

ATTACHMENT OF JOINT STOCK COMPANY SHARES UNDER TURKISH LAW

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One of the legal remedies that the creditor of a joint stock company (“JSC”) has under Turkish Law is the attachment of the share of the debtor JSC shareholder. A JSC share provides two types of rights to the shareholder: (i) financial and (ii) administrative rights. Rights such as participation in the profit and liquidation share and acquisition of new company shares constitute financial rights whereas rights such as attendance to general assembly, voting and election to the board of directors constitute administrative rights. Share attachment only encompasses rights of a financial nature. Administrative rights remain outside the scope of the attachment. However, the shareholders shall not harm the rights of the creditors in use of their administrative rights. It is not compulsory under Turkish law for a JSC share to be tied to a share certificate. If the share has not been tied to a share certificate, it remains uncertificated. Uncertificated shares may also be subject to any kind of transaction just like the share certificates.

Keywords: Joint stock company, Attachment of share, Dematerialized shares, Bearer share Certificates, Encashment.

I. Introduction

One of the legal remedies that the creditor of a joint stock company (“JSC”) has under Turkish Law is the attachment of the share of the debtor JSC shareholder. Under Turkish Law, Turkish Commercial Code (Law No. 6102, published in the Official Gazette dated February 14, 2011 and numbered 27846) (“TCC”) and Enforcement and Bankruptcy Law (Law No. 2004, published in the Official Gazette dated June 19, 1932 and numbered 2128) (“EBL”) stipulate provisions on attachment of company shares. Article 133 of the TCC and Article 94 of the EBL draw the general legal framework in respect to this matter.

II. Attachment of Various Share Types

1. General Information

A JSC share provides two types of rights to the shareholder: (i) financial and (ii) administrative rights. Rights such as participation in the profit and liquidation share and acquisition of new company shares constitute financial rights whereas rights such as attendance to general assembly, voting and election to the board of directors constitute administrative rights.

Share attachment only encompasses rights of a financial nature. Administrative rights remain outside the scope of the attachment. However, the shareholders shall not harm the rights of the creditors in use of their administrative rights.¹

It is not compulsory under Turkish law for a JSC share to be tied to a share certificate. If the share has not been tied to a share certificate, it remains uncertificated. Uncertificated shares may also be subject to any kind of transaction just like the share certificates. In other words, share certificates may be transferred, pledged and a usufruct may be established on them. However, attachment of two types of shares (i.e. tied to a share certificate or uncertificated) involves procedural differences.

2. Attachment of the Shares Tied to A Share Certificate

a) General Information

If the JSC, which the debtor is a shareholder of, has issued share certificates; such share certificates shall be attached in accordance with Article 88 of the EBL on attachment of movable assets.² Pursuant to Article 88 of the EBL, share certificate shall practically be attached and held by the enforcement office.³ In such case, it is not possible for the share certificates to be left at debtor's hands after having been attached and they are held in either enforcement office cash or bank in accordance with Article 9 of the EBL. Accordingly, Article 89 of the EBL shall not be applied for the attachment of the receivables based on documents which are belonging to its bearer and which are endorsable. For this reason, creditor of a JSC shareholder cannot attach shares of the JSC shareholders based on Article 89 of the EBL; in other words, an attachment notice cannot be delivered to the bank or enforcement office for attachment of the share certificates.⁴ As mentioned above, share certificates of the shareholder may only be attached as movable assets in accordance with Article 88 of the EBL.⁵

b) Scope of the Attachment

As also referred above, provisions on attachment of movable assets are applied in attachment of share certificates. In attachment of movable assets, products of movable assets are not included in scope of the attachment unless the contrary is stated during the attachment, whereas products and benefits of the immovable assets are included within the scope of the attachment as per Article 92 of the EBL. However, no specific provisions are stipulated under the EBL whether the scope of the attachment includes products and incomes related to the shares. However, both the decisions of the Court of Appeals,⁶ and scholarly views⁷ agree that all financial rights pertaining to the relevant share are included within scope of attachment in attachment of a share certificate. The Court of Appeals explicitly indicated that administrative rights (e.g., right to vote or attend the general assembly, etc.) of the debtor whose share has been attached are, without any exceptions and conditions, within scope of the restrictive (of disposal) effect of attachment among the asset rights (e.g., profit and liquidation share, preparation term interest, etc.).⁸ However, the matter of by whom the management rights will be used constitutes a problem. The solution accepted by the Court of Appeals, the method setting forth use of such rights by the enforcement

¹ Topuz, 2009, p. 213.

² Karahan & Ünal, 2013, p. 718.

³ Karahan & Ünal, 2013, p. 718.

⁴ Dönmez, 2011, p. 287.

⁵ Kuru, 2002, p. 136.

⁶ "Attachment of the share certificates in joint stock companies may be made in accordance with Article 88 of the EBL through seizure of the share certificate which is a negotiable instrument and which represents the share. In return for the share attached as such, the profit share to be paid to the debtor shareholder would be attached... 12th Civil Chamber of the Court of Appeals, 30.11.1992, 8071/15080 (from; Topuz, 2009, p. 212).

⁷ Topuz, 2009, p. 212.

⁸ Yeniocak, 2009, p. 62.

office, is not very appropriate both from standpoints of applicability and protection of creditor interests. Taking this into account, (i) use of management rights personally by the debtor (who is the actual owner of such right) in a way not damaging the rights of creditors and (ii) provision of a remedy to the creditors for bringing of a cancellation action in case of any damage appear to be a more appropriate solution.⁹

c) Share Certificate Copies

Copies of share certificates cannot be attached pursuant to Article 89 of the EBL. That is because share certificate copies are not negotiable instruments.¹⁰ Although attachment of share certificate copies is theoretically possible pursuant to Article 88 of the EBL, their attachments are unnecessary due to the fact that these are solely papers without any value. In other words, such copies may only be attached as pieces of paper rather than as share certificates.

d) Dematerialized Shares

Share certificates may be issued in a dematerialized manner in the virtual environment apart from being issued as registered or to the bearer.¹¹ Dematerialized shares are the JSC shares which are (i) not published on a physical document, (ii) virtually stored and monitored in virtual accounts and (iii) have been transmitted to the virtual system after dematerialization by the Capital Markets Board or established on the virtual system.¹² Dematerialized JSC shares, as a rule, share the same characteristics with JSC shares. Rights included in and granted by the dematerialized JSC shares and JSC share certificates are the same. The only difference between these two is that the dematerialized JSC shares are not physically published (accordingly, consequences related to this differ).¹³ Dematerialized JSC shares may be attached either pursuant to Article 89 or 94 of the EBL.¹⁴

e) Bearer Share Certificates

Bearer share certificates (as understood from its form or content) are the share certificates granting shareholder rights to its bearer. Transfer of bearer share certificates is regulated under Article 489 of the TCC. In accordance with such regulation, transfer of bearer shares become valid through transfer of possession (e.g. delivery). In contrast with the Former Turkish Commercial Code (Law No. 6762, published in the Official Gazette dated July 9, 1956 and numbered 9353), this provision may create certain problematic results from an enforcement law standpoint. That is because of the fact that the attachment of a bearer share certificate does not harm the ownership rights and principal possession of the debtor on the bearer share certificate. Accordingly, although the enforcement officer becomes the actual possessor of the share certificate after attachment through seizure, the debtor keeps the principal possession and the officer only keep the actual possession on behalf of the debtor. Therefore, attachment of the share certificate does not harm the possession of the debtor. For this reason, if the debtor is

⁹ Yeniocak, 2009, p. 65.

¹⁰ “The creditor requested for sale subsequent to attachment of copies that shall exist in the company, on the basis that it is not possible to obtain joint stock company (bank) share certificates in possession of the debtor (bank shareholder). A joint stock company share certificate is issued either as registered or bearer share certificate and is one of negotiable instruments. Unless there is a clause to the contrary in the company’s articles of association, it may be transferred through endorsement and delivery. On basis of these principles, it is correct that the claim of the creditor has been rejected.” Enforcement and Bankruptcy Chamber of the Court of Appeals, 11.4.1967, 3381/3404 (from; Kuru, 2002, p. 136.

¹¹ Karahan & Ünal, 2013, p. 724.

¹² Karahan & Ünal, 2013, p. 725.

¹³ Karahan & Ünal, 2013, p. 725.

¹⁴ Karahan & Ünal, 2013, p. 730.

provided the opportunity to transfer his share certificate to a third party, the third parties with good faith (*bona fide*) may be able to acquire ownership of the bearer share certificate. In line with the above-mentioned, if the debtor shareholder transfers the bearer share certificate through remittance of the possession, Article 88 of the EBL providing for attachment of bearer share certificates through seizure would be inapplicable. However, even the Court of Appeals has pointed out the purpose of EBL's Article 88 by stating that the attachment should be made through seizure in order to prevent assignment and transfer of attached bearer share certificate to the third parties and that the attachment would not legally be valid if it is not done so.¹⁵ In light of the aforementioned and in consideration of the purpose of EBL's Article 88 as well as problems in the practice, Article 489 of the TCC has not been drafted appropriately.¹⁶

f) Registered Share Certificates

Share certificates may also be issued as registered share certificates. Registered share certificates are negotiable instruments issued in the name of person/entity and showing the share in a JSC. Attachments shall be made by enforcement officer through seizure as per Article 88 of the EBL. The above-referred problems would not be experienced in attachment of registered shares. Because as per Article 490 of the TCC, "transfer via a legal transaction can be made through change of possession of the endorsed registered share to the transferee". Accordingly, the transfer of the registered share is possible through initial ciro and subsequent possession change. The certificate must be in possession of the debtor for execution of such transfer. Since registered shares are negotiable instruments which can also be transferred through ciro, their attachments must be done through seizure.¹⁷

As a result, it does not make a substantial difference from standpoint of attachment provisions whether the JSC share certificates have been issued as registered or bearer share certificates. It is rather the transfer methods of such share certificates which make a difference from standpoint of the effects of the attachment.¹⁸

3. Attachment of Uncertificated Shares

Attachment of uncertificated JSC shares is explicitly regulated under Article 94 of the EBL. In such case, two possibilities would be at stake.

In the first possibility, the enforcement officer may attach the uncertificated share through delivering a written instruction, without any retention measures or personal visit to the company. In accordance with Article 94 of the EBL, enforcement officer may content himself/herself by delivery of a notice. In this notice, (i) attachment of debtor shareholder's JSC shares, (ii) necessity of inscription of attachment to the share ledger, (iii) necessity of delivery of relevant share certificates to the enforcement office instead of the debtor shareholder should there be an issue of JSC share certificates in the future and (iv) necessity of obtainment of consent from the enforcement office instead of the debtor shareholder are notified to the JSC.¹⁹

As per Article 94 of the EBL, the JSC receiving the notice of the enforcement office shall inscribe the attachment to the share ledger. However, this transaction is not a validity condition for the attachment. In any case, attachment of uncertificated shares is deemed complete at the date of delivery of notice to the JSC.

¹⁵ Court of Appeals 19th Civil Chamber, 28.11.1996, 6832/10663.

¹⁶ Topuz, 2009, p. 222.

¹⁷ Topuz, 2009, p. 224.

¹⁸ Topuz, 2009, p. 225.

¹⁹ Kuru, İcra ve İflas Hukuku El Kitabı, 2006, p. 393.

Further to this, Article 94 of the EBL has stipulated for the attachment to be notified to the trade registry in order to prevent acquisitions of third parties in good faith. Transfer of attached shares after registration of the attachment in the trade registry shall be null and void. The purpose of this provision, parallel with the provision under Article 36/3 of the TCC, is to prevent good faith claims of the third parties in case of transfer of uncertificated shares. Pursuant to Article 36/3 of the TCC, claims of persons/entities about not knowing the trade registry records would not be heard or taken into consideration. However, since uncertificated share transfer would be made in accordance with the receivable assignment provisions, Article 94 provision on this matter causes misunderstandings and is appropriate due to the facts that the assignor needs to have the right of disposal for assignment transaction and that the assignee would receive the share already in encumbered condition due to the attachment.²⁰

In second possibility, the enforcement officer deciding for the attachment of uncertificated share may personally go to the company headquarters and personally deliver the attachment notice to the JSC's authorized officer. The purpose for this method is to prevent transfer of debtor's shares to a third party in between the dates of attachment decision and delivery of attachment notice to the JSC. Accordingly, this method is better from standpoint of the creditors.

In respect to this second possibility, EBL and Regulation on Enforcement and Bankruptcy Law (published in the Official Gazette dated April 11, 2005 and numbered 25783) does not provide for any rules in respect to the form and content of the notification to the JSC. For this reason, form and content of such notification have been left to the discretion of the enforcement officer.²¹ In such case, the enforcement officer may conduct the attachment with minutes (in accordance the obligation set forth under Article 8 of the EBL to keep minutes) to be kept in company headquarters, without any notification.

If the share ledger is submitted to the enforcement officer visiting the company headquarters, the officer would either personally inscribe the attachments to the share ledger or have the company official make such inscription while he/she is keeping the relevant minutes. Should the share ledger not be submitted, the enforcement officer notifies the JSC, through the minutes he/she has kept, that (i) the debtor's shares in the JSC are attached, (ii) the attachment should be inscribed to the share ledger, (iii) the relevant share certificates should be delivered to the enforcement office should the JSC issue share certificates in the future. As per Article 94 of the EBL, the date of delivery of such notification is the date of attachment of the uncertificated share. The minutes further warns the JSC of (i) the necessity to make relevant deliveries to the enforcement office instead of the debtor shareholder and (ii) the necessity of obtainment of enforcement office's consent in cases which normally require the consent of the debtor.²²

From the standpoint of Article 89 of the EBL, which allows attachment of the rights and receivables of the debtor before the third parties; since there are no provisions barring the use of Article 89 procedure in such cases, it may be said that attachment of the uncertificated shares with such procedure is possible.²³

4. Attachment of the Interim Certificates

Interim certificates are the documents which are published on a discretionary basis for representing the share until share certificates are issued. Interim certificates give their owners the right to use all rights tied to the share.²⁴ As per Article 486/2 of the TCC, provisions on registered certificates shall be applied to the interim certificates.

²⁰ Topuz, 2009, s. 217.

²¹ Kuru, İcra ve İflas Hukuku El Kitabı, 2006, p. 394.

²² Kuru, İcra ve İflas Hukuku El Kitabı, 2006, p. 394.

²³ Yenioçak, 2009, p. 68.

²⁴ Karahan & Ünal, 2013, p. 747.

Since provisions on registered certificates are applied to the interim certificates, same rules are applied by analogy (as far as applicable) to the legal transactions related to these.²⁵ Therefore, the above-mentioned information related to the registered share certificates are valid also in respect to the interim certificates and interim certificates may be attached and retained in accordance with the provisions of Article 88 of the EBL on attachment of movable assets.²⁶

III. Encashment of the JSC Share

1. Sale of Share Certificates

Encashment of the attached share certificates are conducted in accordance with the provisions on sale of movable assets. As a rule, sale of movable assets are done through the method of public auction. However, Article 119 of the EBL sets forth that the sale transaction may exceptionally be conducted through the method of negotiation if the market value has been offered for a negotiable instrument which has an exchange or market price. In light of this, if the attached share certificates are registered in the stock exchange or sold in the market despite not being registered in the stock exchange, then the sale transaction of the share certificates may be conducted through the method of negotiation.

If the attached share certificates are registered in the stock exchange, sale of the shares may be conducted in Borsa Istanbul (Istanbul Stock Exchange) (“**BIST**”) through the method of public auction in accordance with Article 29 of the Regulation on Istanbul Stock Exchange Share Certificate Market (published in the Official Gazette numbered February 19, 1996 and dated 22559).

Encashment of the dematerialized shares are conducted in BIST through sale by auction. Auction sales are concluded in conformity with the swap transaction procedures. The values sold in accordance with the information transmitted by BIST are removed from the “attachment sub-accounts” so that the selling BIST member may clear his transactional debt. Turkish Lira amounts received in exchange for the sale are sent by the selling member to the accounts notified by the relevant enforcement office. By conduct of all these above, sale transactions of the dematerialized shares would be completed.²⁷

2. Sale of Uncertificated Shares

As per Article 94 of the EBL, attached shares are subject to the sale procedure of movable assets. In line with Article 114 of the EBL, movable assets are, as a rule, sold through public auction. However, should the circumstances set forth under Article 119 of the EBL is fulfilled, sale through negotiation method is exceptionally possible.

Pursuant to Article 106 of the EBL, the creditor shall request the sale of the uncertificated share within six months from the attachment of the share. If (i) the creditor does not request the sale within such six-month duration or (ii) necessary expenses to be determined in accordance with the decision of the enforcement officer is not deposited within fifteen days or (iii) the request is withdrawn and not renewed within the related statutory period, attachment on the shares is removed. Requests for determination of value of the attached shares is not accepted as a request for sale. For this reason, the creditor shall explicitly make the request for sale.²⁸ As per Article 113 of the EBL, the debtor may also make a request for sale without the request of the creditor. Pursuant to the same article, should the value of the attached asset decrease, enforcement officer may *ex officio* initiate the sale without the request of the parties. As per Article 112 of the EBL, the sale transaction shall be made within two months starting from the date of the request for sale.

²⁵ Karahan & Ünal, 2013, s. 748.

²⁶ Topuz, 2009, p. 217.

²⁷ Topuz, 2009, p. 261.

²⁸ Topuz, 2009, s. 254.

Conclusion

One of the legal remedies that the creditor of a joint stock company (“JSC”) has under Turkish Law is the attachment of the share of the debtor JSC shareholder. A JSC share provides two types of rights to the shareholder: (i) financial and (ii) administrative rights. It is not compulsory under Turkish law for a JSC share to be tied to a share certificate. If the share has not been tied to a share certificate, it remains uncertificated. Uncertificated shares may also be subject to any kind of transaction just like the share certificates. If the JSC, which the debtor is a shareholder of, has issued share certificates; such share certificates shall be attached in accordance with Article 88 of the EBL on attachment of movable assets. Copies of share certificates cannot be attached pursuant to Article 89 of the EBL. That is because share certificate copies are not negotiable instruments. Share certificates may also be issued as registered share certificates. Registered share certificates are negotiable instruments issued in the name of person/entity and showing the share in a JSC. Attachments shall be made by enforcement officer through seizure as per Article 88 of the EBL. Encashment of the attached share certificates are conducted in accordance with the provisions on sale of movable assets. As a rule, sale of movable assets are done through the method of public auction. As per Article 94 of the EBL, attached shares are subject to the sale procedure of movable assets. In line with Article 114 of the EBL, movable assets are, as a rule, sold through public auction. However, should the circumstances set forth under Article 119 of the EBL is fulfilled, sale through negotiation method is exceptionally possible.

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