

THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS UNDER THE LAW ON CONSUMER PROTECTION NO. 6502

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Abstract

Nowadays with the digital era most consumer contracts have been concluded via internet as the form of distance contracts and the behavioral habits of the consumers have been shifted correspondingly. Distance contracts are consumer contracts which are concluded without the simultaneous presence of the seller/the supplier and the consumer within the framework of a system where delivery and supply of the goods and the services are provided from a distance by using the distance communication means such as mail order, internet, telephone, fax etc. until and at the time when the contract is concluded. Consumers who are considered as the vulnerable party of the contract are exclusively worth protecting against the sellers/suppliers because in distance contracts they have no chance to see the physical presence of the products or the contracts are simply about some financial services. The amended Law on Consumer Protection numbered 6502 governs some important provisions within the framework of the notion, "consumer protection", in accordance with the behavioral changes of the consumers. Thus, the mandatory right of withdrawal of the consumers has appeared as one of the strongest and most effective tools to protect consumers in distance contracts. The mandatory right of withdrawal allows consumers to withdraw from the consumer contracts unilaterally by sending the product to the seller and taking back the amount paid without giving any reasons. The right of withdrawal aims at protecting the consumers who are considered as the vulnerable party of the consumer transactions. As a tool to protect the consumers, the right of withdrawal helps them to rethink the economical meaning and value of the contract concluded hastily and carelessly. Hence it is not contrary to the principle of *pacta sunt servanda* but it ensures the real freedom of contract of consumers. According to the new Law on Consumer Protection numbered 6502, the consumer has the right to withdraw from distance contracts within 14 days without giving any reasons even if the product is exactly what he/she ordered, perfectly working or suitable for normal use without any defect. Upon the exercise of the right of withdrawal, the consumer is obliged to send back the product and the seller/supplier is obliged to refund the total price including the original delivery price. To achieve the goal at which the consumer protection law aims, it is important for all consumers to know the legal aspects of the right of withdrawal and their rights in this regard. Therefore, this works aims at a global understanding of the nature of the right of withdrawal and the rights and obligations of both consumers and sellers/suppliers, as well. For this purpose, The EU Directive on Consumer Rights numbered 2011/83EU, The Law on Consumer Protection numbered

6502 and the new By-Law on Distance Contracts numbered 29188 and dated November 27 2014 which came into force on February 27 2015 are exclusively taken into consideration.

Keywords: consumer law, distance contracts, consumer protection, right of withdrawal

1 INTRODUCTION

The right of withdrawal (*Widerrufsrecht*; *geri alma hakkı*) is an independent, multifunctional right that forms a new legal position by a unilateral will (*Gestaltungsrecht*) (Özel, 1999, p. 73). As being a multifunctional right, the right of withdrawal has some consequences resembling either the right to cease/cancel or terminate or revoke a contract.¹ However, since the right of withdrawal is an independent *sui generis* right,² it is not possible to make a general definition comprising all types of withdrawal rights in Turkish law. Instead the term should be evaluated separately in every special case.

As being an independent right as belonging to a group of rights aiming at forming a new legal position by means of ending a contract by a unilateral will, the right of withdrawal is a “multifunctional”, “supplementary” and an “alternative” right (Serozan, 2007, p.123-124; Özel, 1999, p. 74).

In Turkish law, the right of withdrawal aims to end either one-sided legal relationships (Öz, 1989, p. 25; Buz, 2007, p. 91) or reciprocal legal relationships e.g. agreements (Özel, 1999, p. 89-90).

Withdrawal of offer (*Antrag*) and acceptance (*Annahme*) prescribed by Art. 10 of the Turkish Code of Obligations numbered 6098 (TCO) and the right of withdrawal of the principal who would like to withdraw the power of agency (*Vertretungsmacht*) as in Art. 42 of TCO are two examples and upon withdrawal these legal transactions would have no legal consequences any more (Tekinay/Akman/Burcuoğlu/Altop, 1988, p. 121, 225; Eren, 2010, p. 232, 406-407; Özel, 1999, p. 89, 94-95; Oğuzman/Öz, 2012, p. 183; Kocayusufpaşaoğlu, 2010, p. 708). Another one-sided relationship ended enjoying the right of withdrawal according to Art. 555 of TCO is order (*Anweisung*). The withdrawal of an order has an *ex nunc* effect (Kocaman, 2001, p. 72; Türk, 2007, p. 142). Not only one-sided legal relationships but also agreements are eligible to be withdrawn. e.g., donation agreements (*Schenkung*) by delivering a movable to the donee. The withdrawal of such donation agreements has *ex tunc* effect (Özel, 1999, p. 93; Serozan, 2007, p. 124; Buz, 2007, p. 90).

As can be seen from the examples, it is not possible to make a definition comprising all types of withdrawal rights or determine their legal aspects in general under Turkish law. However, although a definite and uniform definition cannot be given, the need of prescribing withdrawal rights and the motive of the lawmaker can be explained as follows:

The right of withdrawal serves the interests of the contracting parties who would like to end the contract unilaterally due to characteristic of the relationship or the situation in question and are worth protecting in this regard.

2 LEGAL FRAMEWORK OF THE RIGHT OF WITHDRAWAL

The prerequisites, the implementation and the consequences of the right of withdrawal in consumer law are regulated both by the Law on Consumer Protection numbered 6502 (LCP) and the new By-Law on Distance Contracts numbered 29188 and dated November 27, 2014 which came into force on February 27, 2015 (The By-Law). However, the most important and controversial aspects of “right of withdrawal” in Turkish law is neither its implementation nor its consequences; but its legal aspects regarding the time of validity and its difference from another type of “right of withdrawal” regulated under Turkish copyright law by the Law No.

¹ Although these terms are indistinguishable in English, these rights aiming at forming a new legal position between the contracting parties by means of ending the contract by a unilateral will have completely different meanings and consequences in Continental European law system and thus in Swiss-based Turkish civil law. For instance, the right to cease/cancel a contract (*Rücktrittesrecht*) simply resolves a contract by means of creating an obligation to demand what has received before and from a classical perspective has an *ex tunc* effect. Yet there is a tendency in civil law that *Rücktrittesrecht* has no *ex tunc* effect. This is generally accepted in German law and by some scholars in Turkish law as well. On the other hand, the right to terminate a contract (*Kündigungsrecht*) just ends a contract towards the future without creating an obligation to demand what has received before and has an *ex nunc* effect. The term is applicable in permanent contracts (*Dauerndschuldverhältnisse*). Lastly, the right to revoke a contract (*Anfechtungsrecht*) ends a contract which is void from the beginning (e.g. error, fraud or duress in contracts or contracts which are against individual rights or obligatory rules) with an *ex tunc* effect. Consequently, the right of withdrawal (*Widerrufsrecht*) is another type of *Gestaltungsrecht*.

² There is a controversy regarding the independent character of “right of withdrawal” and some believe that the term should be characterized under other types of *Gestaltungsrechts* aiming at ending a contract, e.g. *Rücktrittesrecht*, *Kündigungsrecht* or *Anfechtungsrecht* (Ehrt, 1990, p. 14).

5846 of December 5, 1951 on Intellectual and Artistic Works (FSEK).

Hence, apart from the problematic definition of “the right of withdrawal” in general, the legal framework of this right in consumer law, i.e. its definition and legal aspect in consumer law and its differences from another right of withdrawal set forth in FSEK, should be analyzed before evaluating the distance contracts and the implementation and consequences of right of withdrawal in consumer distance contracts, as well.

2.1. The Definition and The Legal Aspects of The Right of Withdrawal in Consumer Law

The right of withdrawal set forth in LCP has the same purpose with other withdrawal rights regulated under Turkish law. Therefore, it aims at protecting the consumers who are considered as the vulnerable party of the consumer transactions. As a tool to protect the consumers, the right of withdrawal helps them to rethink the economical meaning and value of the contracts concluded hastily and carelessly. Hence it is not contrary to the principle of *pacta sunt servanda* but it ensures the real freedom of contract of consumers. By enjoying the mandatory right of withdrawal, the consumers are unilaterally able to withdraw from the consumer contracts without giving any reasons by sending the product to the seller and taking back the amount paid. (Palandt, 2010, p. 565; Rebmann/Säcker/Rixecker, 2003, p. 2259, 2268; Yavuz, 2008, p. 758; Kurt, 2011, p. 47, 53; Özel, 1999, p. 81-81)

The right of withdrawal (*Widerrufsrecht, geri alma hakkı*) as prescribed by LCP is an independent right that forms a new legal position by a unilateral will (*Gestaltungsrecht*) of the consumers who are willing to end the contract. Yet there is a controversy in doctrine regarding the legal aspects of this right. In consumer law, it is debatable whether the right of withdrawal is a right that ends a valid contract or is a condition precedent (*aufschiebende Bedingung*) that makes a void contract valid upon non-exercise.

According to Art. 355 of *Bürgerliches Gesetzbuch* (BGB) in German consumer law, the right of withdrawal is considered as the right which ends (*rechtsvernichtende Wirkung*) a valid contract in progress (*schwebend wirksam*) as of alleging the withdrawal right (Jauernig, 2011, p. 477-478; Palandt 2010, p. 566). According to Turkish doctrine it is believed that the same rule should apply to distance contracts (Agdag Güney, 2007, p. 611). On the other hand, for installment payment agreements it is believed that the right of withdrawal is a condition precedent which makes a void (on hold) contract valid (*rechtsverschiebende Wirkung*) upon non-exercise of the right of withdrawal within the withdrawal period (*schwebend unwirksam*) (Zevkilier/Aydoğdu, 2004, p. 250; Özel, 1999, p. 171; Yavuz, 2013, p. 1353). However by considering the Art. 255 of TCO some are in the opposite opinion concerning the installment payment agreements (Gümüş, 2012, p. 214).

In our opinion it is safe to say that also in Turkish consumer law, the solution of being valid (in progress) accepted for distance contracts should be applied to all types of consumer contracts like in German law. Therefore, the consumer contract should be considered valid until the consumer exercises this right. If he/she decides to bring forward the right of withdrawal, the contract will be void from the beginning of the contract; yet if the consumer decides not to bring forward it, the contract will be valid from the beginning (*schwebend Wirksamkeit*).

The Differences Between the Right of Withdrawal in Consumer Law and The Right of Withdrawal in Copyright Law

In Turkish copyright law, there is another right of withdrawal set forth in Art. 58 of FSEK. However, although both rights (both in LCP and FSEK) are defined with the same term (*cayma hakkı*) according to Turkish law, these refer to two distinguished groups of rights. The right of withdrawal in consumer law is a typical *Widerrufsrecht (geri alma)* (Aslan, 2006, p. 436; Yavuz, 2008, p. 758; Kurt, 2011, p. 53); whereas the right of withdrawal in copyright law is a *Rückrufsrecht (cayma hakkı)*. Again, the terms are vague and indifferent in English, yet there is a distinct difference between these two terms under German-based Turkish copyright law. The differences between these rights are as follows:

First of all, the right of withdrawal in consumer law aims to protect the consumers who are worth protection as the vulnerable party of consumer contracts. However, even though the right of withdrawal also aims to protect the copyright owner, the copyright owner cannot be categorically determined as the part who needs protection in copyright contracts. On the contrary, according to Art. 58/IV of FSEK the owner of a copyright is obliged to pay a proper compensation to the other party where the justice is required if he/she wishes to withdraw from the copyright contract. So unlike the right of withdrawal in consumer law, the withdrawal right in copyright law cannot be enjoyed without a suitable indemnification under the circumstances set forth in Art. 58.

Second of all, the right of withdrawal in copyright law cannot be brought forward without giving any reason. To enjoy this right, the interests of the copyright owner should significantly be violated due to the

non-performance of economic rights transferred to the other party by the copyright owner himself/herself (Art. 58/I of FSEK). On the other hand, the consumer is able to enjoy this right within a period of time without giving any reason.

Thirdly, to enjoy the right of withdrawal, the copyright owner has to fulfill some formalities such as giving the other party a fixed period of time with a notification through the notary public (Art. 58/II-III of FSEK); whereas the right of withdrawal in consumer law is free from formalities.

Consequently, as a special remedy in copyright law the right of withdrawal aims to protect the copyright owner by giving him/her the power to end the copyright contract unilaterally under some strict circumstances stipulated by Art. 58 of FSEK and is an independent right when compared with the right of withdrawal in consumer law even though the Turkish legislation prefers to refer both rights by using the same term, "*cayma hakkı*". Under Turkish law, the genuine "*cayma hakkı (Rückrufsrecht)*" is the right prescribed by FSEK and the right in consumer law exercised by the consumers is "*geri alma hakkı (Widerrufsrecht)*".

3 DISTANCE CONTRACTS

Distance contracts are contracts concluded without the simultaneous presence of the seller/the supplier and the consumer by using the distance communication means such as mail order, internet, telephone, fax etc. until and at the time when the contract is concluded within the framework of a system where delivery and supply of the goods and the services are provided from a distance (Art. 48 of LCP). The contracts concerning financial services such as banking, credits, insurance, individual pension, investment and payment are also able to be formed as distance contracts (Erten, 2009, p. 28-32).

However according to Art. 15 of the By-Law, unless agreed otherwise, the consumers are not entitled to use the right of withdrawal when;

- the price is dependent on fluctuations in the financial market,
- the goods are prepared according to the consumer's requests or personal needs,
- the consumer contracts are concluded concerning the supply of goods which are liable to deteriorate or expire rapidly
- the sealed goods are unsealed after delivery and not suitable for return due to health protection or hygiene reasons
- the goods are inherently inseparably mixed with other goods after the delivery,
- the sealed digital content or sealed computer software are unsealed after delivery,
- the consumer contracts are concluded concerning the supply of a newspaper, periodical or magazine with the exception of subscription contracts,
- the consumer contracts are concluded at a specific period of time and made for accommodation, transport of goods, car rental, catering or leisure activity purposes,
- the supply of service is performed in an electronic environment or when the consumer contracts are concluded concerning intangible goods delivered to the consumers immediately,
- the consumer contracts are concluded as service contracts which has begun to be performed with the consumer's consent before the expiration of the withdrawal period

The above mentioned circumstances set forth by the By-Law which the consumers cannot exercise their rights of withdrawal are also in conformity with the Art. 16 of the EU Directive on Consumer Rights numbered 2011/83EU.

4 IMPLEMENTATION AND CONSEQUENCES OF THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS

The consumers have the right to withdraw from the distance contracts without giving any reasons even if the product is exactly what they ordered, perfectly working or suitable for use without any defect. The consumer is not obliged to pay any compensation to the seller/supplier or subject to any penal sanctions in this regard. The consumer has even the right to use or try the product within the withdrawal period because the consumer is not liable of any damages or deterioration of the product due to the ordinary use (Gezder, 2006, p. 183-187).

The withdrawal period is 14 days. The consumer has to exercise the right of withdrawal within 14 days

after he/she or the third party authorized by him/her physically receive the goods or at the same day when the service contract is concluded. However, the consumer would not be bound by the 14 day period if he/she was not informed about the existence and the content of the right of withdrawal by the seller/supplier. It is the seller/supplier who is obliged to prove that the consumer was informed a priori. Yet, at all events the right of withdrawal is expired within a year after the end of the withdrawal period. (Art. 48/IV of LCP and Art. 9 of the By-Law)

According to Art. 48/IV of LCP, if the consumer would like to withdraw from the contract, it is enough to direct this intention to the seller/supplier. However, according to Art. 11 of the By-Law, it is necessary to direct the intention of withdrawal to the seller/supplier in a written form. Yet anyway when the written form is not a prerequisite of validity but a means of proof, the written form will be required for the sake of enforceability (Gezder, 2006, p. 173).

Upon the exercise of the right of withdrawal, the consumer is obliged to send back the product and the seller/supplier is obliged to refund the total price including the original delivery price. The delivery price of the product paid before by the consumer should also be borne by the seller/supplier, unless agreed otherwise. (Art. 12 and 13 of the By-Law)

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