

SIGNATURE IN FORMAT-BASED CONTRACTS

INTRODUCTION

In Turkish Swiss law systems, the principle of optional format is valid. Thus, the parties of the contract may declare their volition, by means of which the agreement is established, in the format of their choice.¹ The 11th article of our Code of Obligations has adopted the principle of optional format in contracts by stating “The properness of the contract does not depend on any format unless there is clarity in the law. If no other rules are defined about the degree, extent and effect of the format ordered by the law, a contract which is not complying with this format would not be proper”. Considering this fact, the individuals may make their contract in a verbal, an informally-written or a formally-written type. However, in the cases that “there is clarity in the law”, the article has adjudicated that the validity of the contract depends upon its being made in that format. Put differently, the law may dictate that the contract should be format-based. Undoubtedly, in the case that the law does not have any format requirements, the parties may, in person, decide to make their contract in written form.

According to this short explanation of ours, the validities of the contracts do not depend on a certain format. Nevertheless, just as the parties may decide that the contract will be in written form, the law, too, could stipulate that the contracts should be made in written form. The format is considered to be based on mutual agreement (volitional, consensual) in the former case, and based on the law (lawful) in the latter case. Here, let us also briefly mention the difference between the format of validity, which is adjudicated by BK.md.11, and the format of proof; the regulation

¹ **Esener Turhan:** Borçlar Hukuku, Ankara 1969 C.I, s. 168; **Reisoğlu Safa:** Borçlar Hukuku Genel Hükümler, İstanbul 2005 s.66

of the rule BK.md.11 is about the format of validity. According to this rule, a contract which is not in accordance with the format stipulated by the law for exceptional cases is invalid. As a matter of fact, the 2nd subsection of the same article points out that in the cases where the law requires a format, the contracts which are not in compliance with this format would not be valid (proper).

The format of proof, on the other hand, is the format required for the existence or execution of a lawful process when disagreement occurs between the parties about the process. This point is adjudicated in HUMK.md.288. According to this rule, it should be proven by a “voucher”, that is by a document when disagreement occurs about a point such as the existence or execution of a lawful process whose value exceeds a certain amount in YTL terms. Here, the matter is not whether or not the agreement is valid, but rather the proof of the claimant when disagreement takes place about a point such as the existence or execution. The law has stipulated that this could be proved only by a document. Except all these, in our Commercial Code, the condition of validity for bill of exchanges are mentioned. One of these conditions is bill of exchange’s being signed by the individual incurring liability. Either of the format of validity, the format of proof and the signature on bill of exchange is important. Our explanations in the sequel are valid for all the three legal institution. Namely,

I) SIGNATURE IN WRITTEN-FORMAT-BASED CONTRACTS

A) SIGNATURE STEP

A contract based on a written format of validity eventuates in two steps; the first step is the writing out of the volutions of the parties, the second step, on the other hand, is the signature step. Therefore, the individual by whom the volutions of parties are put down on paper, written out is unimportant. The contract is not

established unless the prepared writing, that is the text, is signed and is not binding for the party who has not signed it. By the way, signature is a sign that shows someone knows what he accepts by putting this sign under the paper.²

B) SIGNATURE BY HAND

1) Rule of signature by hand

BK.md.14 f/I has declared the rule about with what the signature should be appended, by stating that “The signature should be the handwriting of the individual incurring liability”. According to this rule, the signature should be appended by hand. With this rule, the lawgiver has required that the binding volution in a contract be stated by the party of the agreement, in other words, that the signature be the yield of the owner of the volution. As a consequence of this fact, here, one should comprehend the expression “by hand” in a broad sense rather than a narrow one. The important thing is the statement of the volution of the party incurring liability in a written-validity-based contract, with a sign which we may call signature. Thus, it is possible for one who cannot use “one’s hand” to append signature using the fingers of one’s feet or mouth.

The lawgiver has answered the question of “whose signature” is required in a written-validity-based contract by “the individual incurring liability”. Hence, in a written-validity-based contract, the signature of the individual incurring liability will be required. This style of solution is correct. Because the purpose of the written validity condition is to have the individual to incur liability behave more carefully and considerately and to prevent from making cursory decisions. These purposes are for the party incurring liability in such a contract. For example: contract of bailment is based on a written validity format as required by BK. md. 484. The lawgiver has

² **Esener**, s.174, **Tunçomağ Kenan**: Borçlar Hukuku Dersleri, İstanbul 1965, C.I, s.149, **Eren Fikret**: Borçlar Hukuku, İstanbul 1988, C.I, s.253

required the guarantor to not make cursory decisions, to behave and think more carefully since he or she takes a risk for some other individual's liability. Therefore, the person whose signature is required on a obligatorily written bailment voucher should be the guarantor. There not being the signature of the creditor on the bailment voucher does not invalidate the contract.

2) Signature with a tool

After stating the rule of signature by hand by means of f.I, BK.md.14 has mentioned an exception to this rule in the 2nd subsection. According to the statement of this subsection, "A signature appended with a tool would qualify only in situations accepted by customs and traditions, and when it is necessary to sign valuable documents which are particularly put into circulation in large numbers. The lawgiver has stated this rule considering the exceptional cases where there is a need for a signature to be appended with a tool rather than by hand. According to this rule, a signature with a tool qualifies only in situations accepted by "customs and traditions". The law has given "valuable documents which are particularly put into circulation in large numbers" as an example to this case. In this context, it is either impossible or quite difficult to sign large numbers of company stocks in circulation by hand. In this case, the signature could be appended with a tool.

3) Electronic signature

Technology dictates the change of laws as well. Computer technology was unknown in 1926 when our Code of Obligations was accepted. However today, computers are a part of our lives and it has become a need to communicate and execute lawful processes. Domestic or abroad, two individuals could either conclude a validity-format-based contract (for instance: as required by BK.md.162, alienation of a written-validity-format-based credit; as required by 52nd article of Law 5846, a

written-validity-format-based contract of transfer of financial rights about a production) or could want to obtain the format of proof even if it does not follow a written validity format. It is these needs that have made it necessary to have an exception to the “signature by hand” rule stated in BK.md.14. In order to fulfill this requirement, Electronic Signature Law 5070 was put in execution in 01/23/2004. In the 3rd article of this law, “electronic signature” has been defined as follows; “Electronic data appended to some other electronic data or related to electronic data and used for confirmation purposes”. In the same article, the owner of an electronic signature has been defined as; “Real individual who uses a signature-generating device to make an electronic signature”. Law 5070 has accepted that a signature by hand will have the same lawful consequences as an electronic signature. Let us finally state that electronic signatures are accepted for informally-written-validity-based contracts, and that formally-written-format-based contracts (such as immovable sales or motor vehicle sales) are not allowed in electronic form or with an electronic signature.

C) SHAPE OF THE SIGNATURE

In our laws, there does not exist any rules or limitations about the shape of signatures. Because the important point is not the shape of the signature, but rather its being a sign expressing the binding volition of the individual incurring liability. During the technical inspections in the case that the individual denies the signature, it will be investigated whether or not “the sign used as a signature” is a handwork of that individual. If investigation yields that the sign is that individual’s handwork, the contract will be binding for that individual.

D) LOCATION OF THE SIGNATURE

In written-validity-based contracts, no limiting rules have been mentioned in the law regarding the location of the signature. Signatures are generally appended to the end of the text in written contracts.³ However, signatures placed at any other location will also be valid. Although the location of the signature is unimportant as far as the written validity format in Code of Obligations is concerned, it may be important in other branches of law. For instance, in bill of exchanges, all signatures except those appended on the front side by drawers are bill guarantee.

II) SIGNATURE FOR THE VISUALLY HANDICAPPED AND THE UNABLE TO SIGN

The visually handicapped and the unable to sign can execute all kinds of lawful processes where written format is not required. However, in the case that written format is required, we face the problem how the people who are unable to sign will execute this kind of lawful processes. The lawgiver has stated the 14th and 15th articles considering this fact. These are;

A) THE VISUALLY HANDICAPPED

1) Written contracts of the visually handicapped until the date of 07/07/2005

BK.md.14 f.III has decided how the visually handicapped can sign written-validity-based contracts. According to this rule, “The signatures of the blind do not bind them unless they are formally approved or it is certain that they are cognizant of the transaction text when they sign it”. With this rule, in order for the blind to conclude a written-validity-based contract, two opportunities are offered:

- a) Their usage of approved signature

³ Reisoglu, s.73, Eren, s.260

Even if a visually handicapped individual is able to sign, he or she cannot conclude a written-validity-based contract. The lawgiver has required this in order to prevent them from being abused because even if these visually handicapped people are capable of signing, they are deprived of the opportunity to read the text they sign. Therefore, it is necessary that the signature of a visually impaired individual be formally approved.

b) Proof that they are cognizant of the contract text

If the signature of a visually impaired individual on a written-validity-based contract has not been approved or this has not been possible, the second way for the validity of this contract is “the proof that the visually impaired individual is cognizant of the contract text”. For example, while signing the contract, if there have been two attestors, if these individuals have witnessed that the contract was read out loud and later on when they declare that the visually impaired signed this text, this contract would be valid.

2) Written contracts for the visually impaired after the date 07/07/2005

The rule BK.md.14 f.III was abrogated on 07/07/2005 by the 50th article of Law 5378 “The Law Concerning The Impaired and Changes In Some Laws and executive orders”. There has not been such a change in Swiss Code of Obligations which is the source of our Code of Obligations. No reason exists for this change made in our case. However, this way, the possibility of the visually impaired individuals’ concluding informally-written format based contracts was abolished and it was accepted that these individuals could conclude all written-format based contracts in a public notary. Starting from this date, it is possible for a visually impaired individual to conclude informally-written format based contracts such as the alienation of credit,

bailment only in a public notary. When this change was made, rules concerning written-validity-based contracts concluded by the visually impaired were appended to the 73rd and 75th articles of Public Notary Code 1512 instead of the rule BK.md.14 f.III. Then, the 73rd article of the Public Notary Code changed by Law 5378 is now as follows; “If the public notary realizes that the involved person is speech, auditorily or visually impaired, the process will be executed in front of two attesters in accordance with the impaired’s will. In the case that the involved individual is auditorily or speech impaired and that there is no possibility of written conversation, two attesters and a sworn translator”. This rule is stated for the visually impaired who can sign. If the visually impaired individual can sign, with regard to the 73rd article, the public notary will have two attesters for a written-validity-based contract in accordance with this individual’s will. A contract concluded without having two attesters eventhough the visually impaired demanded would be invalid. IInd subsection of the 75th article of the Public Notary Code made by Law 5378 is as follows: “Usage of a sign, seal or fingerprint instead of signature. Although a signature is appended or a handprint replacing signature is made in a public notary process, if the involved individual demands, or, excluding the visually impaired who are able to sign and in the name of whom the process is executed, the public notary or, if the public notary observes it to be necessary regarding the status or identity of the individual who signs or places a handprint, within the limits of the subsection above, the involved, the attester, the translator or the expert will place a fingerprint as well. In the case of seal usage, fingerprinting is necessary”. Here, the written-validity-based contracts for the visually impaired who cannot sign are mentioned. In the article, having two attesters for processes involving these individuals has been necessitated. The validity of the

contract depends on the existence of two attesters regardless of the will of the visually impaired.

B) THE UNABLE TO SIGN

The unable who are illiterate or who have bodily impairments enter into this category. BK.md.15 has stated the following statement for these individuals: “Every individual who are unable to sign are allowed to place a formally approved and hand-made sign or use a formal testimonial. Statements related to the bill of exchange policy are reserved”. With this rule, the law has regulated how the unable to sign can conclude validity-based contracts. In order for the unable to sign to conclude this kind of contracts, the following requirements should be met:

1) The individual should not sign. BK.md.15 is made for the unable to sign. The individuals who can sign can never benefit this rule. Therefore, an individual who is able to sign cannot use a formally approved and hand-made sign or a formal testimonial which are adjudicated by this article as a replacement for signature. Because BK.md.14 f.I has explicitly adjudicated the rule of “signature by hand”. The exception of this rule is possible only under the limited conditions in the 15th article.

2) The individual’s usage of a hand-made and formally approved sign

a) It is not possible for an unable to sign to use any sign as a replacement for signature. It is necessary that this sign be hand-made. This hand-made sign should be placed on a material. For instance, a sign scraped on a piece of silver metal. Our Code of Civil Procedure (HUMK) mentions “a hand-made sign or a seal” instead of the concept “a hand-made sign” (md.297). According to this, the unable can use a hand-made sign or a seal. A seal is a sign scraped not by the unable in person, but by

another individual. Consequently, the unable can use his or her own hand-made sign as a replacement for signature, as well as a seal scraped by another individual.

b) Our Code of Obligations has not accepted every sign made by an unable as a replacement for signature. It has mentioned the condition that this sign should be “formally approved”. The hand-made sign or the seal must be approved by the public notary in advance.

When these two requirements are met, the unable can conclude a written-validity-based contract. It is also worth noting whether or not the unable can use a fingerprint in order to conclude a written-validity-based contract instead of a hand-made sign or a seal. According to doctrine, it is accepted that the usage of fingerprinting requires the conditions stated in BK.md.15.⁴ Thus, it is possible for an unable to use fingerprinting with the condition that the fingerprint has been approved by the public notary in advance. For the immovable-related formal processes executed in land registry, our Land Registry Constitution accepts fingerprinting without the requirement that the fingerprint has been formally approved to be a replacement for signature. The 18th article of this Constitution has the following statement: “If one or more of the parties are unable to sign, the thumb of the left hand, if missing, one of the other fingers is pressed on the document and it is noted which finger is used. In the case of using a seal, fingerprinting, too, is necessary”. It can be seen that the Land Registry Constitution has accepted the possibility of fingerprinting for the unable in the processes to be executed in Land Registry and has not mentioned the requirement that the fingerprint should be approved in the public notary in advance. The Constitution has taken it a step further and has required fingerprinting accompanying the usage of a seal even if the seal has been formally approved. The 1st subsection of

⁴ **Tekinay:** Borçlar Hukuku Genel Hükümler,6.Bası,İstanbul 1988, sh160; **Kılıçoğlu,Ahmet.:** Borçlar Hukuku Genel Hükümler, 9.Bası, Ankara 2007,s.87.

the 75th article of the Public Notary Code has stated the possibility to use fingerprinting as a replacement for signature regarding the unable.

3) The unable's usage of formal testimonial

“The formal testimonial” mentioned in the article refers to formal documentation or formal approval. Here, the unable tells a formal official about a written-validity-based contract, the formal official signs this information and approves its accordance with the unable's volition.

4) Unrelatedness of the lawful process with the bill of exchange

BK.md.15 has stated that “Statements related to the bill of exchange policy are reserved”. The regulations regarding the policies which our Code of Obligations reserves have been mentioned in our Commercial Code. Regarding the policies, TTK.md.668 has stated the following; “It is required that the declarations in the policy be signed with handwriting. As a replacement for signature with handwriting, one cannot use any mechanical device or a hand-made or an approved sign or a formal testimonial. It is necessary that the handwriting signatures of the blind have been formally approved”. It can be seen that our Commercial Code has required that the policies be certainly signed by hand and declined the unable's usage of any hand-made sign or a formal testimonial, as stated in BK.md.15.