The Grounds for Statute of Limitations Under Turkish-Swiss Private Law and Statute of Limitations Under Turkish International Private Law[1]

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Abstract

As long as the need for social peace and judicial security continues, statue of limitations comes on the scene as an essential concept. In this article the grounds and principles of statue of limitations and statuary of limitations under Turkish international private law will be pursued in terms of social peace and judicial security. Also it will be tracked down in other fields such as law and economy politics, daily life needs, public interest and psychological factors.

Key Words: Statute of Limitations, Turkish Law, Turkish International Private Law

I. Introduction

The fact that a receivable cannot be claimed due to statute of limitation after a certain period of time, even though it continues to be valid, may be considered as being against equity. Nevertheless, the argument that having a receivable and being able to claim such receivable without being subject to any time limit it is equally questionable in terms of equity and security.

In this two sided conflict of interest, the law generally takes action in favor of the debtor on account of the judicial security. Claiming a debt without subjection to a statute of limitation and enforcing it by suit and compulsory execution would harm the judicial security. Thus, statute of limitation in a sense emerges as an inevitable institution. This institution has existed in various systems of law since the ancient times. Hence, the requirements reveal in the same way even the law systems differentiate.

II. The Grounds for Statute of Limitation

First of all, it should be stated that the concepts that can be expressed as reasons for statutute of limitations (*Zweck*; *but*) and the fundamentals of statute of limitations (*Rechtfertigung*; *Begründung*; *fondement*) are different from each other. In the doctrine, it is seen that these terms are evaluated separately[2].

As generally accepted, statute of limitation is a concept principally envisaged with two reasons. On one hand statute of limitation is accepted to protect the debtor against claims of an act which is actualy not a debt or has terminated[3]. Under ordinary life conditions it cannot be expected from the debtor that it keeps after a long period of time has passed, the documents or other means of evidence regarding the performance of the debt or the termination thereof[4]. In the event statute of limitation is not accepted, the debtor may be under the risk of repayment event if the debt has never been born, has been performed or otherwise terminated Also, it can be difficult or even impossible to prove such after a long time has passed.

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2 See. **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 52 vd.; **Oesch,** Albert, Essai dogmatique sur la prescription en droit suisse, Lausanne 1934, p. 7 et seq.

3 See. **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 11 et seq.; **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 54.

4 **Swiss Federal Court** BGE 90 II 428, JdT 1965 I 243; **Tekinay** S. Sulhi/**Akman** Sermet/**Burcuoğlu** Halûk/**Altop** Atilla Borçlar Hukuku, Genel Hükümler, 7. Edition, İstanbul 1993, p. 1030; **Tandoğan,** Halûk, Notions préliminaires à la théorie générale des obligations, Genève 1972, p. 61; **Bucher** Eugen, Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich 1988, p. 444; **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 8 et seq.

For such reason, statute of limitation is also referred to as a supplementary means of evidence (*Beweisersatz*) [5]. It should be considered as a reasonable assumption that, a debt that has not been seeked for by the debtor for a certain period of time has never been born or has terminated[6].

On the other hand, statute of limitation has the purpose to protect the debtor against a claim not even known to exist by the debtor or a resonable expectation regarding a request not to be raised or seeked by the creditor[7]. In the events where the debtor is in this kind of expectation of is not aware of the existence of the debt, it is rightfully set forth that the current condition should be taken into consideration in favor of the debtor[8]. In both reasons, it is clearly seen that statute of limitation is an concept, envisaged in favor of the debtor.

Aside from these reasons, statute of llimitation also serves for some secondary interests[9]. Such that, the creditor of whom the receivable is under the risk of statute of limitation will immediately feel the obligation to claim his receivable[10]. In this way, possible disputes between the creditor and the debtor will be solved as promptly as possible.

According to an opinion, in the event of statute of limitation is not accepted, the proving opportunities for old matters will be difficult and such situation will increase the workload of courts in an undesirable way[11]. For this reason, statute of limitation also serves for decrease of the workload of the courts. This advantage of statute of limitation is clearly stated in the Federal Council Message, regarding the Swiss Federal Bill of Code of Cbligations dated 1881[12]. However, one side of the doctrine rightly objects to this reason. Yet, the mitigation of the workload of the courts cannot be a purpose in the procrement of a concept concerning private law[13].

Again, one side of the doctrine argues that statute of limitation also serves to the punisment of the creditor who does not act diligently in the follow up of its receivable and does not act in a certain period of time[14]. This function which was also partly set forth Federal Council Message regarding the Swiss Federal Bill of Code of Cbligations dated 1881[15] is rightfully rejected, with the reason that statute of limitation cannot have such a purpose[16]. Statute of limitation is a concept especially envisaged for the advantage of the debtor[17]. The fact that people other than the debtor indirectly, economically or otherwise benefit from the statute of limitation does not mean that the statute of limitations is created for these reasons.

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5 **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 54. Also see **Roberto** Vito, Schweizerisches Haftplichtrecht, Zürich 2002 N 564.

6 **Tekinay** S. Sulhi/**Akman** Sermet/**Burcuoğlu** Halûk/**Altop** Atilla Borçlar Hukuku, Genel Hükümler, 7. Edition, İstanbul 1993, p. 1030; **Kocayusufpaşaoğlu** Necip, Borçlar Hukukuna Giriş, Hukuki İşlem, Sözleşme, 4. Edition, İstanbul 2008, p. 46; **Feyzioğlu**, F. Necmettin Borçlar Hukuku, Genel Hükümler, Cilt II, 2. Edition, İstanbul 1977, p. 518.

7 **Swiss Federal Court** BGE 133 III 6; **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 11 et seq.; **Holzer** Pierre A., Verjährung und Verwirkung der Leistungsansprüche im Sozialversicherungsrecht, Zürich 2005, p. 13-14; **Pichonnaz,** Pascal, La presription de l'action en dommages-intérêts : un besoin de réforme , *in* Werro (éd.), Le temps dans la responsabilité civile, Berne 2007, p. 71 et seq., p. 77.

8 **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 55.

9 See **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 56 et seq.

10 **Rey,** Heinz Ausservertrgaliches Haftpflichtrecht, 4. Aufl., Zürich 2008, N 1586; **Pichonnaz,** Pascal, La presription de l'action en dommages-intérêts : un besoin de réforme , *in* Werro (éd.), Le temps dans la responsabilité civile, Berne 2007, p. 71 et seq., p. 77-78.

11 **Oğuzman,** M. Kemal/**Öz,** Turgut, Borçlar Hukuku, Genel Hükümler, 8. Edition, İstanbul 2010, p. 465; **Tekinay** S. Sulhi/**Akman** Sermet/**Burcuoğlu** Halûk/**Altop** Atilla Borçlar Hukuku, Genel Hükümler, 7. Edition, İstanbul 1993, p. 1031; **Eren**, Fikret, Borçlar Hukuku, Genel Hükümler, 12. Edition, İstanbul 2010, p. 1233. Also see. **Kocayusufpaşaoğlu** Necip, Borçlar Hukukuna Giriş, Hukuki İşlem, Sözleşme, 4. Edition, İstanbul 2008, p. 46; **Niklaus,** Jean-Luc, La prescription extinctive: modifications conventionnelles et renonciation, Bâle 2008, N 59.

12 Message CF 27.11.1879, FF 1880 I 115, 116.

13 See. **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 21-22.

14 **Becker**, Hermann, (Berner) Kommentar zum Schweizerischen Zivilgesetzbuch, Band VI/1, Obligationenrecht, Allgemeinen Bestimmungen (Art. 1-183) Bern 1941; Band VI/2, Die einzelnen Vertragsverhältnisse (Art. 184-551), Bern 1944, Vorbem. zu Art. 127-142 N 7.

15 Message CF 27.11.1879, FF 1880 I 115, s. 160. Message CF 27.11.1879, FF 1880 I 115, p. 160.

16 Bk. **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 58. See **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 58.

17 **Swiss Federal Court** BGE 133 III 6; **Pichonnaz,** Pascal, La presription de l'action en dommages-intérêts : un besoin de réforme, *in* Werro (éd.), Le temps dans la responsabilité civile, Berne 2007, p. 71 et seq., p. 77; **Supreme Court** 13th Civil Chamber 15.6.1993, 2112/5075 (*Kazancı Precedent Bank*).

Therefore, the circumstances stated above as secondary benefits of statute of limitation should be regarded as its effects and results rather than the purpose of procurement of statute of limitations[18]. The fundementals of statute of limitations should be pursued in certain other fields rather than legal[19]. In the doctrine, it is stated that the Fundamentals of statute of limitation should be seeked in the law and economy politics, daily life needs, public interest and psychological factors[20]. Aside from all such factors which are undeniably in the foundation of this concept, two basic fundamental factor especially show themselves and indispensably form the reason of existence of statute of limitations. These are establishment of social peace (*Rechtfrieden; paix sociele*) and legal security (*Rechtssicherheit*; *securité du droit*)[21]. Indeed, the fact that receivables may be claimed without being subject to any time period and the debtor being under debt threat without a time limitation can break the social peace. For this reason statute of limitation has a social peace establishing impact[22]. In addition, statute of limitation will after a while ensure legal security by way of its removal effect of uncertainties of legal relationships[23]. Although its impacts of legal security and establishment of social peace, statute of limitation is not related to public order[24].

Statute of limitations and receivable are neither certainly linked with each other nor are factors which can't exist without the other[25]. In the historical process, statute of limitation arose from the above mentioned needs and due to the fact that such needs constitute continuity, it has maintained its presence in various legal systems[26]. As long as the need for social peace and legal security continues, even though the terms of statute of limitation regarding receivables may change, statute of limitation will continue its existence as a concept.

Even though its necessity and fulfillment of various needs is not argued, there has been debates whether public interest exists or not in the recognition of statute of limitation[27].

The debate concentrates on whether statute of limitation serves for public interest or is only stipulated for individual benefits. Certain scholars argue that the recognition that statute of limitations serve for a uncertain purpose such as public interest will cause confusion and assert that such concept only serves for individual benefits[28].

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18 *Assenting* **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 20 et seq.

19 **Bucher** Eugen, Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich 1988, s. 445. **Bucher** Eugen, Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich 1988, p. 445.

20 *Especially see* **Oser,** Hugo/**Schönenberger,** Wilhelm, (Zürcher) Kommentar zum Schweizerischen Zivilgesetzbuch, Band V/1, Das Obligationenrecht, (Art. 1-183), Zürich 1929, Vorbem. zu Art. 127-142 N 3; **Oesch,** Albert, Essai dogmatique sur la prescription en droit suisse, Lausanne 1934, p. 9 vd.; **Bucher** Eugen, Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich 1988, p. 444-445; **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 61

21 See **Gauch** Peter/**Schluep** Walter R./**Schmid** Jörg/**Emmenegger** Susan, Schweizerisches Obligationenrecht, Allgemeiner Teil, 2 Bände, 9. Aufl., Zürich 2008, N 3279; **Holzer** Pierre A., Verjährung und Verwirkung der Leistungsansprüche im Sozialversicherungsrecht, Zürich 2005, p. 19-21; **Deschenaux**/**Tercier** § 20 N 2; **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 62; **Tandoğan,** Halûk, Notions préliminaires à la théorie générale des obligations, Genève 1972, p. 60-61; **Serozan**, *İfa Engelleri* § 25 N 11 ve § 27 N 22; **Eren**, Fikret, Borçlar Hukuku, Genel Hükümler, 12. Edition, İstanbul 2010, p. 1233; **İsviçre Federal Mahkemesi** BGE 133 III 6. Also see **Tekinay** S. Sulhi/**Akman** Sermet/**Burcuoğlu** Halûk/**Altop** Atilla Borçlar Hukuku, Genel Hükümler, 7. Edition, İstanbul 1993, p. 1031.
Supreme Court 13th Civil Chamber 15.6.1993, 2112/5075 (*Kazancı Precedent Bank*) "*In the event it is taken into consideration that statute of limitation conditions legal security and legal satisfaction and serves to social peace* (...)"

22 **Oesch,** Albert, Essai dogmatique sur la prescription en droit suisse, Lausanne 1934, p. 7-8.

23 **Schwander**, Werner, Die Verjährung ausservertraglicher und vertraglicher Schadensersatzforderungen, Winterthur 1963 , p. 2.

24 **Supreme Court** 13th Civil Chamber 15.6.1993, 2112/5075 (*Kazancı Precedent Bank*) "*Statute of Limitations itself does not have a nature related to public order*". *To the contrary* **Feyzioğlu**, F. Necmettin Borçlar Hukuku, Genel Hükümler, Volume II, 2. Edition, İstanbul 1977, p. 530.

25 **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 60.

26 The prior existence of the conceptfirst seen in Roman lawis unknown. See **Çandarlı** Zahid, Borçlar Hukukunda Müruru Zaman ve Buna Mütedair Temyiz Mahkemesi Kararları, Ankara 1943, p. 6-7; **Béquelin** Edouard, Extinction des obligations, FJS *813*, p. 1.

27 For the debates see **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 63 et seq..; **Spiro,** Karl, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristung und Rechte, Bern 1975, p. 23-24; **Holzer** Pierre A., Verjährung und Verwirkung der Leistungsansprüche im Sozialversicherungsrecht, Zürich 2005, p. 17 et seq.

28 **Kessler** Franz J., Der Verjährungsverzicht im Schwezeischen Privatrecht, Zürich 2000, p. 34; **Tschütscher** Klaus, Die Verjährung der Mängelrechte bei unbeweglichen Bauwerken, St. Gallen 1996, p. 11-15. For the opinion regarding public benefit in statute of limitations can only come into question secondarily since the judge cannot take statute of limitations into consideration ex officio and

In our opinion, it is inappropriate to accept that a concept serving for legal security and social peace only serves for individual interest. Even though public interest is a term changing depending on time and conditions and is not very clear[29], it should be accepted that a concept of which the implementation exceeds individual benefits also serves for public interest[30].

III. Statuary of Limitations Under International Private Law

According to the International Private and Civil Procedure Law Article 8, *'statute of limitation is subject to the law applied to the subject matter of the legal transaction or the relationship'*. This result, in other words for statute of limitation to be subject to the law applied to the subject matter of the legal transaction or the relationship (*lex cause; lex obligations*) is the natural result of statute of limitation to be a concept concerning substantive law[31]. Again, since statute of limitations is a concept of substantive law, it has to be resolved based on the substantive law[32]. This outcome is valid for all legal systems that accept statute of limitations as related to substantive law[33].

Accordingly, according to the rules of conflict of law the time period of statute of limitation for that receivable will be the term stipulated under the applicable law.

For instance, the applicable law to contractual obligations ((MOHUK article 24 cont.) or in case of an obligation arising from wrongful acts, the law of the country where the act was commited where the act committed (MOHUK article 34), or if the damage was realized in a country other than the country where the act was committed, such country's law will be the applicable law in the terms of statute of limitation[34].

In some legal systems, statute of limitations is accepted as a concept concerning procedural law rather than not material law. *F*or instance this is the case in terms of common law[35]. In this event, there may be conflicts with regards to the law to be applied to statute of limitations.

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also debts barred by statute of limitations may also be performed see **Pichonnaz,** Pascal, Art. 127-142 CO, *in* Thévenoz/Werro (éd.), Commentaire Romand, Code des obligations I, Genève 2003, art. 127 N 2; **Pichonnaz,** Pascal, La presription de l'action en dommages-intérêts : un besoin de réforme , *in* Werro (éd.), Le temps dans la responsabilité civile, Berne 2007, p. 71 et seq., p. 76-77.

29 See **Swiss Federal Court** BGE 94 Ia 127.

30 **Niklaus,** Jean-Luc, La prescription extinctive : modifications conventionnelles et renonciation, Bâle 2008, N 65; **Gauch** Peter/**Schluep** Walter R./**Schmid** Jörg/**Emmenegger** Susan, Schweizerisches Obligationenrecht, Allgemeiner Teil, 2 Bände, 9. Aufl., Zürich 2008, N 3279; **Wyss**, *Péremption*, s. 18; **Engel**, Pierre, Traité des obligations en droit suisse, Dispositons générales du CO, 2e éd., Berne 1997, p. 797; **Oser,** Hugo/**Schönenberger,** Wilhelm, (Zürcher) Kommentar zum Schweizerischen Zivilgesetzbuch, Band V/1, Das Obligationenrecht, (Art. 1-183), Zürich 1929, Art. 129 N 1; **Becker**, Hermann, (Berner) Kommentar zum Schweizerischen Zivilgesetzbuch, Band VI/1, Obligationenrecht, Allgemeinen Bestimmungen (Art. 1-183) Bern 1941; Band VI/2, Die einzelnen Vertragsverhältnisse (Art. 184-551), Bern 1944, Vorbem. zu Art. 127-142 N 7; **von Tuhr,** Andreas/**Escher,** Arnold Allgemeiner Teil des schweizerischen Obligationenrechts, Band II, Zürich 1974, p. 211; **Däppen,** Robert K., Das Erlöschen der Obligationen, Art. 127-142 OR, *in* Honsell/Vogt/Wiegand (Hrsg.), Basler Kommentar, Obligationenrecht I (Art. 1-529), 4. Aufl., Basel 2007, Vorbem. zu Art. 127-142 N 1. For the former similar decisions of the Swiss Federal Court on this subject matter see BGE 101 Ia 19, JdT 1977 I 3; BGE 90 II 428, JdT 1965 I 243. A recent decision of the court (BGE 133 III 6) is contrary. At this point we can remember the words of Roman Politician Magnus Aurelius Cassiodorus (Cassiodore) "*Prescriptio est patrona generis humani ad utilitatem publicam introducta*" (Statute of limitations is created for the protection of human beings on the grounds of public benefit). This saying quoted by Bruneau (Observations et maximes sur les matières criminelles, Paris 1716, p. 283) is an adaptation of the original one. The original saying is "*Tricennalis autem humano generi patrona praescriptio, eo quo cunctis, vobis jure servabitur*" (Opera Omnia, *in* Patrologiae, LXIX, Variarum Liber V, Epistola XXXVII, Paris 1848) (Thirty year statute of limitations is protective for the human beings so that we can protect all your rights). This saying said in the scope of private law also attracts the interest of criminal lawyers.

31 In the former legislation (dated 1982 and numbered 2675) prior to the International Private and Civil Procedure Law dated 2007 and numbered 5718, same provision (Article 7) was included. Before 1982, although there were no explicit provisions, same result was accepted in the doctrine and practice. Bk. **Çelikel** Aysel/**Erdem** Bahadır, Milletlerarası Özel Hukuk, 10. Bası, İstanbul 2010, s. 452; **Tekinalp** Gülören, Milletlerarası Özel Hukuk, Bağlama Kuralları, 10. Bası, İstanbul 2009, s. 137. See **Çelikel** Aysel/**Erdem** Bahadır, Milletlerarası Özel Hukuk, 10th Edition, İstanbul 2010, p. 452; **Tekinalp** Gülören, Milletlerarası Özel Hukuk, Bağlama Kuralları, 10. Edition, İstanbul 2009, p. 137.

32 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 217.

33 See **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 392 et seq.

34 See **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 309 et seq. and p. 344 et seq.

35 Also in England which is included in the Commom Law system, statute of limitations is accepted as a concept related to procedural law as well as in other countries included in such system. But, this country accepted with an act dated 1984 (*Foreign Limitation Periods Act*) that statute of limitations in conflicts having foreign element will be deemed to be related to procedural law and accordingly will be subject to the law applicable on the subject matter of the conflict.

In fact, since in some common law system countries statute of limitations is a concept concerning procedural law, statute of limitations in terms of such systems will be determined based on the law of the forum (*lex fori)* even if the law to be applied to the subject matter of the dispute is different[36]. In other words, in a country which accepts that statute of limitations is related to procedural law,statute of limitations concerning that receivable will be subject to lex fori even though another law is applicable to receivables as per the rules of conflict of laws.

What will be the case in the event in a lawsuit filed before Turkish courts, the law to be applied to the receivable in accordance with the conflict of laws accepts that statute of limitations for that receivable is related to procedural law? In this case the judge is required to identify the statute of limitations of that receivable as per the law to be applied to the receivable. In other words, even if it is accepted that in the applicable law statute of limitations is subject to procedural law, the judge should accept and apply such as a concept concerning material law[37]. Actually even in legal systems which consider that statute of limitations is a concept of procedural law, it is accepted that the provisions concerning statute of limitations contain material content[38].

According to the rules of conflict of laws, the law applicable to the receivable determines the term of the statute of limitations and the beginning and calculation of term as well as the causes of cessation, interruption, suspension and modification of terms of statute of limitations[39]. Again, the provisions of statute of limitations should be determined in accordance to the applicable law[40]. For instance, if statute of limitations according to the applicable law causes the receivable to terminate, the judge should consider this situation ex officio on condition that the applicable law also accepts so[41]. As the performance of a non existent or terminated receivable cannot be decided, in the event the completion of the statute of limitations is accepted as termination of the receivable, the judge should reject the claim *ex officio*. In this case, the debtor is not required to make defense. In terms of Turkish law, the termination of the receivable with the completion of the statute of limitations and the regulation of this concept by a legal system cannot be accepting as contrary to public order. In fact, in a country having regulations such as Banking Law article 63 and Civil Code article 712 and article 713, Acceptance that the right will terminate with the completion of the statute of limitations does not constitute a contrariety with public order.

Even if another law is applied to the dispute regarding the receivable, since the stage of the lawsuit when the statute of limitation can be claimed and whether it should be taken into consideration by the judge ex officio is a matter of porcedural law, such will be resolved according to lex fori, in other words Turkish Law[42]. For this reason, even if the law to be applied to the subject matter of the lawsuit enables the statute of limitation to be claimed in every stage of the lawsuit, since this situation will be within the context of prohibition of extension of the defense, it will not be accepted in the event of disagreement of the debtor.

However, if the law applicable to the subject matter of the dispute binds material law oriented results to an action which appears to be regarding procedural law, the judge should apply that law[43]. For instance, in the event the rebuttal petition does not include a statute of limitation defence, in case a law which considers such as implied waiver of right is applied, according to Turkish law, after this stage, the statute of limitation defense should not be accepted, even if it is through rectification. Since the right has been waived with the rebuttal petition, such cannot be corrected even by way of rectification. Although, the law applicable to the subject matter of the case requires for statute of limitations to be considered by the judge *ex officio* or reminded to the debtor, the Turkish judge will execute the Turkish law without being dependent on such. In the event the law applicable to the dispute does not determine a term of statute limitations concerning the claim of the receivable, a solution has to be sorted out depending on various possibilities.

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36 See. **Collins** Lawrence, The Conflict of Laws, Vol. I, 14. ed., London 2006, N 7-045 et seq.

37 See **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 218 ve s. 393 et seq.

38 See **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 394 dn. 64.

39 See **Şanlı** Cemal, Milletlerarası Akitlerde Zamanaşımı, *in* İBD 1989/10-11-12, p. 637 et seq., p. 640; **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 217.

40 **Şanlı** Cemal, Milletlerarası Akitlerde Zamanaşımı, *in* İBD 1989/10-11-12, p. 637 et seq., p. 639-640; **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 217.

41 *For instance,* the effect of statute of limitations under Austrian Law is regulated in this way. As required by ABGB § 1451 the completion of statute of limitation causes for the termination of the right.

42 For general principles see **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 374 et seq.

43 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 335.

In case the applicable law does not stipulate a statute of limitation for the receivable, as a rule from the point of Turkish law[44], a receivable to not be subject a statute of limitations is considered damaging to legal security and the judge should apply the term of general statute of limitations in the applicable law by also taking into consideration from the point of such receivable[45]. If, event exceptionally, there is a general statute of limitations in the applicable law, in these cases the application of general statute of limitations of Turkish law can not be considered. However, in the event no term of statute of limitations is set forth in the applicable law, the judge should apply in terms of such receivable, the general term of statute of limitations under Turkish (Code of Obligations article 125)[46]. At this point, the nature of the receivable is not taken into consideration. *For example*, even if the receivable credit arises from a wrongful action or unjust enrichment, the ten year statute of limitation under the Code of Obligations Article 125 should be applied. Yet here, the general statute of limitations under Turkish law is not applied by considering the nature of the receivable. At this point the application of the general statute of limitations under Turkish law is only for the sake of procurement of legal security. Otherwise Turkish law would be applied to the dispute in a way which is not stipulated by the rules of conflict of law. However, in this case the general term of statute of limitation under Turkish law is applied exceptionally and as an obligation[47].

In the applicable law, while, as a rule, terms of statute of limitations concerning receivables are accepted, in the event it is envisaged that the material receivable subject to the lawsuit is not subject to statute of limitations, it is not possible to allege that this situation itself is contrary to public order[48]. Indeed, also under Turkish law, it is accepted that some receivables are not subjected to statute of limitations (Civil Code Article 864)[49]. In the event under the applicable law a situation for the receivable subject to the lawsuit similar to the Turkish Law is foreseen, it cannot be claimed that this situation is contrary to public order. If foreign applicable law envisages a situation accepted under Turkish law, it cannot be said that there is a difference of characteristics among such. In this situation the judge will again apply foreign law. *For instance*, according to Turkish law statute of limitations does not proceed in terms of receivables secured by immovable pledge (Civil Code Article 864). If the same regulation exists in the applicable law, it should be accepted that statute of limitations will also not proceed for such receivable.

The judge may accept, not only in the situtaions of the same nature but also in the situations of similar nature, the claim that the receivable is not subject to statute of limitations. For instance, in Turkish law, unlike the immovable pledge ,the principle regarding non-applicability of statute of limitations is not recognized for the receivables secured by the movable pledge (Code of Obligations Article 138). But even the receivable, which is secured by movable pledge, is barred by the statute of limitations, the creditor can benefit from the pledge. The creditor, in this case, shall be protected up to the value of the pledge. In the event that the foreign law adopts the principle that the statute of limitations does not proceed on the receivables secured by the movable pledge, in our opinion, application of such principle should be refrained from considering the contradiction to the public order. In Turkish law, recognition of statute of limitations for the receivables secured by movable pledge is not a necessity of public order, it is completely a choice of the legislator. Also it is not a blameworthy matter that another law considers this situation as it is in the immovables pledge. For this reason in this situation for which a similar condition is stipulated, the problem should be resolved by applying foreign law and it should not be asserted that this is contrary to the public order.

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44 Legal security being damaged in this way indirectly also concerns public order. For this reason, in the doctrine and the application these situations are considered as direct contradicitons to public order .See. **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Bası, İstanbul 2009, s. 394. **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 394.

45 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, İstanbul 2009, p. 184 ve p. 394

46 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17.Edition, İstanbul 2009, p. 184 ve p. 394.

47 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17.Edition, İstanbul 2009, p. 184.

48 As required by the rules of conflict of the laws, in a case where Swiss law was applicable law and which was brought before the German Court, with regards to the subject matter receivable which is not subject to statute of limitations under Swiss law, the German Supreme Court considered that the fact that receivables are not barred is contrary to public order. However, the German Court considered and applied the general term of statute of limitation of Swiss Law rather than the German Law.

49 Before the amendment of Enforcement and Bankruptcy Law Article 143 with the Law numbered 4949, statute of limitation would also not proceed for receivables subject to Certificate of insolvency. With the amendment such receivables have been subjected to a 20 years statute of limitation.

In the event that the reason for the non-applicability of statute of limitations under the applicable law is not convenient for reconcilation and making analogy with Turkish law system and acceptance of the same is contrary to the public order, the rule for application of the foreign law and non-applicability of statute of limitations should not be applied. In the applicable law, the situation arranged due to the mis-proceed of time period, if it is not possible to accord and compare and its acceptance is contrary to the public order, the application of foreign law and mis-proceed of time period rule should not be applied. In this case the judge shall still aply primarily the foreign law. In this case, term of statute of limitation which is determined for such receivable under the applicable law, without the reason for the non-applicability of statute of limitations, shall be considered in terms of the concrete receivable in dispute for the purpose of subject matter of the concrete credit, without regarding the causa of mis proceed of time period, still the time period duration regulation in applicable law will be taken into consideration[50].

The dissimilarity between the term of statute of limitations under the applicable law and the Turkish law doesn't prevent the application of such law[51].

Nevertheless, in the event that the term of statute of limitations under the applicable law is too short or long comparing with the same under Turkish law, consideration of such term may be regarded as contrary to the public order[52]. Neither the Supreme Court does not regard the term of statute of limitations itself as a matter of public order subject while it does not apply the foreign law in the event that too long term of statute of limitations is stipuled under foreign law, considering that such term is contrary to the public order[53]. Despite we consider mentioned practice of the Supreme Courts appropriate in principle convenient, we think the assestment and criteria regarding the term of statute of limitations' duration would not be always realistic.

In case term of statute of limitations under the applicable law is set so short that this makes it drastically difficult to claim of the right, the application of this law may be contrary to the public order. However, the assesment should be made considering that short term of statute of limitations exists in Turkish law and also the nature of the receivable in dispute[54].

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50 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17.Edition, İstanbul 2009, p. 184 ve s. 394.

51 **Supreme Court**, 11th Civil Chamber, 15.06.1990, 3552/4774 (Kazancı Precedent Bank) It is not found appropriate that the case is rejected on the ground that statute of limitations under the Turkish Commercial Code to be applied for the case due to the fact that it is filed in Turkey without mentioning the reason for not considering the foreign legislation, translation of which is notarized, since it is required to decide upon according to the result to be concluded after the determination of the term of statute of limitation under the foreign law to which the cheques in dispute are subject to in accordance with Article 732, 733 and 681 of Turkish Commercial Code and Article 1, 2 and 7 of the International Private and Civil Procedure Law for the reason that the plaintiff rejects the defendant's defence regarding the statute of limitation claim under Turkish Commerical Code and built its claim on the foreign law texts on the basis of the fact that longer term of statute of limitation is stipulated by Iranian Law where the cheque was issued. Also see **Supreme Court**, 11th Civil Chamber, 15.09.1989, 5912/4324 (Istanbul Barre Revue 1990/1-2-3, p. 271). Also see **Supreme Court,** 11th Civil Chamber, 28.15.1998, 383/3945 (Moroğlu/Kendigelen, Article 6) "As stated in our Chamber's decision dated 15.09.1989 and numbered 1989/5912-4324, the matter that the term of statute of limitations is regulated differently comparing with the Turkish law (…) does not constitute contradiction to the public order. The dispute (regarding whether the final judgement is barred by the statute of limitation or not) between the parties arises from the German law and should be settled according to the provisions of the same.

In a former decision, **Yargıtay** states **(**11th Civil Chamber, 5.4.1979, 1512/1798, Kazancı Precedent Bank) "The statute of limitation, itself, does not refer to the public order, while claiming for the statute of limitation is left to the defendant's option. Maximum term of statute of limitation regulated under the law of where the court is placed (lex fori) is a mandatory provision. Accordingly, application of a foreign law which sets a longer term of statute of limitation than the same of lex fori cannot be claimed. According to **Çelikel/Erdem (**Milletlerarası Özel Hukuk, 10th Edition, Istanbul 2010, p.453), "The fault of the Supreme Court regarding the assestment of the relationship between mandatory rules and public order which prevents the foreign law to be applicable, results in the application of Turkish law to the case. **Supreme Court,** 11th Civil Chamber changed this precedent by its decision dated 28.15.1998 and numbered 383/3945 (Moroğlu/Kendigelen, Article 6).

In the **Supreme Court's** 11th Civil Chamber decision, referred by **Şanlı (Şanlı** Cemal, Milletlerarası Akitlerde Zamanaşımı, İBD 1989/10-11-12, p. 637 et seq., p. 642), it is mentioned that German law should be applied fort he subject matter of the dispute while the Supreme Court inappropriately decide siz months-term regulated under Article 25/4 should be applied for the case on the grounds that such term is mandatory.

52 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17th Edition, Istanbul 2009, p. 394.

53 For instance **Supreme Court** 13th Civil Chamber, 15.6.1993, 2112/5075 (*Kazancı Precedent Bank*)

54 **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17th Edition, Istanbul 2009, p. 394. "Whether it is accepted within the scope of substansive law or procedure law, the statute of limitations can be considered as linked with the public order in terms of its nature and provisions. However, this matter should not be exaggerated.

Long durations for the term of statute of limitations under the applicable law should also be analyzed in the same way[55]. If the term of statute of limitations is regulated as a mere formality under the foreign law, in other words there is objectively no difference in the ordinary conditions of life between availability or non-availability of such term, one may argue the contradiction to public order. Otherwise the recognition of longer term of statute of limitations comparing with Turkish law itself is not separately enough to indicate the infringement of public order[56]. In such cases, the nature of the receivable for which long term of statute of limitations should also be taken into account for the assestment.

A conflict in this subject matter (before 2002 amendments to the BGB) became an issue when the German law which accepts term of statute of limitations for thirty years was required to be applied in a case[57]. The practice of our Supreme Court, which is stating that German law's 30 years-term of statute of limitations is found contrary to the public order with regards to our law with 10 year- term of statute of limitations, cannot be considered as appropriate. Besides, this opinion should not be treated as a general rule.

Despite the fact that the term of statute of limitations is currently regulated as three years under German law (BGB § 195), in most countries having close links with Turkey, long terms of statute of limitations are recognized[58]. It should not be asserted without considering further factors, especially the nature of the receivable, that thirty year term of statute of limitations is absolutely contrary to the public order when compared to ten year-term of statute of limitations in Turkish law[59]. For instance, in German law also after 2002 amendments, the term of statute of limitations in the event of violation of the physical integrity is stipulated as thirty yeras (BGB § 197). According to Turkish law which is as sensitive as German law to the violation of body integrity, such receivables' being subject to thirty year- term of statute of limitations should not be evaluated as contrary to the public order. Not to mention that long term of statute of limitations (Bankruptcy and Enforcement Law Article 143/6; criminal case statute of limitations under Code of Obligations Article 60/2) and even the receivables which are not subject to statute of limitations (Civil Code Article 864) exist in Turkish law.

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55 **Şanlı** Cemal, Milletlerarası Akitlerde Zamanaşımı, İBD 1989/10-11-12, p. 637 et seq., p. 642; **Nomer,** Ergin/**Şanlı,** Cemal, Devletler Hususi Hukuku, 17. Edition, Istanbul 2009, p. 394; **Tekinalp** Gülören, Milletlerarası Özel Hukuk, Bağlama Kuralları, 10. Edition, Istanbul 2009, p. 142-143.

56 **Şanlı** Cemal, Milletlerarası Akitlerde Zamanaşımı, İBD 1989/10-11-12, p. 637 et seq., p. 642.

57 In a decision (13th Civil Chamber, 15.6.1993, 2112/5075, *Kazancı Precedent Bank)*, conclusion part of which is impossible to agree with, the Supreme Court considers 30 year- term of statute of limitation in German law as contrary to the public order for only this reason. In the mentioned decision it is set forth that "it should be accepted that 30 year- term of statute of limitation under German lawto be applied for the loan relationship between the parties. Following this acceptance, considering the nature of the present case, it gains greater importance to clarify whether the public order is in question or not for the terms of statute of limitations. In principle, statute of limitations, itself does not have a nature related to the public order. However, occasionally, statute of limitations may be considered as related with the public order in terms of its nature and provisions. On the other hand, it is important to act sensitibely and carrefuly and pay attention not to justify the intervention of the public order unless the characteristic of the case requires. Considering that the statute of limitations is not only serving for the benefits the debtor, but also the social peace which requires legal security and lefal satisfaction, a receivable's being subject to a long term of statute of limitations should be considered as contrary to the public order. Accordingly, since the German law stipulates 30 year- statute of limitations, which is too long comparing with the same of Turkish law, to be applied for the dispute to which the statute of limitations is applied as the substantive law before the Turkish court, this situation shall be considered as contradiction to the public order. In such a case, it is required to eliminate the provisions of the foreign law on the grounds of the public order." In the decision, the Supreme Court which states that "it is important to act sensitibely and carrefuly and pay attention not to justify the intervention of the public order unless the characteristic of the case requires" decides adversly to its statement.

58 For instance in Austrian law, the general term of statute of limitation is thirty years (ABGB § 1478) and the term of staue of limitation for the privileged legal persons' receivables is forty years (ABGB §§ 1472 and 1485); while the general term of statute of limitation is thirty years in French law (French Civil Code Article 2262) as well.

59 Contrary only from this point the **Supreme Court 13th Civil Chamber,** 15.06.1993, 2112/5075 (*Kazancı Precedent Bank*).