İSTANBUL ÜNİVERSİTESİ YAYINEVİ

İstanbul Hukuk Mecmuası, 80 (2), 357-381

DOI: 10.26650/mecmua.2022.80.2.0001
https://dergipark.org.tr/pub/ihm
http://mecmua.istanbul.edu.tr/tr/_

İstanbul Hukuk Mecmuası

RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Submitted: 10.12.2021
Revision Requested: 29.03.2022
Last Revision Received: 13.04.2022
Accepted: 27.05.2022

An Examination of the Liability for Compensation for the Breach of Choice of Court Agreements: In the Light of the German Federal Court Decision of 17.10.2019

Melis Avşar*

Abstract

In the case subject to the decision of the German Federal Court (BGH) dated 17.10.2019, there was an exclusive choice of court agreement in favor of the Bonn courts, because of one of the parties filed a lawsuit in the US courts, the other party had to pay high amounts of litigation costs and attorney fees. In the case, the BGH accepted that the international choice of court agreement was violated, and it was decided that compensation be paid in accordance with the provisions of the law of obligations. This decision could set a precedent for the states included in the Continental European legal system. The reasonings accepted in the decision are of a nature that can also be asserted in terms of Turkish law. With the exclusive choice of court agreement, the parties are obliged to file a lawsuit in the chosen court (prorogation) and not to file a lawsuit in other non-chosen state courts (derogation). Although the dominant approach was accepting of the legal nature of the international choice of court agreement as a procedural law contract in the past, the new jurisprudence confirmed that the choice of court agreement also has a substantive law character. Article 112 of the TCO will have to be applied to the compensation liability under Turkish law in case of a breach of the choice of court agreement. The conditions sought in article 112 of the TCO are as follows: a breach of an obligation, occurrence of damage, existence of a fault and the presence of a causal link. These elements must be present for the breach of the choice of court agreement to lead to a liability for compensation.

Keywords

International Choice of Court Agreement, The Breach of the Choice of Court Agreement, The Liability for Compensation, German Federal Court Decision of 17.10.2019, TCO article 112

Alman Federal Mahkemesi'nin 17.10.2019 Tarihli Kararı Işığında Milletlerarası Yetki Anlaşmalarının İhlal Edilmesinin Tazminat Sorumluluğu Doğurması Hakkında Bir İnceleme

Öz

Alman Federal Mahkemesi'nin 17.10.2019 tarihli kararına konu olay, Bonn mahkemeleri lehine münhasır nitelikte bir yetki anlaşması bulunmasına rağmen, taraflardan birinin ABD mahkemelerinde dava açması sonucu, diğer tarafın yüksek tutarlarda dava masrafı ve avukat ücreti ödemek zorunda kalması nedeniyle uğramış olduğu zararın tazmini talebine ilişkindir. Mahkemece bu davada, milletlerarası yetki anlaşmasının ihlal edildiği kabul edilmiş ve borçlar hukuku kapsamında bir tazminat ödenmesine karar verilmiştir. Bu karar, Kıta Avrupası hukuk sistemine dahil devletler bakımından emsal olabilecek niteliktedir. Kararda, kabul edilen gerekçeler Türk hukuku bakımından da ileri sürülebilecek niteliktedir. Münhasır nitelikteki milletlerarası yetki anlaşmasıyla taraflar seçilen mahkemede dava açma (prorogasyon) ve seçilmeyen diğer devlet mahkemelerinde dava açmama (derogasyon) borcu altına girmektedir. Milletlerarası yetki anlaşmasının hukuki niteliğini, usul hukuku sözleşmesi olarak kabul etme görüşü eskiden hâkim olsa da yeni içtihatlarla birlikte maddi hukuk sözleşmesi

* **Corresponding author:** Melis Avşar (Res. Asst. Dr.), Istanbul University, Faculty of Law, Department of Private International Law, Istanbul, Turkiye. E-mail: melis.avsar@istanbul.edu.tr ORCID: 0000-0001-7957-6851

To cite this article: Avsar M, "An Examination of the Liability for Compensation for the Breach of Choice of Court Agreements: In the Light of the German Federal Court Decision of 17.10.2019" (2022) 80(2) İstanbul Hukuk Mecmuası 357. https://doi.org/10.26650/mecmua.2022.80.2.0001

This work is licensed under Creative Commons Attribution-NonCommercial 4.0 International License

niteliğine sahip olduğu da kabul edilmektedir. Yetki anlaşmasının ihlal edilmesi, yani seçilmeyen bir devlet mahkemesinde bir dava açılması halinde oluşacak tazminat sorumluluğuna Türk hukukunda TBK madde 112'nin uygulanması gerekecektir. TBK madde 112'de aranan şartlar; bir borcun ihlal edilmiş olması, zarar meydana gelmiş olması, kusurlu olunması ve illiyet bağı bulunmasıdır. Yetki anlaşmasının ihlalinin de tazminat sorumluluğuna yol açabilmesi için bu unsurların mevcut olması gerekir.

Anahtar Kelimeler
Milletlerarası Yetki Anlaşması, Yetki Anlaşmasının İhlali, Tazminat Sorumluluğu, 17.10.2019 tarihli Alman Federal Mahkemesi Kararı, TBK madde 112

Extended Summary

The US company and the German company, both operating in the field of telecommunications, decided in their contract that any disputes arising from the contract would be heard exclusively in the Bonn courts. However, as a result of a contractual dispute, the US company filed a lawsuit against the German company in the District Court of Washington. In this case, the US court gave a decision of lack of jurisdiction and dismissed the case for this reason. Thereupon, in the lawsuit filed in the Bonn court, a compensation for the damages arising from the litigation costs (the American rule of cost) and attorney fees due to the lawsuit filed in the US was requested. In the 2019 German Federal Court (BGH) decision, the claim for compensation for the damages arising from the breach of the choice of the court agreement was accepted within the framework of the German Civil Code (BGB) § 280.

The 2019 BGH decision is quite innovative in terms of accepting the breach of the choice of court agreement, and leads to compensation liability in the field of substantive law (obligations law). The decision has the impact of setting a precedent both in terms of the legal systems in Continental Europe and Turkey. In addition, a clear jurisprudence was presented in the decision in terms of the legal nature of the choice of court agreement, the law applicable to the choice of court agreement and the interpretation of the choice of court agreement. The legal nature of the choice of court agreement was accepted as a substantive law contract in terms of the obligation not to file a lawsuit in the non-chosen court. Furthermore, regardless of the legal nature of the choice of court agreement, if the interpretation of the party wills indicates that the parties enter into an obligation of not to file a lawsuit against each other in a non-chosen court, the liability must arise.

The court accepted that the liability for compensation would be subject to the BGB § 280, that regulates liability for compensation in the case of the breach of contract. In Turkish law, this issue is regulated in article 112 of the Turkish Code of Obligation (TCO). Therefore, the examination of the applicability of the legal grounds in the 2019 BGH decision in terms of Turkish law should be examined within the framework of this article. According to the conditions provided in article 112 of the TCO, the act of filing a lawsuit in the non-chosen court will constitute a breach of contract.

The second condition provided by this article is the occurrence of damage. If the non-chosen court where the lawsuit was filed gives a decision of lack of jurisdiction, the litigation costs and attorney fees incurred must be calculated. However, if the non-chosen court, where the lawsuit was filed, found itself having jurisdiction and making decisions on the merits, revealing the occurrence of damage would be quite difficult. In accordance with the international comity, in this case, finding that damage has occurred and may constitute an interference with the sovereignty of the states. The third condition sought in article 112 of the TCO is the existence of a fault. The plaintiff will be liable for the damage incurred unless he can prove that he was not at fault in filing a lawsuit in the non-chosen court. The plaintiff cannot prove that he is not at fault by claiming that his lawyer recommended filing a lawsuit in the non-chosen court. The last condition sought in TCO article 112 is that there should be a causal link between the damage and the act of the breach of the contract.

The compensation claim arising from the breach of the choice of court agreement is subject to a ten-year limitation period stipulated in article 146 of the TCO. This period will begin to run from the date of filing a lawsuit in the non-chosen court.

I. Introduction

The choice of court agreement is a widely used dispute resolution method in the international commercial arena. Most of the time, parties who entered a contractual relationship include a dispute resolution clause in their contract. Commonly this is either a choice of court clause or an arbitration clause.[1] These clauses will benefit the parties in terms of the predictability regarding the litigation costs and the duration of the litigation and help to build legal certainty.[2] When a dispute arises, the result of the court decision depends on where the lawsuit is filed. Since the court where the lawsuit is filed will apply its own procedural law and the differences between the conflict of laws rules of the states will have an impact on the applicable law, where the lawsuit will be filed will have an impact on the decision to be given.[3] Although the choice of court agreements and the arbitration agreements have similar features in this respect, only the issue of the breach of the choice of court agreement will be examined in this study.

To reduce uncertainties and provide predictability to the parties, it is recommended that the parties include a choice of court clause in their contracts. However, once a dispute has arisen, there is no guarantee that one of the contracting parties will file a lawsuit in the chosen court. Failure to file a lawsuit in the chosen court may have different consequences. It is accepted that these consequences are mostly related to procedural law. It has been widely accepted in most of the states that the chosen court will have the exclusive jurisdiction over subject matter (*prorogation effect*) and the non-chosen courts won't have the jurisdiction to hear the case (*derogation effect*).[4] As a result, if there an exclusive choice of court agreement exists, the defendant has the right to challenge the jurisdiction of the non-chosen court.[5] However, recently, it has started to be accepted that the choice of court agreement has an impact not only on procedural law, but also on substantive law.[6] According to *Briggs*, there is no difference in principle between the obligation to sell and the obligation to sue in the chosen court.[7]

---

1 Cemal Sanli, *Uluslararasi Ticari Akitlerin Hazırlanması ve Uyusmazliklarin Cozum Yollari* (7th edn, Beta 2019) 66; Nuray Eksi, *Milletlerarasi Ticaret Hukuku* (4th edn, Beta 2020) 143.

2 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (1st edn, Oxford University Press 2008) 1.Briggs.

3 Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (5th edn, International, Kluwer Law 2016) 3.

4 Briggs (n 2) 111; Peter Hay, 'Forum Selection Clauses - Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law' (2021) 35 Emory International Law Review 1, 2.

5 Aysel Celikel and B Bahadır Erdem, *Milletlerarasi Ozel Hukuk* (17th edn, Beta 2021) 653; Ergin Nomer, *Devletler Hususi Hukuku* (23rd edn, Beta 2021) 487; Cemal Sanli, Emre Esen and İnci Ataman Figanmese, *Milletlerarası Özel Hukuk* (9th edn, Beta 2021) 510; Guloren Tekinalp, *Milletlerarasi Ozel Hukuk Baglama ve Usul Hukuku Kurallari* (13th edn, Vedat 2020) 415; Vahit Dogan, *Milletlerarasi Ozel Hukuk* (6th edn, Savaş 2020) 79; Gulin Gungor, *Turk Milletlerarasi Ozel Hukuku* (Yetkin 2021) 254; Ziya Akinci, *Milletlerarasi Ozel Hukuk Ders Kitabi* (1st edn, Vedat 2020) 130.

6 Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (1st edn, Hart 2017) 10.

7 Briggs (n 2) 175.

In common law systems, since the beginning of the 2000s, decisions have been made that affirm the breach of the choice of court agreement will lead to liability for compensation.[8] Except for the 2009 Tribunal Supremo decision of Spain,[9] there were no decisions in civil law systems regarding the breach of choice of court agreements until the German Federal Court Decision of 17.10.2019.[10]

In this study, the question of whether a breach of a choice of court agreement will constitute an obligation to compensate the contracting parties will be examined. This examination will be based on the decision of the German Federal Court on the subject. This decision could set a precedent in terms of Continental European law systems and the Turkish law system. In this context, firstly, the German Federal Court Decision of 2019 ("BGH 2019") will be summarized. Afterwards, the BGH 2019 decision will be evaluated in terms of Turkish law. This evaluation will be made of the nature of the choice of court agreement, the applicable law, the implementation of article 112 of the Turkish Code of Obligations (TCO)[11] to the breach of the choice of court agreement, and the statute of limitations. Within the scope of this study, only the breach of the exclusive choice of court agreement will be examined. The non-exclusive choice of court agreement and the asymmetric choice of court agreement are excluded from this study.

Secondly, the conditions for the effectiveness of the choice of court agreement and the validity of the choice of court agreement are excluded from this study. Issues related to procedural law, such as which court shall have the jurisdiction to see the dispute arising from the breach of the choice of court is also outside of the scope of this study.

Lastly, article 329 of the Turkish Civil Procedure Code[12] will not be considered due to it being out of the context of this study. According to article 329, "*the malicious defendant or* ***the party litigating without any right*** *may be ordered to pay all or part of the attorney's fee agreed with the other party's attorney, in addition to the litigation expenses. In the case of a dispute about the amount of the attorney's fee or if the amount is found to be excessive by the court, this amount is directly determined*

---

8 Chee Ho Tham, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye' [2004] Lloyd's Maritime and Commercial Law Quarterly 46, 50.

9 In 1995, a contract was signed between a Spanish company and a US company. According to article 14 of this contract, Spanish law will be applied in disputes and claims between the parties, and the Courts of Justice of Barcelona will have the jurisdiction. In 1997, the Spanish company filed a lawsuit in the Court of Florida demanding contractual damages. The Court of Florida rejected the claim (due to lack of jurisdiction). The US company filed a lawsuit in the Courts of Justice in Barcelona demanding that the expenses be paid for by lawyers in the Florida Court. The *Tribunal Supremo* accepted this claim and ordered the party to pay compensation for the breach of the choice of court agreement. *See* Santiago Álvarez González, 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement' (2009) 6 IPRax 530.

10 *Bundesgerichtshof (BGH) III ZR 42/19*.

11 Act No. 6098 dated 11.01.2011. (RG 04.02.2011/27836)

12 Act No. 6100 dated 12.01.2011. (RG 04.02.2011/27836)

by the court." This article is based on good faith[13] and the attorney's fee to be paid to the other party in accordance with this article is accepted as a penalty specific to the procedural law.[14] That is, it is not in the nature of compensation.[15] However, in the case of the breach of the choice of court agreement, the plaintiff does not file a lawsuit, although he does not have the right to file a lawsuit. The plaintiff uses his right to sue by filing a lawsuit in the non-chosen court. Moreover, since each state has the right to determine the international jurisdiction of its own courts, it cannot be said that the plaintiff does not have the right to file a lawsuit, since the court chosen by the choice of court agreement may see itself as incompetent. In addition, since this study aims to examine whether the breach of the choice of court agreement will have a consequence in terms of substantive law, more detailed examinations of article 329 are excluded from the scope of this study.[16] In the BGH 2019 decision, it is clearly stated that the Brussels I Regulation[17] and the rules in the German Code of Civil Procedure (*Zivilprozessordnung*-ZPO) cannot be applied to the consequences of breaching the choice of court agreement in terms of substantive law.[18]

II. The German Federal Court Decision of 17.10.2019

A. Merits

The issue relates to a contractual claim between a German and a US company that operate in the telecommunications area. The parties mutually entered into a contract to receive the data traffic of the other party at the so-called peering points, to transport them further in their network to the connected customers and to ensure the necessary transmission capacity at the nodes within their networks.[19] After the plaintiff (the

[13] Baki Kuru, *Medeni Usul Hukuku El Kitabi Cilt 1* (Yetkin 2020) 291; Ramazan Arslan and others, *Medeni Usul Hukuku* (7th edn, Yetkin 2021) 167; Hakan Pekcanitez and others, *Pekcanitez Usul-Medeni Usul Hukuku* (15th edn, On Iki Levha 2017) 914; Suha Tanriver, *Medeni Usul Hukuku Cilt 1* (2nd edn, Yetkin 2018) 425.
There is no article corresponding to TCPC art. 329 in German law. However, in the German Code of Civil Procedure § 138, the obligation of the parties to act with good faith is regulated in accordance with the regulation of TCPC art. 29 (obligation to tell the truth and act in good faith). *See* Abdurrahim Karsli, *Medeni Usul Hukukunda Usuli Islemler* (1st edn, Kudret Basim 2001) 197; Hakan Pekcanitez, Hulya Tas Korkmaz and Nedim Meric, *Gerekceli Hukuk Muhakemeleri Kanunu* (12th edn, On Iki Levha 2021) 45.
In German law, the good faith is also not regulated as a general rule in the field of substantive law. However, the courts consider the principle of good faith in cases where fairness requires it. *See* Acun Papakci, 'Durust Davranma ve Dogruyu Soyleme Yukumlulugu' (2016) 11 Bahcesehir Universitesi Hukuk Fakultesi Dergisi 103, 106.

[14] Pekcanitez and others (n 13) 914; Tanriver (n 13) 425.

[15] In Turkish law, it is stated that a separate action for compensation can be filed if the act contrary to TCPC art. 329 also constitutes a tortious act. *See* Kuru (n 13) 291; Bilge Umar, *Hukuk Muhakemeleri Kanunu Şerhi* (2nd edn, Yetkin 2014) 136. As it is clearly seen, the attorney's fees to be paid within the scope of this article is not dependent on a breach in terms of the law of obligations. In that case, the consequences of breaching the choice of court agreement in the field of substantive law can be handled independently of TCPC art. 329.

[16] Despite this, it can be argued that the attorney fees and litigation expenses paid in the lawsuit filed in the non-chosen court can be claimed within the scope of TCPC art. 329. In particular, this view can be defended in accordance with the views that strictly accept the legal nature of the choice of court agreement as a procedural law contract.

[17] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[18] *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 28.

[19] ibid para 1 and 56.

US company) sent a larger volume of the data into the defendant's (the German company) network in the first few years of the contract, negotiations were held on the free increase in transmission capacity in favor of the plaintiff.[20] In 2016, after the negotiations failed, the plaintiff filed a lawsuit in the District Court of Washington requesting additional capacities. The defendant challenged the jurisdiction of the court based on the exclusive choice of court clause in the contract. According to article 14/3 of the contract; "*This agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction*". The Washington District Court refused to hear the case based on the lack of jurisdiction.[21] Meanwhile the defendant paid the US$196,000 attorney's fees and other litigation costs. The District Court did not decide on the litigation costs.[22]

Thereupon the US Company sued the defendant in the court in Bonn (*Landgericht Bonn*) with the same claims. In this trail, the defendant filed a counterclaim for the attorney's fee and other litigation costs which were paid in the lawsuit filed in the US as contractual damage. The Court rejected the claimant's request. However, the defendant's counterclaim was accepted.[23] Upon the plaintiff's objection, the higher-level court in Cologne (*Oberlandesgericht Köln*), which examined the case, overturned the decision of the court in Bonn.[24] The defendant applied for an appeal against the decision of the higher court in Cologne. Upon appeal, the case was brought before the Federal Court of Germany (*Bundesgerichtshof*). The court found the defendant's counterclaim request acceptable. The case was sent back to the court in Cologne to decide on the amount of compensation.[25]

B. Legal Grounds

Before beginning to examine the case, the BGH made some observations on merits. Firstly, the court found that there was no contradiction between the decisions of the US court and the district court of Bonn. The US court found lack of jurisdiction regarding the dispute on merits, but even if the court found itself competent and rendered a judgment, the subject matter of this decision would be different from the decision of the district court of Bonn.[26] The Bonn decision is about the damages resulting from the lawsuit filed in the US court. The damage here arises from filing a lawsuit in the US court itself.

---

20 ibid para 3.

21 ibid para 4.

22 At this point we should mention the rules of attorney fees in American law. As a rule, each party should pay its own attorney's fee regardless of whether it is winning or losing party. For more information about this rule *see* John F Vargo, 'American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, The' (1993) 42 American University Law Review 1567, 1569.

23 *LG Bonn, Urteil vom 08112017-16 O 41/16* para 96.

24 *OLG Köln, Urteil vom 26022019-3 U 159/17* para 53.

25 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 16.

26 ibid para 19.

Secondly, it cannot be clearly understood from the decision, but the BGH accepted that the applicable law to the damages arising from the breach of the choice of court agreement is subject to the applicable law to the main contract between the parties.[27] The interpretation of the choice of court agreement is subject to the applicable law to the main contract in order to determine whether the parties agree to settle the disputes exclusively in the chosen court. In addition, which disputes fall within the scope of the choice of court agreement is determined according to this law.[28]

Thirdly, the BGH observed that failure to file a lawsuit in the exclusively chosen court resulted extra litigation costs for the defendant. Thus, the plaintiff's act can be accepted as a non-observance of contractual obligations within the scope of article 280/1 of the German Civil Code (BGB)[29] because the choice of court agreement is accepted as a substantive law contract that regulates procedural relationships.[30]

III. Evaluation of the German Federal Court Decision within the scope of Turkish Law

A. The Nature of the Choice of Court Agreement

Whether the breach of the choice of court agreement will lead to a contractual compensation liability, is a question that can be answered depending on the determination of the legal nature of the choice of court agreement. If the choice of court agreement is strictly accepted as a procedural law agreement, claiming that its breach gives rise to a compensation liability under the law of obligations is not possible.[31] In Turkish law, procedural law contracts are defined as the contracts of the parties that have an effect in the field of procedural law.[32] Procedural law contracts aim to influence the case and are not considered to be obligatory for the parties in the fields of substantive law.[33] In the research conducted within the scope of this study, it was not found in the doctrine or the judicial decisions that compensation was awarded on the grounds that there was a situation contrary to the obligation in the field of substantive law in the case of a breach of procedural agreements.

The legal nature of the choice of court agreement is a controversial issue in Turkish law. The first approach regarding this issue is classification of the choice of court

27 ibid para 21.

28 ibid para 34 and 36.

29 ibid para 52.

30 ibid para 26.

31 Ahmed (n 6) 117.

32 Saim Ustundag, *Medeni Yargilama Hukuku* (7th edn, Nesil Matbaacilik 2000) 416–417; Yavuz Alangoya, Kamil Yildirim and Nevhis Deren-Yildirim, *Medeni Usul Hukuku Esaslari* (8th edn, Beta 2011) 163; Karsli (n 13) 223; Pekcanitez and others (n 13) 437; Evren Koc, *Medeni Usul Hukuku Kapsaminda Usuli İslemlerde Irade Bozukluklari* (1st edn, Sumer Kitabevi 2021) 140.

33 Koc (n 32) 150.

agreement as a procedural law contract, because it is aimed that, with the will of the parties, the drawing up of a contract has an effect in the field of procedural law. According to those scholars, even if the choice of court agreement is classified as a procedural law contract, it is accepted that the agreement also has some substantive law features. For example, it is accepted that the rules of substantive law will be applied by analogy to the matters such as the existence and the validity of the choice of court agreement.[34] The second approach regarding this issue is the view that accepts the choice of court agreement as a substantive law contract that has an effect on procedural law. However, there are very few scholars who support this view.[35] As a third view, it is argued that the international choice of court agreement has a double-character (both procedural and substantive law). As a justification for this, it is shown that, unlike the domestic choice of court agreement, an international choice of court agreement is not intended to have an effect only in procedural law. While making international choice of court agreements, the parties also aim to have some consequences in terms of substantive law. For example, the directly applicable rules of the chosen state's court may have an impact on the applicable law.[36] It should be added that the opinions put forward regarding the legal nature of the choice of court agreement in Turkish law are made mostly in terms of the domestic choice of court agreements.

In the BGH 2019 decision, it was stated that it is legally possible to accept the agreement filing a lawsuit in the chosen court as a contractual obligation.[37] The nature of the choice of court agreement does not conflict with it.[38] According to the established case law of the German Federal Court, the choice of court agreement is considered a substantive law contract regulating procedural law matters. Under the freedom of the contract, the parties can agree on these supplementary obligations in a contract, and it is not required to be considered a procedural law contract.[39] This result doesn't change, even if the choice of court agreement is classified as a

---

[34] Ayfer Uyanik, *Turk Milletlerarasi Usul Hukukunda Yetki Sözlesmeleri* (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Yüksek Lisans Tezi 1994) 33; Pekcanitez and others (n 13) 304; Nur Bolayir, *Medeni Usul Hukukunda Yetki Sozlesmeleri* (Beta 2009) 46–47; Berk Demirkol, *Milletlerarasi Yetki Anlasmalari* (Vedat 2018) 148; Gungor (n 5) 253; Kuru (n 13) 196; Ustundag (n 32) 418; Tanriver (n 13) 442; Arslan and others (n 13) 233; Alangoya, Yildirim and Deren-Yildirim (n 32) 177. Moreover, the Turkish Supreme Court decided that the provisions of the TCO could not be applied to a choice of court agreement regulated among the general conditions in a contract, and that a valid choice of court agreement would be found if it fulfils the conditions in TCPC art. 17-18. (The 19th Civil Chamber of the Supreme Court Case No. 1297/7378 dated 25.04.2016) In this decision it is strictly accepted that the legal nature of the choice of court agreement as a procedural law contract. *See* also Melis Avsar, *Milletlerarasi Usul Hukukunda Mahkemelerin Yetkisinin Belirlenmesinde Taraflarin Irade Serbestisi* (On Iki Levha 2021) 72. It should be added that the opinions put forward regarding the legal nature of the choice of court agreement in Turkish law are made mostly in terms of domestic choice of court agreements.

[35] Ilhan Postacioglu, *Medeni Usul Hukuku Dersleri* (Sulhi Garan Matbaası 1975) 160; Saim Ustundag, 'Medeni Usul Hukukunda Salahiyet Anlasmalari' (1967) 27 IUHFM 310, 310. (*Ustundag* did not defend this view in his later published work called Civil Procedure Law.)

[36] Avsar (n 34) 78.

[37] *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 25.

[38] ibid para 26.

[39] ibid.

procedural law contract, because the methodological distinction between a procedural law contract and a substantive law contract does not contradict the legal admissibility of establishing such contractual obligations.[40] Therefore, it is necessary to interpret the will of the parties in order to determine whether the choice of court agreement includes the obligation to file a lawsuit in the chosen court.[41]

As can be seen, the BGH accepted the filing of a lawsuit in the chosen court as a substantive law obligation, regardless of the nature of the choice of court agreement. It was accepted that the interpretation of the will of the parties would be taken into consideration while making this determination. In the light of this decision, it can be argued that, regarding to Turkish law: regardless of whether the nature of the choice of court agreement is accepted as a procedural or a substantive law contract, if it is understood from the will of the parties that it is an obligation to file a lawsuit in the chosen court, violation of this obligation may lead to compensation.

The interpretation of the will of the parties will be determined according to the law applicable to the choice of court agreement. Therefore, firstly, the law to be applied to the choice of court agreement will be examined. Later, it will be discussed which rules, within the framework of the determined law, will be interpreted.

B. Applicable Law

The applicable law to the choice of court agreement is divided into two parts. For the conditions and effectiveness of the choice of court agreement, the law of the forum (*lex fori*) will be applied. However, *lex fori* does not necessarily apply to the substantive consequences of the choice of court agreement, such as compensation liability for the breach of the choice of court agreement.[42] The application of various laws may come to mind as to what conditions should be fulfilled regarding whether the choice of court agreement has been breached or not. These are the laws to be applied to the main contract (*lex causae* of the main contract), the law of the chosen court (*lex fori prorogati*), the law of the court in which the compensation claim is filed (*lex fori*) or the law applicable to the choice of court agreement.[43] The law applicable to the choice of court agreement is either the *lex causae* of the main contract or the *lex fori prorogati*. In most cases these two laws are the same.[44]

---

40 ibid para 27.

41 ibid para 34.

42 Jennifer Antomo, *Schadensersatz Wegen Der Verletzung Einer Internationalen Gerichtsstandsvereinbarung?* (Mohr Siebeck 2017) 382.

43 Felix Ries, *Der Schadensersatzanspruch Wegen Der Missactung Einer Internationalen Gerichtsstandsvereinbarung* (Duncker&Humblot 2018) 172; Frederick Rielaender, 'Schadensersatz Wegen Klage Vor Einem Aufgrund Gerichtsstandsvereinbarung Unzustaendigen Gericht' (2020) 84 RabelsZ 548, 581.

44 Ries (n 43) 178.

In the BGH 2019 decision, since the choice of law clause in the main contract included the choice of court agreement, it was decided that German law should be applied to the claims regarding the breach of the choice of court agreement. In addition, *lex fori*, *lex fori prorogati* and *lex causae* of the main contract also refer to German law.[45] Most of the time, *lex fori prorogati* and the *lex cause* of the main contract may be the same law. However, in some cases these laws could point out different laws. For example, an exclusive choice of court and a choice of law agreement has been made in favor of the US courts. When one party files a lawsuit in a non-chosen court, the other party may seek damages for the breach of the choice of court agreement in any court that accepts its jurisdiction. Therefore, if this claim is brought to a US court, then the *lex fori*, the *lex fori prorogati*, the *lex causae* of the main contract and the law applicable to the choice of court agreement will be the same law (US law). However, if a party has a residence in Germany and this lawsuit is filed before the German courts, then the *lex fori* will be a different law. On the other hand, if there is no choice of law clause in the main contract, then the *lex causae* of the main contract may change depending on where the lawsuit is filed.

The BGH 2019 decision did not answer the question of which law should be applied if the *lex causae* of the main contract differs from the *lex fori prorogati*. However, it can be observed that the BGH is closer to the *lex causae* of the main contract as the applicable law to the compensation claims. This shows that the party autonomy is accepted as a key element that determines the law applicable to the breach of choice of court agreements.

In Turkish law, the issue of choosing a foreign state court with a choice of court agreement is regulated in article 47 of the Turkish Private International and Procedural Law Code (PIL).[46] The choice of the Turkish courts however, with the choice of court agreement is subject to the conditions in articles 17 and 18 of the TCPC. The regulations in articles 17-18 of the TCPC assert that the conditions of the choice of court agreement must be met in order to have an effect in the procedural law. However, there is no regulation regarding applicable law to the effects that the choice of court agreement will have in the field of substantive law, such as the compensation liability of the choice of court agreement in the case of breach, or the validity of the choice of court agreement in the field of substantive law. In Turkish law, various views are put forward regarding the law to be applied to the choice of court agreement. According to one view, the *lex fori* should be applied to the choice of court agreement.[47] According to another view, it is argued that the *lex fori* can only be applied if the *lex fori* is known or likely to be known by the parties as an

[45] *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 21.

[46] Act No. 5718 dated 27.11.2007. (RG 04.02.2011/27836)

[47] Dogan (n 5) 77; Burcu Irge Erdogan, *Milletlerarasi Usul Hukukunda Yetki Anlasmalari* (1st edn, On Iki Levha 2021) 56.

applicable law to the choice of court agreement.[48] From another view, the law of the court (including the conflict of laws rules)[49] in which the compensation claim is filed (*lex fori*) should be applied and this law will be the law of the state whose court is chosen (*lex fori prorogati*).[50] Another view is that since it is not possible to apply the *lex fori* directly to the choice of court agreement, the law applicable to the choice of court agreement should apply to the compensation claims. However, since there is no regulation regarding the applicable law in the TCPC, it must be admitted that there is a legal gap in this regard. The judge should fill this gap. This law will be either the *lex causae* of the main contract or the *lex fori prorogati* (as the law that has a closest connection).[51]

The rule of party autonomy has been accepted as the general rule that determines the law applicable to the contracts.[52] Therefore, the *lex causae* of the main contract and the *lex fori prorogati* will be the same when the courts and the law of the same state is chosen. However, if these two choices are different, then the *lex causae* of the main contract and the *lex fori prorogati* will not be the same, and the question of which law should be applied will arise. There is no judicial decision in this regard. In my opinion, it is important to find the law that has the closest connection with the choice of court agreement, and that law is the law of the chosen court (*lex fori prorogati*). Because it is accepted that the choice of court agreement and the main contract are separable contracts.[53] Therefore, different laws may have the closest connection to the main contract and the choice of court agreement.

The interpretation of the will of the parties regarding whether they assume to have the obligation to file a lawsuit in the chosen court and the conditions sought for the compensation liability to arise in the case of the breach of the choice of court agreements falls within the scope of the law applicable to the choice of court agreement.

---

48 Fugen Sargın, *Milletlerarasi Usul Hukukunda Yetki Anlasmalari* (Yetkin 1996) 109.

49 Here it is suggested that article 24 of the PIL should be applied by analogy. According to the article 24: "*The law explicitly designated by the parties shall govern the contractual obligation relations. The designation which can be concluded without hesitation from the provisions of the contract or is understood from the affairs of the case is also valid. ... If the parties have not explicitly designated any law, the relation arising from the contract will be governed by the most connected law to the contract. This law is accepted to be the law of the habitual residence (at the moment of the conclusion of contract) of the debtor of the characteristic performance; the law of the workplace or (in absence of a workplace) the law of the residence of the above mentioned debtor in case the contract is concluded as a result of commercial and professional activities; in case that the debtor has multiple workplaces, the law of the workplace which is the most tightly related to the contract. Nevertheless, considering the state of all affairs if there is a law more tightly related to the contract, that particular law shall govern.*"

50 Demirkol (n 34) 253.

51 Avsar (n 34) 303.

52 Celikel and Erdem (n 5) 384; Nomer (n 5) 323; Tekinalp (n 5) 277; Rona Aybay and Esra Dardagan, *Uluslararasi Düzeyde Yasalarin Catismasi* (2nd edn, İstanbul Bilgi Üniversitesi Yayınları 2008) 250; Sanli, Esen and Ataman Figanmese (n 5) 321; Dogan (n 5) 398; Gungor (n 5) 173.

53 Sargın (n 48) 91; Demirkol (n 34) 46.

C. The Interpretation of the Party Wills

The choice of court agreement, as with all contracts, occurs with the agreement of mutual party wills.[54] Therefore, the rules for the interpreting party wills will be the same as the general rules for the contracts.

In the BGH 2019 decision, it is stated that regardless of whether the choice of court clause is regulated in the general terms and conditions or provided in a separate agreement, the choice of court agreement will be interpreted according to its objective content and the typical meaning in accordance with the BGB § 157.[55] The interpretation to be made according to this article will be made in good faith and by taking into account the customary practices.[56] During interpretation, the wording of the choice of court agreement will be considered firstly. However, an interpretation based only on the wording is not required. The interpretation should be made in accordance with the purpose and the logic of the choice of court agreement. According to the recognized principles of the interpretation, the judge should also take into account the purpose pursued with the choice of court agreement and the interests of the parties, as well as the other accompanying circumstances that may shed some light on the meaning of the party wills.[57]

Within the framework of this rule, the BGH concluded that, even if it was not expressly foreseen that the breach of the choice of court agreement would lead to liability for compensation, the agreement to file a lawsuit in the exclusively chosen court would constitute an obligation under the BGB § 280 by way of interpretation.[58]

In Turkish law, almost the same rules regarding the interpretation of the contracts have been adopted as those accepted in German law. According to article 19 of the TCO, the interpretation of the contract should be based on the real and mutual will of the parties.[59] So if it is understood from the parties' wills that the choice of court agreement has a full derogation effect regarding the non-chosen courts, even if it is not explicitly accepted by the parties that this will create a debt relationship in the sense of substantive law, the party wills to derogation will result in the conclusion that the breach of the choice of court agreement should be compensated.

In summary while it is a procedural right for the parties to file a lawsuit in the chosen court, this situation also imposes an obligation on the parties to file a lawsuit only

54 Sargın (n 48) 48.

55 BGB § 157: "*Contracts should be interpreted as required in good faith, taking into account traditional practices.*" <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0466> Date of Access 01 December 2021.

56 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 36.

57 ibid para 50.

58 ibid para 36.

59 M Kemal Oguzman and M Turgut Oz, *Borclar Hukuku Genel Hukumler* (19th edn, Vedat 2021) 203; Fikret Eren, *Borclar Hukuku Genel Hukumler* (25th edn, Yetkin 2020) 526; Ahmet M Kilicoglu, *Borclar Hukuku Genel Hukumler* (25th edn, Turhan 2021) 336; Necip Kocayusufpasaoglu, *Borclar Hukuku Genel Bolum Cilt 1* (7th edn, Filiz 2017) 333–334.

in the chosen court. Issues such as the international jurisdiction of the chosen court and the outcome of the decisions of the non-chosen courts are among the procedural consequences of the choice of court agreement. The obligation arising from the choice of court agreement in the field of substantive law has an effect only between the parties and arises because of the parties' commitment to each other not to file a lawsuit somewhere else rather than the chosen court. There is no harm in saying that such an obligation has been established between the parties within the scope of the principle of the party autonomy, which is accepted in the field of substantive law.[60]

As a result, it can be said that failure to file a lawsuit in the court exclusively chosen court may create a liability for compensation due to the non-performance of obligation under article 112 of the TCO, which basically has a similar function to the BGB article 280.[61]

D. Application of the Article 112 of the Turkish Code of Obligations

The conditions of contractual liability arising from the contract are regulated in article 112 of the TCO. These conditions can be grouped under four headings: the breach of an obligation (violation of the contract), the damage, the fault, and the causality.[62] In the absence of one of these conditions, the liability to pay compensation under article 112 shall not arise. These conditions must be met for the violation of the choice of court agreements to be liable to compensation.

Before examining the conditions sought in this article, it should be mentioned briefly that as a result of the violation of the choice of court agreement, as a rule, only the parties of the choice of court agreement can be the creditor and the debtor. However, in cases where it is possible to extend the choice of court agreement to third parties, the third party may also be in the position of debtor or creditor due to the violation of the choice of court agreement.[63] [64]

1. The Breach of the Contract

The breach of the contract occurs in the case of non-fulfillment or failure to fulfill an obligation at all. Within the framework of the TCO article 112, non-performance of the obligation may occur by the act of performing or by the act of not performing it.[65]

60 Avsar (n 34) 298.

61 According to the BGB § 280, if the debtor violates an obligation arising from the contractual relationship, the claimant can demand compensation for the resulting damage. For more information *see* Reiner Schulze and others, *Bürgerliches Gesetzbuch Handkommentar* (10th edn, Nomos 2019) § 280 Rn 1-21.

62 Eren (n 59) 1172; Oguzman and Oz (n 59) 407; Kilicoglu (n 59) 817.

63 Ries (n 43) 77.

64 For cases where the extension of the choice of court agreement to third parties is accepted in Turkish law, *see* Avsar (n 34) 287; Irge Erdogan (n 47) 37.

65 Eren (n 59) 1173; Oguzman and Oz (n 59) 461; Kilicoglu (n 59) 816.

The choice of court agreement constitutes the obligation of both parties to file a lawsuit in the chosen court and not to file a lawsuit in other non-chosen courts, unless otherwise agreed.[66] Since this obligation is not foreseen solely for one party, it can be violated by both parties. Even if the legal nature of the choice of court agreement is accepted as a substantive law agreement or a hybrid agreement, it will not be easy to determine the nature of the debt that the choice of court agreement will create in the field of substantive law. It has been argued that the nature of this debt can be accepted as a primary obligation or an ancillary obligation, depending on the characteristics of the concrete case.[67]

In my opinion, only the derogation effect of the choice of court agreement is able to form a substantive law obligation. Because the parties have the right to decide on whether to file a lawsuit when a dispute occurs. Therefore, whether to file or not to file a lawsuit cannot be considered a breach of contract. However, not filing a lawsuit in the non-chosen courts can be considered an obligation of "not to perform" a specific act.[68] Since the choice of court agreement and the main contract are considered separate contracts,[69] the obligation of not filing a lawsuit in the non-chosen courts cannot be accepted as an ancillary obligation. Accordingly, the choice of court agreement will create an independent obligation. In the case in question, the plaintiff applied to the German and European authorities to increase the data volume signed in the peering contract between the parties. The plaintiff subsequently filed a lawsuit in a US court because he was told, he would have had a better outcome. It was also found clear to the parties that an agreement on the choice of court can also have substantive law effects.[70]

The breach of choice of court agreement should be examined under a variety of possibilities. Firstly, it can be breached by filing a lawsuit in the non-chosen court. The reason behind such a violation of the choice of court agreement may be the purpose of *forum shopping*. In other words, after the dispute has occurred, the plaintiff can file a lawsuit in the court where he expects he will achieve the most advantageous outcome for himself. However, it is not necessary that such a benefit was intended for the breach to occur. The suit may also be filed in the non-chosen court because the

---

66 If there was an asymmetric choice of court agreement, that is, if the parties were to be given different opportunities in terms of the possibility of applying to the court, it would not be possible to talk about the existence of an equal debt for both parties.

67 Ries (n 43) 138.

68 Accepting the debt arising from the derogation effect of the choice of court agreement as an obligation of performing or not performing will not make a difference in practice. *See* Richard Resch, 'Druckmittel Wider Die Sowie Kompensation Nach Missactung Internationaler Gerichtsstandsvereinbarungen Vor Deutschen Gerichten Im Verhältnis Zu Drittstaaten' [2020] NZG 241, 245.

69 This principle called the "severability of the choice of court agreement", and according to this, invalidity of the main contract does not lead to the invalidity of the choice of court agreement, and the choice of court agreement means that it creates a separate debt, not an ancillary obligation within the scope of the main contract. For further information *see* Ahmed (n 6) 54.

70 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 56.

choice of court agreement is considered to be invalid or the choice of court clause in general conditions is unknown.[71] However, if the will of the parties is not intended to conclude an exclusive choice of court agreement, or if there is a truly invalid choice of court agreement, a breach of choice of court agreement cannot be mentioned.

In the BGH 2019 decision, it was stated that articles 91 and 281 of ZPO[72] do not have a blocking effect with regard to a substantive claim for compensation.[73] If there is no claim for reimbursement under the domestic procedural law of the non-chosen court, a substantive law claim for the reimbursement of costs according to the BGB § 280 can come into effect.[74] The claimant breached the obligation under the choice of court agreement to file a lawsuit in the exclusively chosen Bonn court by filing a lawsuit before the US court.[75]

The second group in which the breach of the choice of court agreement may occur is in the case of set-off or counteraction. In a lawsuit filed in the non-chosen court, the other party's objection to set-off is not considered a breach unless specifically regulated in the choice of court agreement. However, the counterclaim brought in the non-chosen court should be considered a breach of the choice of court agreement.[76]

The act that violates the choice of court agreement is the filing of a lawsuit in the non-chosen court, the fact that this court considers itself competent does not eliminate the violation. However, whether this court considers itself competent or not will play a role in the calculation of the damage to be incurred, as will be examined in the next chapter.

2. Damages

The parties may claim compensation due to a breach of the contract if they suffer a loss. If the parties have not suffered any damage despite the breach of the contract, no compensation can be claimed.[77] Anyone who is obliged to pay compensation

71 Ries (n 43) 140.

72 ZPO § 91: "*The party that has not prevailed in the dispute is to bear the costs of the legal dispute, in particular any costs incurred by the opponent, to the extent these costs were necessary in order to bring an appropriate action or to appropriately defend against an action brought by others.*"
ZPO § 281: "*If, based on the regulations regarding the local or substantive competence of courts, the court's lack of jurisdiction is to be pronounced, and provided it is possible to determine the competent court, the court before which the action was initially brought is to declare, upon corresponding application being made by the plaintiff, that it is not competent and is to refer the legal dispute to the competent court. Should several courts have jurisdiction, the dispute shall be referred to the court selected by the plaintiff.*" *See* <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> Date of Access 01 December 2021.

73 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 43.

74 ibid.

75 ibid para 52.

76 Ries (n 43) 157.

77 Oguzman and Oz (n 59) 411; Kilicoglu (n 59) 817–818.

should restore the condition that would have existed if the circumstance that requires compensation had not occurred (positive damage).[78] [79]

The first group of damages that may occur as a result of the breach of the choice of court agreement are the costs to be paid out of court. In this group, the non-chosen court gave a decision of a lack of jurisdiction. Examples of these damages are attorney fees, communicating attorney fees, and travel expenses.[80] In a lawsuit filed in a non-chosen court, if the defendant has never participated in this lawsuit, that court may gain jurisdiction because he has not filed a plea for jurisdiction in the required time. Therefore, the defendant's participation in an action brought in a non-chosen court may be necessary in overriding that court's jurisdiction.[81] In Turkish law, different from German law,[82] according to article 71 of the TCPC, it is accepted as a rule that anyone who has the capacity to sue can file a lawsuit and follow their own case. There is no obligation to be represented by an attorney.[83] However, it is a common practice for the parties to have themselves represented by attorneys and communicating attorneys in international commercial disputes.[84] Therefore, in Turkish law, even if there is no obligation to be represented by an attorney in an international commercial dispute, compensation for the damages caused by the defendant's defending himself with an attorney may be demanded. Because it would be contrary to the ordinary course of life to claim that the defendant can defend himself effectively in a legal system that he is unfamiliar with and in a technical and complex dispute. Also in Turkish law, according to article 164 of the Turkish Attorneyship Code (TAC),[85] the fee to be paid to the attorneys can be at most 25% of the value of the dispute subject to the case. Since this article is related to the attorney's fee to be paid in the cases brought in Turkish courts, it cannot be applied to the calculation of the attorney's fees paid in the cases filed in foreign states like Anglo-Saxon states where it is possible to decide on the higher attorney's fees. It is not possible for this article to find direct application in the calculation of the damage arising from the breach of the choice of court agreement, since the attorney's fees have already been paid, the damage has

78 Oguzman and Oz (n 59) 412.

79 A similar understanding is accepted in case of breach of the arbitration agreement. With compensation, it is ensured that the injured person is brought to the situation he would have been in if the arbitration agreement not been breached. *See* Yusuf Caliskan, 'Tahkim Sozlesmesine Aykiriliktan Dolayi Tazminat Talebi', *Milletlerarası Ozel Hukukta Guncel Konular Sempozyumu Anadolu Universitesi Eskisehir 21-22 Nisan 2016* (Yetkin 2016) 328. For example, in some ICC decisions, it has been stated that the cost of the proceedings in the state court where the case was filed will be included in the scope of the damage. For information on these decisions, *see* ibid 331.

80 Ries (n 43) 167.

81 Antomo (n 42) 108.

82 ZPO § 78: "*The parties to disputes before the regional courts (Landgerichte, LG) and the higher regional courts (Oberlandesgerichte, OLG) must be represented by an attorney*." *See* <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> Date of Access 01 December 2021.

83 Alangoya, Yildirim and Deren-Yildirim (n 32) 145; Ustundag (n 32) 399; Pekcanitez and others (n 13); Tanriver (n 13) 539; Kuru (n 13) 346; Arslan and others (n 13) 277; Ali Cem Budak and Varol Karaaslan, *Medeni Usul Hukuku* (5th edn, Filiz 2021) 114.

84 Ries (n 43) 168.

85 Act No. 1136 dated 19.03.1969. (RG 07.04.1969/13168)

already occurred.[86] If a very high amount of attorney's fees are paid in the lawsuit filed in the non-chosen state court, the judge may make a reduction in this case as per articles 51 and 52 of the TCO.[87] For example, the injured party has an obligation not to increase the damage and should take the necessary measures to prevent the damage from increasing.[88] So, if it is possible to take an anti-suit injunction decision to prevent the lawsuit from being filed in the non-chosen court, not taking this decision may cause the damage to be increased by the fault of the defendant.[89]

In a lawsuit filed in the non-chosen court, only the costs incurred in asserting the lack of jurisdiction will constitute compensable damage, not all the expenses paid to the lawyers.[90] It can also be said that the difference between the costs of the chosen and non-chosen court should be excluded when calculating the compensation. But it would be hard to calculate and to prove such a difference.[91] Finally, if the lawsuit is filed in the chosen court, and travel expenses are to be made for it, the difference should be deducted in the calculation of the damage.

While calculating the damages, the interest on the money spent by the parties should be added.[92] Although there are some differences in the calculation of the interest rates in German and Turkish law, it is accepted to pay interest on money debts in regulations of both the BGB and TCO. According to article 88 of the TCO, the annual interest rate to be applied in the interest payment debt, if not agreed in the contract otherwise, is determined according to the provisions of the legislation in force at the date of the interest debt.[93]

In the 2019 BGH decision, the court found that the damages must be calculated by making the determinations of the local court (Bonn) regarding the plaintiff's objection that if the defendant's precautionary submission of the matter to the US District Court is not necessary for an appropriate legal defense and that the defendant cannot then seek reimbursement of all the attorneys' fees (some fees were made for the defense on the merits). Whether this is the case if determined by US law, as the

[86] In case the law to be applied to the choice of court agreement is a foreign state law, it may be considered whether the article 164 of TAC can be accepted as a directly applied provisions of Turkish law within the framework of the article 6 of PIL. In my opinion, this can be discussed if there is a conflict regarding the applicable law to the wage contract made with the attorney. The damages suffered due to the breach of the choice of court agreement is considered a material fact.

[87] TCO art. 51/1: "*The judge determines the scope of the compensation and the form of payment, taking into account the necessity of the situation and especially the gravity of the fault.*"
TCO art. 52: "*If the injured party has consented to the act that caused the damage or has been effective in the emergence or increase of the damage or aggravated the situation of the indemnity obligor, the judge may reduce the compensation or remove it completely. If the indemnity liable, who caused the damage with slight fault, will fall into poverty when he pays the compensation, the judge can reduce the compensation if fairness requires it.*"

[88] Basak Baysal, *Zarar Görenin Kusuru* (1st edn, On Iki Levha 2012) 40–41.

[89] Koji Takahashi, 'Damages for Breach of a Choice of Court Agreement' (2008) 10 Yearbook of Private International Law 57, 86.

[90] Briggs (n 2) 312.

[91] Ries (n 43) 171.

[92] Peter Mankowski, 'Ist Eine Vertragliche Absicherung von Gerichtsstandsvereinbarungen Möglich?' (2009) 1 IPRax 23, 29.

[93] Eren (n 59) 1098.

legal dispute is conducted in the US and the contract between the defendant and the attorneys assigned for this purpose is subject to US law. It should be clarified whether a lawyer is required under applicable US law to choose the safest way to achieve the goal pursued by the client and it may be therefore necessary to defend -as a precautionary measure- also in the substance of the claims made, notwithstanding the plea of jurisdiction.[94] In summary, in a case brought before a non-chosen court, as a principle, only the attorney's fee made regarding the plea of jurisdiction can be claimed. However, as a precautionary measure, if the defense on the merits will be the safest way for the client, then the attorney's fee may be requested for the defenses made on the merits. It should not be forgotten that the value of the dispute between the parties is also an important factor in calculating the cost of attorneys, because if the value of the dispute is high, the attorney fees and other costs will be high accordingly.[95]

A second group of damages may also occur when the non-chosen court decides on the merits of the case.[96] At this point, the defendant should prove that costs have been incurred in relation to the plea of jurisdiction. The defendant cannot claim defense costs incurred on the merits of the case. However, it is difficult to prove which costs were made for what purpose.[97] In the case filed in the non-chosen court, if the court decides on the merits in favor of the plaintiff, the defendant may suffer a loss regarding the substance of the case. The problematic issue is whether the hypothetical better position the defendant might have had if the case were brought before the chosen court would be compensated. It is very difficult to prove such damage. Firstly, the damage must have occurred. Since a non-chosen court's decision on the merits will have no effect unless it is enforced, this hypothetical damage may be only arisen after the enforcement decision.[98] However, even if the non-chosen court's decision is enforced,[99] the compensation for the hypothetical difference between the possible decision of the chosen court would be problematic. The biggest argument against this is that deciding that such compensation would be contrary to the international comity, because if such compensation is awarded, it will interfere with the decision of another state's court (the non-chosen court). As a general rule accepted in international law, "*every sovereign state is bound to respect the independence of every other sovereign*

94 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 60.

95 Jennifer Antomo, 'Zivilprozessrecht: Schadensersatz Wegen Verletzung Einer Gerichtsstandsvereinbarung' (2020) 4 EuZW 143, 151.

96 Takahashi (n 89) 85.

97 ibid.

98 Antomo (n 42) 522.

99 It should be added that one of the conditions sought for the enforcement of foreign court decisions in Turkish law is that the decision was not given by a court that has an excessive jurisdiction. In Turkish law, the jurisdiction of the court chosen by the choice of court agreement is considered exclusive. Therefore, when enforcement is requested in Turkey of a decision taken from a court that was not chosen, this situation constitutes a reason for a refusal to enforce. For further information *see* Burak Huysal, '6100 Sayili Hukuk Muhakemeleri Kanunu Ile Getirilen Yenilikler Isiginda Yabanci Mahkeme Kararlarinin Taninmasi ve Tenfizi Konusunda Bazi Tespitler' (2012) 32 MHB 71, 91–93.

state", and all states should act in accordance with this principle as a requirement for international comity.[100]

3. Fault

The breach of contract may result in compensation if the breach was committed with fault. According to article 112 of the TCO, unless the debtor proves that no fault can be imposed on, the debtor is obliged to compensate the damage caused by the creditor.[101] In both German and Turkish law, it is acceptable to examine whether the debtor can be held liable for non-performance. In article 114 of the TCO, the principle of fault has been accepted as a general rule. The debtor will be deemed liable for any fault in non-performance of the debt.[102] In addition, the burden of proof is on the debtor. The debtor should prove that he is not at fault in avoiding the liability.[103] In the 2019 BGB decision, it was clearly stated that the plaintiff is liable for the breach of the choice of the court if there is no evidence showing that he is not at fault.[104]

The plaintiff also cannot avoid liability by saying that his lawyer suggested filing a lawsuit in the non-chosen court. In the first instance court decision (*LG Bonn*), the court stated that it cannot relieve the plaintiff from the compensation liability that the plaintiff was advised by a lawyer when the lawsuit was filed in the US court. Also, it is not stated that the lawyer was unable to recognize the risk that the court called upon would deny its jurisdiction based on the choice of court agreement.[105] In the 2019 BGH decision, the court accepted the approach taken by the first instance court and found the plaintiff responsible for the actions of his attorneys pursuant to the BGB § 278.[106] According to the BGB § 278, the debtor is responsible for any negligence on the part of his legal representative, and the persons who represent him to perform his obligation, to the same extent as his own negligence.[107] There is a similar rule in article 116 of the TCO, differing from the rule in BGB is that the legal representatives are not explicitly counted as third parties.[108] However, attorneys are not accepted as legal representatives. The relationship between the attorney and the client is based on the proxy. Therefore, there is no difference between the BGB and the TCO in this regard. The approach adopted in the 2019 BGH decision is similarly acceptable in terms of Turkish law.

---

100 Ian Brownlie and James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 85.

101 Eren (n 59) 1182; Oguzman and Oz (n 59) 433; Kilicoglu (n 59) 822.

102 Eren (n 59) 1181; Oguzman and Oz (n 59) 432; Kilicoglu (n 59) 822.

103 Eren (n 59) 1187; Oguzman and Oz (n 59) 406; Kilicoglu (n 59) 822.

104 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 53.

105 *LG Bonn, Urteil vom 08.11.2017-16 O 41/16* (n 23) para 107.

106 *Bundesgerichtshof (BGH) III ZR 42/19* (n 10) para 55.

107 <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0838> Date of Access 01 December 2021.

108 Semih Yunlu, *Yardimci Kisilerin Fiillerinden Sorumluluk* (1st edn, On Iki Levha 2019) 183.

4. Causality

There must be a causal link between the breach of the contract and the damage. If the damage is not due to the breach of the contract but for another reason, the liability for compensation will not arise. The claimant will prove that there is a causal link.[109] It should be accepted that there is a causal link between the breach of the choice of court agreement and the damages such as the litigation costs and attorney fees incurred in the lawsuit filed in the non-chosen court.

E. The Statute of Limitations

According to article 146 of the TCO, every claim is subject to a ten-year statute of limitations unless there is a contrary provision in the law.[110] In claims for compensation arising from the breach of the contract, the statute of limitations begins to run from the moment the performance of the principal obligation becomes due. However, in non-performing obligations, due to the nature of the obligation, it is accepted that the statute of limitations begins from the moment the obligation is breached.[111]

The obligation not to file a lawsuit in the non-chosen courts (*derogation*) will be subject to this rule, as it has been accepted as a non-performing obligation in this study. In other words, a ten-year statute of limitations will start to run from the moment of filing a lawsuit in the non-chosen court.

IV. Result

Since the 2000s, it has been accepted in common law that the breach of the international choice of court agreement creates liability for compensation. In civil law, it has been accepted quite recently. The 2019 BGH decision is very important in this regard. However, in Turkish law, there is no case law regarding this matter yet.

In Turkish law, the dominant view regarding the nature of the choice of a court agreement needs to be reconsidered in order for the breach of the choice of court agreement to be able to result in compensation liability. The dominant opinion in Turkish law accepts the nature of the choice of court agreement as a procedural law contract. In the 2019 BGH decision, it has been accepted that regardless of the acceptance of the nature of the choice of court agreement, it should be investigated whether such a liability for compensation arises by interpreting the parties' wills.

---

[109] Eren (n 59) 1181; Oguzman and Oz (n 59) 409; Kilicoglu (n 59) 819.

[110] Since the statute of limitations in Turkish law is governed by the law applied to the merits of the dispute, the TCO finds an application here. For detailed review, *see* Faruk Kerem Giray, *Milletlerarasi Ozel Hukuk ve Usul Hukukunda Zamanasimi* (1st edn, Beta 2020) 80.

[111] Eren (n 59) 1423; Oguzman and Oz (n 59) 633.

The law chosen by the parties to be applied to the contract should be applied to the interpretation of the choice of court agreement and the conditions that the breach of it creates liability for compensation. In the absence of the choice of the law, the law of the chosen state's court, which is the law that has the closest connection to the choice of court agreement, should be applied. This approach was also adopted in the 2019 BGH decision.

The law to which the choice of court agreement will be governed should be applied to the conditions in which the breach of the choice of court agreement creates liability for compensation. With the 2019 BGH decision, it has been accepted that this is the law chosen by the parties to be applied to the main contract.

In the interpretation of the party wills, the accepted general rules regarding the interpretation of the substantive law contracts find application. The judge should take into account the purpose pursued with the choice of court agreement and the interests of the parties, as well as the other accompanying circumstances that may shed light on the meaning of the parties' will.

In Turkish law, a compensation liability arising in this way will be within the scope of article 112 of the TCO. If the conditions in this article are fulfilled, compensation will be required. Accordingly, firstly a breach must first be found. The breach of the choice of court agreement occurs when a lawsuit is filed in a non-chosen court. Because the parties have the obligation of a non-performing act. The second condition is the occurrence of damage. If the court gives a decision of a lack of jurisdiction in the case filed in the non-chosen court, it will be easier to calculate the damage. However, in a lawsuit filed in a non-chosen court, if the court decided to have the jurisdiction and decided on the merits, it will be more difficult to calculate the damage. Because claiming that the damage has occurred due to the decision of the foreign court, it may be against the international comity rules. Thirdly, the breach should occur through the fault of the debtor. The fact that the lawyer has been advised that the filing of a lawsuit in the non-chosen court does not eliminate the fault. The burden of proof is on the debtor. The last condition is the existence of a causal link between the damage and the breach.

The liability for compensation arising from the breach of the choice of court agreement is subject to the ten-year limitation period under article 146 of the TCO. This period begins to run from the moment of filing a lawsuit in the non-chosen court.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Grant Support: The author declared that this study has received no financial support.

Hakem Değerlendirmesi: Dış bağımsız.
Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.
Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

Bibliography/Bibliyografya

Ahmed M, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (1st edn, Hart 2017)

Akinci Z, *Milletlerarasi Ozel Hukuk Ders Kitabi* (1st edn, Vedat 2020)

Alangoya Y, Yildirim K and Deren-Yildirim N, *Medeni Usul Hukuku Esaslari* (8th edn, Beta 2011)

Álvarez González S, 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement' (2009) 6 IPRax

Antomo J, *Schadensersatz Wegen Der Verletzung Einer Internationalen Gerichtsstandsvereinbarung?* (Mohr Siebeck 2017)

——, 'Zivilprozessrecht: Schadensersatz Wegen Verletzung Einer Gerichtsstandsvereinbarung' (2020) 4 EuZW 143

Arslan R and others, *Medeni Usul Hukuku* (7th edn, Yetkin 2021)

Avsar M, *Milletlerarasi Usul Hukukunda Mahkemelerin Yetkisinin Belirlenmesinde Taraflarin Irade Serbestisi* (On Iki Levha 2021)

Aybay R and Dardagan E, *Uluslararasi Düzeyde Yasalarin Catismasi* (2nd edn, İstanbul Bilgi Üniversitesi Yayınları 2008)

Baysal B, *Zarar Görenin Kusuru* (1st edn, On Iki Levha 2012)

Bolayir N, *Medeni Usul Hukukunda Yetki Sozlesmeleri* (Beta 2009)

Born G, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (5th edn, International, Kluwer Law 2016)

Briggs A, *Agreements on Jurisdiction and Choice of Law* (1st edn, Oxford University Press 2008)

Brownlie I and Crawford J, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012)

Budak AC and Karaaslan V, *Medeni Usul Hukuku* (5th edn, Filiz 2021)

Caliskan Y, 'Tahkim Sozlesmesine Aykiriliktan Dolayi Tazminat Talebi', *Milletlerarası Ozel Hukukta Guncel Konular Sempozyumu Anadolu Universitesi Eskisehir 21-22 Nisan 2016* (Yetkin 2016)

Celikel A and Erdem BB, *Milletlerarasi Ozel Hukuk* (17th edn, Beta 2021)

Demirkol B, *Milletlerarasi Yetki Anlasmalari* (Vedat 2018)

Dogan V, *Milletlerarasi Ozel Hukuk* (6th edn, Savaş 2020)

Eksi N, *Milletlerarasi Ticaret Hukuku* (4th edn, Beta 2020)

Eren F, *Borclar Hukuku Genel Hukumler* (25th edn, Yetkin 2020)

Giray FK, *Milletlerarasi Ozel Hukuk ve Usul Hukukunda Zamanasimi* (1st edn, Beta 2020)

Gungor G, *Turk Milletlerarasi Ozel Hukuku* (Yetkin 2021)

Hay P, 'Forum Selection Clauses - Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law' (2021) 35 Emory International Law Review 1

Huysal B, '6100 Sayili Hukuk Muhakemeleri Kanunu Ile Getirilen Yenilikler Isiginda Yabanci Mahkeme Kararlarinin Taninmasi ve Tenfizi Konusunda Bazi Tespitler' (2012) 32 MHB 71

Irge Erdogan B, *Milletlerarasi Usul Hukukunda Yetki Anlasmalari* (1st edn, On Iki Levha 2021)

Karsli A, *Medeni Usul Hukukunda Usuli Islemler* (1st edn, Kudret Basim 2001)

Kilicoglu AM, *Borclar Hukuku Genel Hukumler* (25th edn, Turhan 2021)

Koc E, *Medeni Usul Hukuku Kapsaminda Usuli İslemlerde Irade Bozukluklari* (1st edn, Sumer Kitabevi 2021)

Kocayusufpasaoglu N, *Borclar Hukuku Genel Bolum Cilt 1* (7th edn, Filiz 2017)

Kuru B, *Medeni Usul Hukuku El Kitabi Cilt 1* (Yetkin 2020)

Mankowski P, 'Ist Eine Vertragliche Absicherung von Gerichtsstandsvereinbarungen Möglich?' (2009) 1 IPRax 23

Nomer E, *Devletler Hususi Hukuku* (23rd edn, Beta 2021)

Oguzman MK and Oz MT, *Borclar Hukuku Genel Hukumler* (19th edn, Vedat 2021)

Papakci A, 'Durust Davranma ve Dogruyu Soyleme Yukumlulugu' (2016) 11 Bahcesehir Universitesi Hukuk Fakultesi Dergisi 103

Pekcanitez H and others, *Pekcanitez Usul-Medeni Usul Hukuku* (15th edn, On Iki Levha 2017)

Pekcanitez H, Tas Korkmaz H and Meric N, *Gerekceli Hukuk Muhakemeleri Kanunu* (12th edn, On Iki Levha 2021)

Postacioglu I, *Medeni Usul Hukuku Dersleri* (Sulhi Garan Matbaası 1975)

Resch R, 'Druckmittel Wider Die Sowie Kompensation Nach Missactung Internationaler Gerichtsstandsvereinbarungen Vor Deutschen Gerichten Im Verhältnis Zu Drittstaaten' [2020] NZG 241

Rielaender F, 'Schadensersatz Wegen Klage Vor Einem Aufgrund Gerichtsstandsvereinbarung Unzustaendigen Gericht' (2020) 84 RabelsZ 548

Ries F, *Der Schadensersatzanspruch Wegen Der Missactung Einer Internationalen Gerichtsstandsvereinbarung* (Duncker&Humblot 2018)

Sanli C, *Uluslararasi Ticari Akitlerin Hazırlanması ve Uyusmazliklarin Cozum Yollari* (7th edn, Beta 2019)

Sanli C, Esen E and Ataman Figanmese İ, *Milletlerarası Özel Hukuk* (9th edn, Beta 2021)

Sargın F, *Milletlerarasi Usul Hukukunda Yetki Anlasmalari* (Yetkin 1996)

Schulze R and others, *Bürgerliches Gesetzbuch Handkommentar* (10th edn, Nomos 2019)

Takahashi K, 'Damages for Breach of a Choice of Court Agreement' (2008) 10 Yearbook of Private International Law 57

Tanriver S, *Medeni Usul Hukuku Cilt 1* (2nd edn, Yetkin 2018)

Tekinalp G, *Milletlerarasi Ozel Hukuk Baglama ve Usul Hukuku Kurallari* (13th edn, Vedat 2020)

Tham CH, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye' [2004] Lloyd's Maritime and Commercial Law Quarterly 46

Umar B, *Hukuk Muhakemeleri Kanunu Şerhi* (2nd edn, Yetkin 2014)

Ustundag S, 'Medeni Usul Hukukunda Salahiyet Anlasmalari' (1967) 27 IUHFM 310

——, *Medeni Yargilama Hukuku* (7th edn, Nesil Matbaacilik 2000)

Uyanik A, *Turk Milletlerarasi Usul Hukukunda Yetki Sözlesmeleri* (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Yüksek Lisans Tezi 1994)

Vargo JF, 'American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, The' (1993) 42 American University Law Review 1567

Yunlu S, *Yardimci Kisilerin Fiillerinden Sorumluluk* (1st edn, On Iki Levha 2019)

Bundesgerichtshof (BGH) III ZR 42/19

LG Bonn, Urteil vom 08112017-16 O 41/16

OLG Köln, Urteil vom 26022019-3 U 159/17