INTERNATIONAL LEGAL DIALOGUE

STUDENT CONFERENCE ON BANKRUPTCY LAW

23 May 2022

ABSTRACTS BOOK

Edited by:

Prof. Dr. Nevhis Deren Yıldırım

Prof. Dr. Peter A. Windel

Prof. Dr. Fabian Klinck

Prof. Dr. Markus Fehrenbach

ISBN: 978-625-8022-36-0

Istanbul 2022

RUHR UNIVERSITÄT BOCHUM RUB UNIC nasamer KOÇ UNIVERSITY DR. NÜSRET – SEMAHAT ARSEL INTERNATIONAL BUSINESS LAW IMPLEMENTATION AND RESEARCH CENTER KOÇ ÜNİVERSİTESİ LAW SCHOOL

STUDENT CONFERENCE ON BANKRUPTCY LAW

23 MAY 2022 MONDAY 10:00

ONLINE

Conference Committee:

Prof. Dr. Nevhis Deren Yildirim Koç University Istanbul
Prof. Dr. Peter A. Windel Ruhr-Universität Bochum
Prof. Dr. Fabian Klinck Ruhr-Universität Bochum
Prof. Dr. Markus Fehrenbach Ruhr-Universität Bochum

Session I 09:00 (CET), 10:00 (Turkey GMT+3)

New Concordat Regime in Turkish Law
Dr. Serpil Işık, Istanbul University Faculty of Law, Department of Civil Procedural Law and Execution and Bankruptcy Law

An Overview of Chapter 11 of the United States and Evaluation of Restructuring in Turkish Insolvency Law
İdil Zorağlu, Student at Istanbul University Faculty of Law

The English Scheme of Arrangement
Georgia Jones, Student at Ruhr-University Bochum Faculty of Law

Session II 13:00 (CET), 14:00 (Turkey GMT+3)

International Effects of Bankruptcy under Turkish Law
Meltem Ece Oba, PhD Candidate and Research Assistant at Koç University Law School, Department of Private International Law

Categories of securities on movables in German Bankruptcy Law
Emilia Schoettler, Student at Ruhr-University Bochum Faculty of Law

Liquidation of securities in German Bankruptcy
Jannik Rzoska, Student at Ruhr-University Bochum Faculty of Law

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RUB RUHR-UNIVERSITÄT BOCHUM

Professor Dr. Peter A. Windel
Chair of Procedural Law and Civil Law
Faculty of Law

KOÇ ÜNİVERSİTESİ

Professor Dr. Nevhis Deren Yıldırım
Hukuk Fakültesi

International Legal Dialogue

23th May 2022, ZOOM
09:00 – 12:00 MESZ/10:00 – 13:00 TRT/
13:00 – 15:30 MESZ/14:00 – 16:30 TRT

Student Conference on Bankruptcy Law

Prof. Dr. Nevhis Deren Yildirim
Hukuk Fakültesi

Prof. Dr. Peter A. Windel
Chair of Procedural and Civil Law, Faculty of Law

Online-Event

INTERNATIONAL LEGAL DIALOGUE

STUDENT CONFERENCE ON BANKRUPTCY LAW

ABSTRACTS BOOK

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NEW CONCORDAT REGIME IN TURKISH LAW[*]

Dr. Serpil Işık[**]

One of the purposes of bankruptcy law is to save debtors who are struggling with economic difficulties and are on the verge of insolvency. For this purpose, the establishment of the postponement of bankruptcy in Turkish law was one of the methods accepted for the recovery of capital companies and cooperatives whose financial situation had deteriorated. The postponement of bankruptcy, which is a structure introduced for capital companies and cooperatives whose financial situation has deteriorated, has been completely removed from Turkish law upon intense complaints arising from the problems in its application. In order to fill the gap arising from the abolition of the postponement of bankruptcy, the provisions of the concordat were amended with Law No. 7101 on the Execution and Bankruptcy Law and the Amendment of Some Laws published in the Official Gazette No. 30361 on 15 March 2018. Thus, instead of the establishment of the postponement of bankruptcy, the concordat regime was introduced for the debtors on the verge of bankruptcy.

Although the basic understanding of the concordat was preserved with the amendments made to the Enforcement and Bankruptcy Code (EBC) with Law No. 7101, fundamental changes were realized in terms of its functioning, processing, and results. So, how is the new concordat regime regulated by the legislator in Turkish law?

With the new regulations introduced by the Law No. 7101 in the Enforcement and Bankruptcy Code, the basic stages of the concordat institution were preserved. On the other hand, the contents of the stages of the concordat and the authorities to be applied have been amended. Accordingly, with the amendment of Law No. 7101, the concordat procedure will begin with the application of one of the debtors or creditors to the commercial court of first instance. Upon the acceptance of the concordat application by the commercial court of first instance, a temporary respite decision with a unique content will be issued pursuant to amendment of Law No. 7101. In relation to this, Law No. 7101 stipulates that upon the application of the concordat, as a result of the examination to be carried out by the commercial court of first instance, if the documents in Article 286 of the Enforcement and Bankruptcy Code are complete, the debtor will immediately be granted a temporary respite decision (Art. 287 para 1 EBC).

[*] Reviewed by the members of the Conference Committee.

[**] Research Assistant Dr. Serpil Işık, Istanbul University Department of Civil Procedure and Enforcement - Bankruptcy Law, isikserpil1988@hotmail.com; serpil.isik@istanbul.edu.tr. ORCID: 0000-0003-4329-1138.

If the commercial court of first instance finds that the application for concordat does not meet the requirements stipulated in the law and does not contain the documents in Article 286 of the Enforcement and Bankruptcy Code, it will reject the debtor's request. On the other hand, if the commercial court of first instance, which examines the concordat application, finds that the documents in Article 286 of the Enforcement and Bankruptcy Code are complete, it shall issue a temporary grace period of three months and ensure its immediate announcement (EBC Art. 288 para 2). At the same time, with the amendments under Law No. 7101 it is stated that this period could be extended for a maximum of two months (Art. 287 para 4 EBC). As can be seen, after the amendment of Law No. 7101, the maximum period accepted in terms of temporary respite may be up to five months.

The commercial court of first instance shall take all necessary measures for the preservation of the debtor's assets together with the temporary grace period (Art. 287 para 1 EBC). It shall also decide on the appointment of a temporary concordat commissioner of one or three persons by a temporary respite order. Thus, it will be possible to closely monitor by the commissioner that the concordat has a chance of success (EBC Art. 287 para 3).

If it is seen that the concordat has a chance of success within the temporary grace period, the court will give the debtor a final deadline of one year (Art. 289 para 3 EBC). However, in cases where it is difficult to bring the concordat to the ratification stage, this period may be extended up to six months (EBC Art. 289 para 5).

An important innovation introduced by Law No. 7101 in terms of the concordat is that a board of creditors will be established with a final deadline decision not to exceed seven creditors. The board of creditors shall submit an opinion to the court in the cases stipulated by law. Within the final deadline, after determining who the creditors are, the concordat project will be finalized.

Within the final deadline, after determining who the creditors are, the concordat project is finalized. Creditors are summoned to a meeting for the concordat project. At this meeting, the concordat project may be accepted or rejected by the creditors. After the whole procedure has been completed, the file will be sent to the commercial court of first instance for attestation within the final deadline. After completion of the content examination, the court will decide on the ratification or rejection of the concordat.

Generally speaking, the concordat procedure is a rather long and demanding process. The previously applied postponement of bankruptcy process is considered as more practical compared to the comparatively newly introduced concordat process which is implemented through the amendments by the Law No. 7101. On the other hand, the lack of an alternative institution in Turkish law to save debtors on the verge of bankruptcy from the situation they are in has increased the demand for the concordat in a very short time since the amendment of Law No. 7101 took place. Since 2018, with the entry into

force of the amendment of Law No. 7101, the number of debtors requesting concordats has gradually increased.

INTERNATIONAL EFFECTS OF BANKRUPTCY UNDER TURKISH LAW*

Meltem Ece Oba**

With the expansion of the cross-border commercial transactions, the number of companies which operate in different jurisdictions have increased. Differences in the legal rules as to the taxation and incorporation as well as the growth of the group of companies have yielded in corporations having assets in various different jurisdictions. Such an international setting of commercial operations has resulted in a growing number of complex bankruptcy lawsuits with international effects.

In this context, the question as to how a court in a given country may reach out to the assets of a bankrupt company situated in a different jurisdiction has emerged as a crucial one along with the issues of establishing the jurisdiction of the national courts to open a bankruptcy proceeding with a foreign element. Further, recognition of a foreign bankruptcy decision is also a problematic aspect of the cross-border bankruptcy lawsuits bearing in mind the grounds of non-recognition of foreign judgments especially in relation to the breach of public policy and exclusive jurisdiction rules. Hence, the international effects of bankruptcy which lie at the heart of international commercial transactions concern so many different legal aspects of private international law rules that need to be addressed.

In this presentation, the aforementioned international effects of bankruptcy will be examined from a Turkish private international law point of view. In this regard, initially the jurisdiction of Turkish courts in a bankruptcy lawsuit that involves a foreign element will be addressed. Further, debates under the Turkish legal doctrine regarding the adaptation of the principle of universalism or territorialism will be touched upon. Next, issues regarding the recognition of foreign bankruptcy decisions by the Turkish courts will be examined. In conclusion, the problematic aspects of international bankruptcy procedures under Turkish law will be discussed along with possible solutions.

* Reviewed by the members of the Conference Committee.

** Research assistant, Koç University Faculty of Law Department of Private International Law, meoba@ku.edu.tr. ORCID no. https://orcid.org/0000-0001-5492-7352.

CATEGORIES OF SECURITIES ON MOVABLES IN GERMAN BANKRUPTCY LAW*

Emilia Schoettler**

The categories of securities on movables in German Bankruptcy Law determine which rules are valid if securities on movables and bankruptcy intertwine. They do intertwine because, on the one hand, securities can be provided to ensure creditors will not be stuck with the costs they have made in advance, expecting the debtors to fulfill their debts. Debtors - on the other hand - will not fulfill their debts if the bankruptcy proceeding regarding their property has been started. For this reason, the German Bankruptcy Code determines separation and separate satisfaction. The separation [Section 47 of the German Insolvency Code (InsO)] describes the entitlement of someone to claim the release of something from the bankruptcy estate because it is no part of the bankruptcy debtor's assets. Whereas separate satisfaction (Sections 49, 50 InsO) stands for the liquidation of something out of the debtor's property in favor of a preferred creditor.

Accordingly, securities can cause a right to claim separation as far as the securing object is no part of the debtor's property. Furthermore, securities can get someone into the position of claiming separate satisfaction as far as the object still needs to be counted as the property of the debtor.

Considering the characteristics of pledges in movables and according to the rules of the German Civil Code (BGB), it is to accentuate that the debtor respectively the pledgor is still the owner of the item, even after the lien has been provided. Rather, the security extends to the creditor's allowance to liquidate the pledged item if the debtor fails to fulfill the secured claim (Section 1228 BGB). Accordingly, Section 50 InsO determines that pledges in movables entitle the pledgees to separate satisfaction if a bankruptcy proceeding has been opened against the debtor's assets.

The retention of title (Section 449 BGB) describes the security, which is provided by transferring the ownership of an object subject to the payment of the purchase price. This results in the seller retaining the ownership until the purchase price has been paid in full.

If the buyer gets bankrupted, the bankruptcy administrator is entitled to decide whether to fulfill the contract and therefore induce the condition (Section 103 subsection 1 InsO). The bankruptcy administrator could either pay the purchase price and keep the object of purchase for the bankruptcy

* Reviewed by the members of the Conference Committee.

** Student at Ruhr-University Bochum, Faculty of Law. emilia.schoettler@t-online.de

estate or they can refuse to pay, so the seller can claim separation of the bought object, which still belongs to his or her property.

In comparison to the retention of title, the transfer of ownership in order to secure a claim works by the debtor assigning a movable to the creditor. This allows the creditor to liquidate the item in case the debtor does not fulfill the secured claim. With transferred ownership, the creditor has no interest in obtaining the possession over the object they own, but to gain satisfaction out of its liquidation. This is why Section 51 No 1 Insolvency Statue determines that the creditor needs to be treated the same as the holder of a pledge on movable property and therefore can claim separate satisfaction in bankruptcy proceedings.

By the different treatment of retention of title and transferred ownership, it becomes clear that the distinction between the categories of separation and separate satisfaction is by no means based on the fact that the creditors are entitled to ownership of an object claimed for the bankruptcy estate. Instead, the purpose of the respective security needs to be considered.

The purpose of the retention of title can be seen in the fact that the object of purchase can be reclaimed in the event of a breach of contract without the ownership having to be transferred back. The purpose of transferred ownership lies in gaining satisfaction for the unfulfilled secured claim through the liquidation of the securing object. Even outside the bankruptcy, the securing objects rather counts as a possibility to get satisfied. Therefore, the contractual determinations of the transfer of ownership to secure a claim are sufficient for the respective movable object to still be assigned to the debtor's assets and with that grant the right to demand separate satisfaction.

Those securities which enable to get satisfied by liquidation outside bankruptcy grant the possibility of claiming separate satisfaction during the bankruptcy, due to their assignment to the debtor’s property. The security of retention of title pursues the purpose of reclaiming the sold object as part of the creditor’s property, which finds its equivalent in the possibility to claim separation in bankruptcy.