decision which they do not want to be implemented or a decision that is against the law to the approval of the general meeting. That is why, a certain decision or an individual matter submitted to the approval of the general meeting, theoretically, can still be accepted as the liability of the managers towards the company, partners, and creditors. Otherwise, the managers may intend to submit quite a few of the decisions or individual matters to the approval of the general meeting just to avoid their liabilities. The problem to be considered here is if the general meeting after approval still follows the procedure of legal liability. The theory, with good reason, states that after the decision or individual matter in question gets the approval of the general meeting, it cannot be explained in good faith (bona fides) that the general meeting should not take a decision of discharge or should file a lawsuit for liability. Therefore, unless the decision of the majority of the general meeting is declared canceled or declared null and void, it is not possible for the general meeting not to take a decision of discharge or to file a lawsuit for liability. Moreover, the partner who voted for the approval once cannot sue the manager for liability. The fact that the managers are meant to maintain liability according to article 625/2 of TCC, is, in case of the bankruptcy of the company, critical for the insolvency administrator and if this insolvency administrator neglects to sue the managers, it may be meaningful for the creditors to file a liability case against the managers (Yıldız, 2013; Bahtiyar, 2019; Yıldırım, 2008).

In sum, when the managers submit a certain decision or individual matter to the approval of the general meeting and they get the approval, it is necessary to make a distinction between those who hold the right to sue and those who do not. Neither the partners who vote for the approval of the decision of the general meeting nor the company should hold the right to sue the managers. According to article 625/2 of TCC, the managers hold the liability for those three groups: the partners who voted against the approval of the decision; in case of bankruptcy of the company — the insolvency administrator; in case the insolvency administrator does not sue them — the creditors of the company.

On the other hand, the liability of the partners who approve the decision of the managers in the general meeting must also be questioned. In other words, whether or not the partners, as they approve the decisions of the managers, become a part of the actual organ of the company must be questioned. In theory, on account of the rules added to the agreement of the company, it is proposed that the partners have already gained the position of the organ of management and thus the liability should be shared among the partners and the managers (Sener, 2017). However, our conviction is that it is difficult to reach this result for the partners who are using the authority granted to them by TCO. It is because the partners do not intend either to act as managers or to overtake the management of the company; they simply use the authority implemented by the law.

One cannot say that the interference of the partners in the management of the company is essentially crucial. Also in Swiss law, the actual organ is defined as somebody who participates in the company’s decision-making process. If a managerial decision is changed or enlarged, this condition is fulfilled (Siffer, Fischer, & Petrin, 2008). Therefore, within the scope of article 625/2 of TCC, it is not possible to say that the partners are actual organs or can be held liable. Moreover, the fact that the liability is shared among partners and managers, leads the partners to abstain from adding provisions as such to the agreement of the company with a tendency to disapprove the decisions or the individual matters submitted by the managers. It is our belief that at this point arises a risk for this article to be inapplicable.

Lastly, it must be noted that if a certain decision or an individual matter, which approval is made a “must” by the provisions of the agreement of the company, is not submitted to the approval of the general meeting, cannot affect the managers’ representative authority used against the third persons of good faith (bona fides). That is, even if they should conclude a contract, which must be submitted to the approval, do so without the approval of the general meeting, the contract still has the binding power on part of the company — even when the other party of the contract neither know nor is supposed to know that such approval does not exist (Gasser et al., 2016; Kratz, 2016; Şener, 2017; Çebi, 2019; Yurtman, 2017).

4.6. The intent of reserving the articles 51 and 52 of TCO

The very last sentence of article 625/2 of TCC rules the reservations of articles 51 and 52 of TCO, something which does not exist in OR 811. Still, even in Switzerland, the judges in the lawsuits for liability that are filed against managers of the companies, take into consideration OR 43 and OR 44 which are the origins of articles 51 and 52 of TCO as they decide for the compensation. That is to say, despite the differences in the wordings of article 625/2 of TCC and OR 811, the consequences of the application of the articles are the same in both systems (Yurtman, 2017).

Article 51/1 of TCO rules that in dealing with obligations arising from the torts “the judge determines the form of the payment for compensation and its content with regard to the circumstances and particularly the degree of fault”. Article 52/1 of TCO makes a list of the situations where the judge may raise or reduce the amount of the payment for compensation. According to this article “if the damaged person settles for the act of injury or partakes in the cause or increase of the injury or if he aggravates the situation of the perpetrator, then the judge may decrease or remove the compensation”. As a result of article 625/2 of TCC which rules these reservations, the managers may defend themselves by declaring that they have already submitted a certain decision or individual matter and getting the approval of the general meeting in liability cases filed by the partners who voted against the approval of the decision, the insolvency administrator or the creditors, themselves. The judge will decide on the amount of
compensation accordingly (Yıldız, 2013). However, it is clear that every approval of the general meeting should not be evaluated as "the damaged person settles for the act of injury" as expressed in article 52/1 of TCO. If the case in question justifies "settling for the act of injury", then we should accept that the judge may decide to decrease or remove the compensation (Tekinalp, 2015).

5. CONCLUSION

In Turkish law, article 625/2 of TCC allows certain decisions and individual matters to be submitted to the approval of the general meeting by the managers. This article is important as it allows the partners to be informed and to make comments on the managers’ certain decisions and individual matters submitted to the approval. Thus, the managers find the opportunity to consult with the partners, and the rapport between the general meeting and the managers is established.

Article 625/2 of TCC is integrated into the Turkish law with differences from its origin, OR 811. Since the differences between the two legal systems, regarding the articles, bring about different applications and practices. Considering its differences from OR 811, we have developed an interpretation of article 625/2 of TCC and tried to see the kind of provisions to be made in the agreements of the companies. This interpretation is important because it deviates from other interpretations on the same topic and will innovate new ones. This paper, because it also focuses on article 625/2 of TCC with its impact on the decision-making process together with the liabilities of the managers, we hope, will be used by future researchers.

OR 811 rules that under the provisions of the agreement of the company certain decisions must be submitted to the approval of the general meeting, the individual matters, however, are optional for the manager. In the second case, the managers are free to choose to submit (or not to submit) these matters to the approval of the general meeting. This means that, OR 811 differentiates “certain decisions” and "individual matters", thereby enabling the agreement of the company to make two kinds of regulations. As opposed to that, article 625/2 of TCC does not make any difference between them and concedes that the managers’ certain decisions and individual matters should necessarily be submitted to the approval of the general meeting adding a provision to the agreement of the company.

Since article 625/2 of TCC dictates it and because the provision is included in the agreement of the company, managers do not have any options whether or not to submit a certain decision of individual matter in question to the approval of the general meeting. However, since certain decisions and individual matters should be submitted to the approval of the general meeting by way of the agreement of the company, regulation can be made stating that these may be submitted to the approval of the general meeting. It is because, that based on the principle of “in toto et pars contenetur” (the majority also contains the few), the managers are entitled to choose between to submit and not to submit the certain decisions and individual matters to the approval of the general meeting. Thus, the discretionary power given to the managers with regard to individual matters by OR 811 should also be accepted through interpretation in Turkish law with regard to certain decisions and individual matters.

As a result, in the agreement of the company, there are two ways of making regulations: either the managers must submit certain decisions and individual matters to the approval of the general meeting, or the managers are granted a discretionary power to submit or not to submit them to the general meeting. If the manager is given this discretionary power, the manager out of his initiative could make a decision without the approval of the general meeting in a state of emergency.

The certain decisions and individual matters to be submitted to the approval of the general meeting should be clearly stated in the agreement of the company. A regulation, for instance, submitting all decisions of managers to the approval of the general meeting cannot be made within the agreement of the company. In addition, certain decisions and individual matters to the approval of the general meeting should not be within the scope of the untransferable and inalienable authorities and duties of the managers. It is because managers are bound to act by the decision of the general meeting to approve or not to approve. In case of disapproval, the managers are not entitled to execute the decision. Thus, submission of such authority to the approval of the general meeting means that the untransferable authority of the managers is subordinated to the decision of the general meeting.

Whether certain decisions or individual matters submitted by the manager to the general meeting are obligatory or optional, the approval of the general meeting neither removes nor restricts the liability of the managers. However, it should be accepted that neither the partners who vote for the approval of the decision of the general meeting nor the company have the right to file a lawsuit for liability against the managers. As a matter of fact, it cannot be explained in good faith (bona fides) to vote for the approval of a certain decision or individual matter in the general meeting and at the same time to file a lawsuit for liability against the managers. According to article 625/2 of TCC, the managers hold the liability for those three groups: the partners who voted against the approval of the decision; in case of bankruptcy of the company — the insolvency administrator, in case the insolvency administrator does not sue them — the creditors of the company.

On the other hand, the very last sentence of article 625/2 of TCC rules the reservations of articles 51 and 52 of TCO. As a result of this, the managers may defend themselves by declaring that they have already submitted a certain decision or individual matter and getting the approval of the general meeting in liability cases opened by the partners who voted against the approval of the decision, the insolvency administrator or the creditors, themselves. The judge will decide on the amount of compensation accordingly.

Concerning the limitations to be submitted to research, this paper does not discuss the influence of certain decisions and individual matters approved by the general meeting on the achievements of
the company. For example, we do not investigate whether or not such a decision would increase profitability. This is because limited liability companies in Turkey, as opposed to joint-stock companies, do not have to disclose their financial statements. Consequently, the public at large would not be informed about which limited liability companies have been making profits or how many of them are making regulations in the agreements with regard to article 625/2 of TCC. It would obviously be interesting to identify whether the decisions made by the managers on their own or the decisions they made in consultation with the partners would contribute more to the success of the company but answering this question is beyond the scope of the present study.

Furthermore, this paper does not include any evaluations of the rulings made by the Turkish courts concerning the validity of the provisions that are in the agreements of the companies, as there have been no such rulings so far. If any such court decisions are issued in the future, it would be imperative to provide analyses of these decisions. This would make a good suggestion for future research indeed, as such analyses would potentially be very useful in guiding the regulations that will be included in the agreements of the companies in the future.

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