

THE ISSUE OF ADOPTION OF UNJUST ENRICHMENT CASE FOR NEGOTIABLE INSTRUMENTS' PRACTICE IN THE 10-YEAR APPLICATION OF THE TURKISH CODE OF COMMERCE SINCE 2012

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Abstract. One of the original and exceptional institutions of the negotiable instruments law is the unjust enrichment case. Although unjust enrichment is regulated in the Turkish Code of Obligations in general terms and is accepted as a source of debt relations, it also constitutes the subject of a case-specific to the Turkish Code of Commerce and only negotiable instruments as a result of the choice of the legislator. Due to its exceptional nature, the legislator has also strictly determined the conditions that must be fulfilled to file an unjust enrichment case in negotiable instruments. This approach of the legislator is correct. The unjust enrichment case in negotiable instruments creates an extraordinary and additional demand opportunity for the right holder. Despite this option and opportunity, these bills are used only as ordinary bills instead of filing a lawsuit for unjust enrichment in negotiable instruments. Undoubtedly, this is a contradiction. To put it briefly, the reason for this contradiction is the lack of awareness in the practice of law.

Keywords: negotiable instruments; Turkish law; promissory notes; unjust enrichment; cheques

INTRODUCTION

Negotiable instruments law is a commercial law branch with its own principles and institutions. As a few of these principles, strict form requirements and short statutes of limitations prevailing in negotiable instruments may result in the loss of rights arising from such kinds of bills. This situation is absolutely inconsistent with fairness. For this reason, the legislator has regulated the case of unjust enrichment in negotiable instruments as an exceptional and extraordinary institution. The subject of this study is the examination of this exceptional case in terms of its conditions and consequences. In this way, it aims to examine an original legal institution in terms of Turkish law to contribute to comparative law studies.

1. *RATIO LEGIS* OF THE PROVISION OF UNJUST ENRICHMENT

1.1. Keeping Negotiable Instruments Law Up-to-Date

Negotiable instruments law is a branch of law that preserves its existence and validity, perhaps by transforming, despite all technological developments and the digitalization of commercial life. Although it is argued in the doctrine that the negotiable instruments law can no longer meet today's needs, has lost its independence and should be accepted as a sub-branch of the law of contracts, in my opinion, the negotiable instruments law has its own principles and is the closest to digitalization and technological developments [Kurt 2021, 24]. On the other hand, it cannot be claimed that the negotiable instruments have not been transformed [Kaya and Tatlı 2022, 23]. As a matter of fact, the electronic cheque and electronic promissory notes codification preparation studies, which started with a delay in Turkish Law, can be considered an example of this transformation. In addition, the data-matrix system in cheques, which has been valid since 2016, reveals that the transformation in the negotiable instruments law, at least in terms of cheques, started earlier [Baytemür 2021, 14].

One of the reasons why the negotiable instruments law maintains its current validity is that its specific principles and institutions still maintain their effectiveness. The basic principles of negotiable instruments law include the validity of the short statute of limitations and submission deadlines and adherence to excessive form conditions [Doğan 2022, 31]. These principles are of vital importance for the negotiable instruments law to meet the needs of fast and stable commercial relations [Kendigelen and Kırca 2022, 45]. As a matter of fact, as long as these needs exist, negotiable instruments law will continue to exist.

1.2. The Need for Alternative Proceedings and Claims in Negotiable Instruments Law

Short statute of limitations specific to negotiable instruments, aggravated procedural conditions that must be followed in order to assert the rights arising from negotiable instruments bring handicaps, especially for creditors [Gültekin 2020, 30]. Rights arising from negotiable documents can be lost because only formal requirements such as submission and protest are not fulfilled. In addition, rights arising from negotiable instruments may lose their ability to be claimed with the expiration of the statutes of limitations, which are shorter than the general statute of limitations. The possibility that right holders may lose their receivables in negotiable instruments simply

because of not complying with short statutes of limitations and not fulfilling excessive formal requirements has led the legislator to provide validity to some alternative and extraordinary claims.

The first of these demand ways is the transfer of the provision. The transfer of the provision is regulated in Article 731 of the TCC. However, the transfer of the provision cannot be valid for promissory notes whose legal nature is not remittance and for cheques with which the addressee banks do not enter into the relationship of the negotiable instruments [Kaya and Tatlı 2022, 99]. Considering that promissory notes are the most preferred type of negotiable instruments, it is seen that the ability of the transfer of provision institution to be an alternative demand method is insufficient to eliminate the handicaps [Aydin 2021, 145]. In other words, the handicaps we mentioned above do not disappear with the transfer of the provision, which is an institution specific to the bill of exchange, which is the least preferred type of negotiable instruments in commercial practice.

As another alternative and exceptional way of demand, unjust enrichment is regulated in bills of exchange. The 3rd Book of the Turkish Code of Commerce,¹ which is dedicated to the Law of Negotiable Instruments, in Article 732 regulates the institution of unjust enrichment in bills of exchange. Contrary to the transfer of the provision, this regulation became valid for all types of negotiable instruments, in other words, for the bill of exchange, promissory note and cheque. For this reason, unlike the transfer of provision, its ability to be applied is wider.

2. CASE OF UNJUST ENRICHMENT IN NEGOTIABLE INSTRUMENTS

2.1. Exceptional Character

The case of unjust enrichment in negotiable instruments has an exceptional character. For this reason, the legislator preferred to meticulously regulate the conditions necessary for the right holder to file a lawsuit arising from the negotiable instruments. These conditions should be interpreted narrowly and strictly when applying. In other words, care should be taken not to expand the application of the unjust enrichment case in negotiable instruments [Eriş 2016, 550].

This indebtedness rising from the unjust enrichment claim is exceptional and unusual. Because although the mentioned debtors get rid of their debts arising from the negotiable instruments, the legislator still exceptionally gives the creditor the opportunity to pursue, perhaps as a last chance,

¹ Official Gazette. Date: 14.02.2011. Number: 27846.

against the debtors of the negotiable instruments. Contrary to the unjust enrichment in the law of obligations, unfair enrichment cannot be mentioned here. It does not need to be mentioned either. In the case of unjust enrichment in negotiable instruments, it is required and also sufficient for the enrichment of the defendants on the loss of the holder's right due to the short statute of limitations or failure to fulfil the formal conditions [Eriş 2016, 551].

2.2. Conditions for Claiming Right Related to Unjust Enrichment

According to Article 732 of the TCC, the essential prerequisite for filing a lawsuit for unjust enrichment in negotiable instruments is that the bearer of the bill must lose the rights arising from the negotiable instruments. However, this loss must occur for two reasons so that an unjust enrichment lawsuit can be filed [Kaçak 2010, 353]. The first of these is the statute of limitations. The second is negligence in the submission process necessary for protecting the rights arising from the negotiable instruments and in the protest process in case of non-payment of the negotiable instruments [Uzunallı and Yıldırım 2021, 80]. With the realization of any of these reasons, although the issuer and the acceptor, who are the main debtors of the negotiable instruments, are freed from their obligations arising from the negotiable instruments, they remain indebted to the right holder, who is the creditor.

2.2.1. Loss of Right in the Negotiable Instruments Due to Statute of Limitations

Compared to other debt relationships, shorter statute of limitations have been determined for negotiable instruments. As stated before, the reason for this is the establishment of fast and stable relations with transaction security in commercial life with negotiable instruments. As a matter of fact, in the Turkish Code of Obligations,² which is one of the main legal sources of private law, 2-year and 10-year statutes of limitations have been determined for claims arising from torts. In contrast, a 10-year statute of limitations has been generally accepted for claims arising from contracts. We should also state that the statute of limitations of 5 years instead of 10 years is specifically regulated in the legislation. For example, the statutes of limitations for the receivables arising from agency and brokerage agreements are determined as 5 years.

Here, the statute of limitations applicable to the negotiable instruments is regulated shorter than the general statute of limitations foreseen for debt

² Official Gazette, Date: 04.01.2011. Number: 27836.

relations. This choice of the legislator is very accurate. First, the rights arising from negotiable instruments are devoid of reason. To put it more accurately, negotiable instruments are sources of exclusive debt relationships. The existence of a basic debt relationship is not a necessary prerequisite for issuing negotiable instruments [Kendigelen and Kirca 2022, 246].

As a matter of fact, we can examine the statute of limitations stipulated for the bill of exchange under three sub-headings. Accordingly, claims against the accepting addressee are subject to a 3-year statute of limitations. This period runs from the maturity date of the bill of exchange. The statute of limitations is 1 year for the claims of the holder against the debtors of the application in the bill of exchange [Kaçak 2010, 353]. The 1-year period runs from the date the holder protests the bill of exchange and the maturity of the bill of exchange if exemption from the protest is in question [Uslu 2006, 37]. The last statute of limitations on the bill of exchange is 6 months. The shortest limitation period of 6 months is for the claims of the debtors of the bill of exchange against other application debtors who were in the negotiable instruments relationship before them as payers. As a matter of fact, the 6-month statute of limitations begins to run from the date the debtor of the application pays the bill of exchange or the notice is sent to him for payment [Uzunallı and Yıldırım 2021, 82].

Similarly, the statute of limitations has been determined for the promissory note, which is the most preferred type of negotiable instrument. Accordingly, claims that can be made against the issuer of the promissory note are subject to a 3-year statute of limitations [Günay 2022, 379]. This is because the legal responsibility and position of the issuer of the promissory note are the same as the addressee who accepted the bill of exchange. The final debtor in the bill of exchange is the addressee who accepts, while in the promissory note, the final debtor is regarded as the issuer of the promissory note. The 3-year limitation period, which is subject to the claims that the holder may raise against the issuer of the promissory note, will also run from the maturity of the bill [Uslu 2006, 38]. The claims that the promissory note holder can bring against the debtors of the application are also subject to the 1-year limitation period, just like the bill of exchange, and the 1-year limitation period runs from the date of the protest. In case of exemption from the protest, the date on which the 1-year limitation period will start to run will still be the due to the maturity date. The 6-month statute of limitations also applies to the promissory notes. Just like in the bill of exchange, the 6-month limitation period, which is subject to the claims of the payer of the bill against the debtors who came before him in the bond relationship, will start to run from the date of notification of the proceedings initiated for the payment if the application debtor has not paid the bill, or the date of the lawsuit if filed [Uzunallı and Yıldırım 2021, 82].

While the bill of exchange qualification is being discussed in comparative law, the statute of limitations for cheques that do not have a question mark in terms of Turkish law is also regulated under two headings. Accordingly, in cheques, the claims of the holder to the debtors of the application and the debtors of the application to each other as payers are subject to a 3-year statute of limitations [Karadayı 2021, 156]. The 3-year limitation period for the holder starts to run from the end of the legal submission periods. The statute of limitations for the claims of the debtors against each other will start to run from the date of payment or notification of the lawsuit or enforcement proceeding [Aydın 2021, 43]. It should be noted that there is no debtor in the form of an acceptor in cheques. Because the addressee of cheques can only be the bank and the addressee bank cannot be included in the cheque relationship as debtor in accordance with the principles of cheque law.

Here, the expiration of the statute of limitations, which varies according to the types of negotiable instruments, causes the loss of rights arising from negotiable instruments. For this reason, the beneficiaries who pass the statute of limitations will no longer be able to assert their claims arising from the negotiable instruments [Eriş 2016, 551]. However, at this point, we encounter questions that may need to be discussed in another scientific study. While the statute of limitations was not regulated in the TCO as a reason for ending a debt, why would the statute of limitations in negotiable instruments cause the loss of rights? Is there a contradiction here?

2.2.2. Loss of Right in Negotiable Instruments Due to Failure to Fulfil Procedural Requirements

There are formal requirements that must be fulfilled in order not to forfeit and use the application right, which is a right specific to negotiable instruments. The first is to submit the negotiable instruments to the debtor within the legal deadlines. If not paid, it is determined by the form conditions specific to the negotiable instruments. If these requirements are not fulfilled, it is still accepted that the right arising from the negotiable instruments has expired, regardless of whether the statute of limitations has expired.

Submission of negotiable instruments to the debtor of the bill is subject to certain conditions in terms of time, place and form. Failure of the submission causes the right arising from the negotiable instruments to no longer be asserted to the final debtor [Eriş 2016, 552]. According to Article 708 of the TCC, the bill of exchange must be presented to the addressee at the place of payment indicated on the bill, to be paid on the day of payment or within two working days following the payment day. If the debtor

has a workplace, it must be submitted for payment at the workplace if there is no workplace at his residence. If the bill of exchange is paid when it is submitted, in this case, the submission for payment must be made within 1 year from the issuance of the bill of exchange. This rule, which is valid for the bill of exchange, is also valid for promissory notes in accordance with Article 778 of the TCC. The submission of cheques for payment is regulated with a different approach. The submission periods for payment on the cheque are regulated differently according to the payment and issuance places of the cheque [Karadayı 2021, 103]. Accordingly, if the cheque is to be paid at the place of issuance, it must be presented within 10 days. If the cheque is to be paid in a place other than where it was issued, it must be presented within 1 month. If the cheque is to be paid in a different continent from where it was issued, a legal submission period of 3 months applies. If the cheque is not submitted to the addressee bank within these periods, the creditors will no longer be able to claim their rights arising from it [Büyüksişli 2020, 38]

The bearer, who submits his right arising from the negotiable instruments within the legal periods, should have the non-payment status determined with appropriate documents if the payment is not made. Otherwise, a loss of rights will occur again. However, in this case, the lost right is the right of application that can be asserted against the application debtors. Determining the non-payment status with appropriate documents is possible with the protest process carried out by the notary public for bills of exchange and promissory notes. In cheques, the legislator has made it possible to determine the non-payment condition with two more alternative procedures in addition to the protest process [Büyüksişli 2020, 45]. The first of these transactions is the statement of the official clearing house and the second is the statement of the addressee bank to which the cheque is submitted, which determines that the cheque has not been paid [Karadayı 2021, 127]. Here are the other reasons that cause the loss of the right arising from the negotiable instruments, not making the submission for payment to the final debtor or the addressee bank for the cheques and failure to determine the non-payment status with appropriate documents even if the submission has been made.

2.3. Parties to the Litigation

The case of unjust enrichment in negotiable instruments can be filed by the right owner who lost his right in the negotiable instruments for the reasons and conditions explained above. This person is specified as a bearer in the Code.

In the case, on the defendant's side, there is the debtor who has been freed from his debt in the negotiable instruments only because the bearer lost his right due to the statute of limitations or the failure to take the necessary procedural actions [Kaçak 2010, 353]. However, this debtor is specified as "accepting addressee" and "issuer" in the Code. Accordingly, for the bills of exchange, in this case, it is the accepting addressee, if there is one, or the issuer of the bill of exchange if there is none. In the promissory notes, on the other hand, only the issuer of the bill can take place on the defendant's side. In the cheque, there can be only one related party on the defendant's side too: the issuer of the cheque [Aydın 2021, 56]. As a matter of fact, the addressee banks cannot accept the check; even if they do, this declaration of acceptance does not create any legal consequence [Kaya and Tatlı 2022, 136].

The cases of unjust enrichment in negotiable instruments cannot be brought against endorsers, whom we can refer to as application debtors [Eriş 2016, 552]. The legislator has determined that an unjust enrichment lawsuit cannot be filed in negotiable instruments against endorsers whose debts arising from the relationship of the negotiable instruments expire for the same reasons. Although only endorsers are stated in the article, it is necessary to evaluate the debtors of application other than endorsers in the same way and accept that the case can only be brought against the main debtors in negotiable instruments [Toros 2019, 153]. Considering that the institution is based on an exceptional and extraordinary right to demand and that exceptional provisions should be interpreted narrowly, it is appropriate to reach this conclusion.

2.4. Period of Limitation of the Case of Unjust Enrichment

The provision of the case of unjust enrichment in negotiable instruments does not recognize a right to a lawsuit that can be benefited forever. The statute of limitations for the unjust enrichment case in negotiable instruments, which was the subject of discussions since it was not regulated at the time of the repealed law, has been clearly and unequivocally determined as 1 year in Article 732 of the TCC. When the 1-year statute of limitations begins to run, the rights that can be directed against the main debtor in the negotiable instruments become time-barred [Eriş 2016, 553].

This 1-year statute of limitations can be criticized for appropriateness. In our legal system, there are general assumptions about the statute of limitations, such as 2 years, 5 years and 10 years. The commission that prepared the TCC aimed that the statute of limitations to which the unjust enrichment case is subject to be both an exceptional regulation and in line with the general limitation period approaches, and underlined that the duration

should be compatible with the 2-year period. However, contrary to this approach, it was not appropriate to choose a 1-year statute of limitations in the enactment process.

2.5. Criticism of Regulation

The rules of proof in the case of unjust enrichment in negotiable instruments conflict with the general principles of evidence law. The general principle of law is that the plaintiff (claimant) proves his claim. It is the defendant's rebuttal of the plaintiff's claim. However, this generally accepted equation has not been accepted as valid in the case of unjust enrichment in negotiable instruments. Because according to Article 732 of the TCC, the plaintiff is not obliged to prove that the defendant has become rich. It is necessary and sufficient for the legislator to prove that the plaintiff lost his right from the negotiable instruments and that this loss was caused by the expiration of the statute of limitations or the failure to comply with the formal conditions necessary for asserting the right.

On the other hand, the defendant can only save himself from making payment by proving that the plaintiff did not become rich despite losing his rights. As can be seen, the legislator's choice contradicts the general principles of the law of evidence. This situation, which may seem strange at first glance, should be considered reasonable considering the exceptional character of the unjust enrichment case in negotiable instruments.

In my opinion, it is a correct choice to accept the case of unjust enrichment in bills of exchange as valid for all types of negotiable instruments without discrimination. While the validity of the case of unjust enrichment in negotiable instruments was controversial in the previous Code, these discussions were ended in the TCC, and it was accepted that the case of unjust enrichment in negotiable instruments would be valid for all types [Günay 2022, 354].

The statute of limitations on the unjust enrichment case in negotiable instruments was not regulated in the previous Code. This situation was a deficiency which was the subject of discussions about the statute of limitations. Thanks to the TCC, the legislator wanted to eliminate this deficiency and regulated that there is a 1-year limitation period from the date of expiration of the right in the negotiable instruments. This provision is accurate because it fills a gap. However, the inaccurate thing is to prefer a 1-year period, considering the general approach of the legislator for statutes of limitations as explained in the previous title.

Although the unjust enrichment case in negotiable instruments grants the bearer an exceptional right of claim and the burden of proof and the conditions for litigation are eased in favour of the bearer, we see

that it is not preferred much in legal practice. The apparent reason for this is that the holders prefer to use the said bills as ordinary bills in cases where the right in the negotiable instruments expires due to statute of limitations or non-compliance with formal procedures. The accuracy of this choice is debatable. However, the main reason is the lack of awareness regarding law practitioners. The clearest evidence of this is the scarcity of the Supreme Court's decisions based on Article 732 of the TCC.

CONCLUSION

As an exceptional and extraordinary institution, the case of unjust enrichment in negotiable instruments is the last exit before the bridge, so to speak, because it gives a last claim to the right holder who unfairly lost his right due to the short statute of limitations and excessive form conditions. Due to this exceptional character, the necessary conditions for the lawsuit to be filed have been strictly determined and no expansionary interpretation has been allowed. Again, exceptional rules regarding both the parties to the case and the burden of proof have also been validated. On the other hand, the legislator also made wrong choices to eliminate all the deficiencies while reregulating this case with the TCC that came into force in 2012. Perhaps the most important of these choices is that the 1-year statute of limitation does not comply with the statute of limitations prevailing in Turkish private law. On the other hand, the reason why the case, which created such an exceptional demand opportunity, was not accepted in the commercial practice can be explained by the lack of awareness in the commercial practice, even among the lawyers.

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