

Developments

Determination of the Creditors and the Context of the Restructuring Project in Turkish Restructuring Law

By *Cenk Akil**

A. Introduction

The enforcement and bankruptcy system in Turkey is principally regulated by the Code of Enforcement and Bankruptcy (CEB), Act Number 2004,¹ which came into force on 4 September 1932. This Code mainly originates from the Swiss Federal Law on Debt Collection and Bankruptcy. During 2003 and 2004, several amendments were made to the CEB by Law Number 4949 and by Law Number 5092.

In this context, economic and other causes of adoption of a new restructuring system must be explained. From the legal perspective, the CEB was lacking effective rehabilitation schemes. The concordat regime was far from meeting the needs of the firms in several aspects. The need for creation of a “modern rescue culture” entailed introduction of new regimes. This new regime is a product of judicial parallelism between different countries. The United States Chapter 11 reorganization system is employed as a model in affirming a rehabilitation approach to the resolution of problems experienced by financially distressed companies. However, the Turkish system is based on pre-packaged Chapter 11 plans, not on the traditional Chapter 11 procedure.

In terms of reorganization, the legal focus is based on the piecemeal fashion of a number of different processes. Among these regimes are basic concordat (composition),²

* Research Assistant, University of Ankara, Faculty of Law. Email: akilcenk@yahoo.com.

¹ Code of Enforcement and Bankruptcy, Law No. 2004.: R.G. [Official Gazette], 19 Sept. 1932, No. 2128, enacted: 19 June 1932 [hereinafter “CEB”].

² See CEB arts. 285-308 for “basic concordat” which is called as “composition” as well. Concordat is an enforcement institution that is adopted to protect the debtors who are in unavoidably bad financial states and to maintain equality between the creditors of such a debtor. A debtor in such a case makes an agreement with the majority of its creditors. According to this agreement, the nonprivileged creditors renounce a certain percentage of their claims. The debtor pays its debts with its current assets in the ratio accepted by the creditors and the remaining portion of its debts is discharged. According to this, concordat is such a compulsory agreement that the debtor makes with the majority which exceeds the absolute majority of its creditors and the two thirds majority of its claims. The nonprivileged creditors renounce a specific percentage of their claims and the debtor discharges from all of its debts by paying the percentage of them accepted in the agreement. The agreement takes effect with the confirmation of the Commercial Court. There are some types of concordat which are regulated in the CEB. See BAKI KURU, RAMAZAN ARSLAN, & EIDER YILMAZ, İCRA VE İFLAS HUKUKU 695-698 (2005).

concordat after bankruptcy,³ composition with the creditors for the transfer of assets,⁴ adjournment of bankruptcy,⁵ restructuring of capital companies and cooperatives by conciliation (restructuring),⁶ and extension of maturity in extraordinary circumstances,⁷ which are regulated in the CEB. The Act for Restructuring the Debts to the Financial Sector, Act Number 4743, was put into effect on 31 January 2002 to strengthen the financial condition of firms affected negatively by the economic crisis. Private workouts, which are called private concordat, are available under legal jurisprudence as well.

The restructuring scheme, which is also used in these practices, was introduced on 12 February 2004 by Law Number 5092, which inserted a new chapter concerning restructuring into the CEB.⁸ Shortly thereafter, on 17 April 2004, the Regulation of Restructuring of Capital Companies and Cooperatives by Conciliation⁹ (RR) was issued by the Ministry of Justice in order to elaborate on the details of implementation of restructuring.¹⁰

B. Determination of the Impaired Creditors by the Restructuring Scheme

Pursuant to Article 5 of the RR, the debtor may determine the creditors with which he will negotiate and to whose votes he will put the acceptance of the project in order to restructure¹¹ his debts freely, provided that the scheme is in conformity with the

³ See CEB art. 309 of the CEB for “concordat after bankruptcy.”

⁴ See CEB arts. 309/a-309/l “composition with the creditors for the transfer of assets.”

⁵ See CEB arts. 179-179/b for “adjournment of bankruptcy.”

⁶ See CEB arts. 309/m-309/ü for “restructuring.”

⁷ See CEB arts. 317-329/a for “extension of maturity in extraordinary circumstances.”

⁸ Law Amending the Execution and Bankruptcy Code, Law No.: 5092 R.G., 12 Feb. 2004, No. 25380, enacted 12 Feb. 2004.

⁹ Hereinafter “RR.”

¹⁰ Efe Direnisa, *Corporate Reorganization In Turkish Law Compared With The United States Chapter 11*, 2 J. YEDİTEPE U. FAC. L. 166-168 (2005).

¹¹ The legal qualification of the restructuring institution is controversial in Turkish legal doctrine. According to the minority view, this way is a kind of concordat. According to the prevailing view, the restructuring institution is different from concordat in many ways. The most important difference is that while in concordat the basis is the restructuring of the debts of the debtor company, by taking precautions like changing the amounts of payment or maturities of the debts, these techniques can also be used in restructuring by conciliation as well, the main goal in restructuring is not the restructuring of the debts, but the restructuring of the firm, structurally and financially. See SEMA TAŞPINAR AYVAZ, İCRA-İFLÂS HUKUKUNDA YENİDEN YAPILANDIRMA 293 (2005); HAKAN PEKCANİTEZ, OĞUZ ATALAY, MERAL SUNGURTEKİN, & MUHAMMET ÖZEKES, İCRA VE İFLÂS HUKUKU 431-432 (2007); Erol Ulusoy, *Ticaret Hukuku Açısından Uzlaşma Yolu ile Borçların Yeniden Yapılandırılması*, in İÇİN ARMAĞAN 554 (Yavuz Alangoya ed., 2007).

provisions stated in the related code and regulation. Pursuant to Article 309/m of the CEB, acceptance of the restructuring scheme prepared by the debtor company by the required majority of only the impaired creditors (the creditors who will be in different positions from their previous positions), is enough so that the debtor company can apply to restructuring. Therefore, different from concordat, in the restructuring by conciliation there are only the creditors impaired by the scheme prepared by the debtor company, vis a vis the debtor.¹²

The code defines the concept of “impaired creditors” as the creditors whose claims, rights, or interests will be restructured by the restructuring project.¹³ As the restructuring scheme starts to have legal effect only after the moment of decision of confirmation of the application of restructuring,¹⁴ “the creditors impaired by the scheme” have to be understood as “the creditors whose claims, rights and interests will be restructured with the restructuring project.”¹⁵

The debtor that intends to apply to restructuring by conciliation primarily should determine the impaired creditors, the circumstances to which they will be subject, and the changes that will occur in the creditors’ legal positions. The code leaves the determination of the impaired creditors to the debtor’s initiative and does not impose any restriction about the nature of the impaired creditors. Therefore, with this project, by means of restructuring the privileged claims, encumbered claims and the claims subject to the Code About the Way of Collection of the Public Claims, Act Number 6183, besides the ordinary claims, the debtor company can include the creditors of these claims in the scope of the project. The code extends the scope of the creditors which can be included in the project and enables the restructuring of interests and rights besides the claims. For instance, in a restructuring project, it is possible for the debtor company to restructure an unmaturing claim, a contingent claim, or a lien.¹⁶

It is asserted in the doctrine that granting to the debtor the authority of making the creditors impaired or unimpaired by the project without having to obey any legal criteria creates an inequality in terms of the impaired creditors.¹⁷ Even though at first sight the debtor’s ability to affect the creditors of the project at his own desire without having a

¹² BAKI KURU, İCRA VE İFLÂS HUKUKU EL KİTABI 1351 (2004); TAŞPINAR AYVAZ, *supra* note 11, at 303.

¹³ CEB art. 309/m/II.

¹⁴ CEB art. 309/r/I.

¹⁵ ALPER EFE ERTEN, MALİ DURUMU BOZULAN SERMAYE ŞİRKETLERİNİN UZLAŞMA YOLUYLA YENİDEN YAPILANDIRILMASI 66-67 (2006).

¹⁶ *Id.* at 67.

¹⁷ TAŞPINAR AYVAZ, *supra* note 11, at 306.

legal ground seems like an inequality, the essence of the restructuring institution is aimed at rescuing the debtor enterprise, the authority that is granted to the debtor must be accepted as normal.¹⁸

Pursuant to the Article 309/n/1/1 of the CEB, it is essential to state how equality is provided between the creditors that the debtor wishes to impair in the project and creditors having similar claims. With this provision, a legal criterion to provide equality between similar creditors is not stipulated. From this point of view, there are some who come to the conclusion that “a payment less than the payment made to the unimpaired creditor cannot be offered to the impaired creditor.”¹⁹ But the conclusion that it is necessary to provide for equality among the creditors regarding the amounts of payment cannot be drawn from this provision. It has been pled that only the necessity of explaining how equality is provided is anticipated with this provision, and that the equality between the creditors may not definitely be equality with respect to the amount of payment.²⁰ The debtor can submit such a payment plan to the impaired creditor such that he puts the impaired creditor in a similar position as the unimpaired creditor. Moreover there is no need to look for absolute equality. Otherwise, if the Turkish legislature’s aim was an absolute equality, furnishing the debtor with the authority of separating the creditors as impaired and unimpaired by the project would have no meaning.²¹

It is also asserted that the criterion of “the debtor’s application to restructuring in good faith,”²² which is counted among the conditions of approval of the project in the CEB, makes it possible to control the debtor’s separation of the creditors as impaired and unimpaired by the project, regarding the determination of how the debtor provides the equality between the similar creditors.²³ This criterion can be used if the debtor applied for restructuring with the purpose of providing a greater benefit to some creditors than others. However, always applying this criterion to the separation that the debtor makes in determining the impaired creditors of the project can preclude restructuring, because the underlying thought in permitting classification of creditors is to increase the chance of acceptance of the prepared restructuring project. Otherwise each classification done by the debtor might be qualified as in bad faith because of this criterion. But, as the basis of

¹⁸ HÜLYA YARICI, SERMAYE ŞİRKETLERİ VE KOOPERATİFLERİN UZLAŞMA YOLUYLA YENİDEN YAPILANDIRILMASI 54 (2007).

¹⁹ TAŞPINAR AYVAZ, *supra* note 11, at 306. Compare Hakan Pekcanitez, *Yeniden Yapılandırma Projesinin Tasdiki ve Uygulanması*, in: İCRA VE İFLAS KANUNDAKİ DEĞİŞİKLİKLER ÇERÇEVESİNDE SERMAYE ŞİRKETLERİ VE KOOPERATİFLERİN BORÇLARININ YENİDEN YAPILANDIRILMASI SEMİNERİ 36 (2004).

²⁰ YARICI, *supra* note 18, at 55.

²¹ *Id.* at 55.

²² CEB art. 309/p/1.

²³ TAŞPINAR AYVAZ, *supra* note 11, at 307.

the system is to rescue the debtor, reasonable choices of the debtor which will provide the acceptance of the project should be allowed. Looking for a project that will satisfy everyone and provide an absolute equality among all the creditors is both opposite to the conceptual context of conciliation and will not allow the restructuring to happen, because “conciliation” requires that both the creditors *and* the debtor make sacrifices from their own rights.²⁴

Pursuant to Article 309/n/II of the CEB, the project can classify the creditors into more than one category on the condition that claims having broadly similar legal characteristics are classified in the same category.²⁵ On the other hand, in the Article 6 of the RR, “classification of claims” is mentioned, rather than “classification of creditors.” From the point of view of the last mentioned provision, it is asserted in doctrine that the “categories of claims” should be constituted rather than the “categories of creditors,” and that the number of “claims” should be considered rather than the number of “creditors,” especially regarding the determination of the majority which will be constituted during voting.²⁶ According to the other view,²⁷ the regulation of the CEB is more appropriate, and even in foreign legal practices not the claims but the creditors are separated into the categories.

In Article 6/I of the RR, the structural principles that must be applied by the debtor company, which wants to separate the claims into categories during the preparation of restructuring project are described in 7 paragraphs. According to these paragraphs:

1. Mainly similar claims are shown in the same category. There must be acceptable economic or commercial reasons in order to put the similar claims into different categories.²⁸

²⁴ YARICI, *supra* note 18, at 55.

²⁵ With the regulation of the CEB Article 309/n/II regarding Turkish Law, the institution of classification of claims is based on the institution of classification of claims in the American method of restructuring. Pursuant to the Bankruptcy Code [hereinafter BC] § 1122, it is possible to put a claim into a specific category if the claims in the category are substantially similar to one another. Like the CEB, the BC also does not define the concept of “substantially similar.” See ERTEK, *supra* note 15, at 68. It can be generally said that in the American restructuring method, the similar rights are allowed to be classified into many categories on the condition that the classification is just. See Stefan Riesenfeld, *Das amerikanische Sanierungsverfahren – Ein rechtsvergleichender Überblick*, 1 KONKURS, TREUHAND- UND SCHIEDSGERICHTSWESEN, at 94-95 (1983). American jurists understand “being just” usually as the sharing of the burdens and the benefits of the restructuring scheme between the creditors properly. See AXEL FLESSNER, SANIERUNG UND REORGANISATION 94 (1982).

²⁶ SÜMER ALTAY, KONKORDATO VE YENİDEN YAPILANDIRMA HUKUKU 1283 (2005).

²⁷ TAŞPINAR AYVAZ, *supra* note 11, at 308; YARICI, *supra* note 18, at 57.

²⁸ For example, secured creditors, unsecured creditors, and privileged creditors will constitute different categories. Moreover, if there is a difference between the securities, these secured claims may be classified between each other, too. See Abdulkadir Böke, *Sermaye Şirketleri ve Kooperatiflerin Uzlaşma Yoluyla Yeniden*

2. One creditor can be involved in more than one creditor category as a result of its claims' characteristics, and it votes for the project separately for each of its claims that has a different quality.
3. If the impaired creditors of the project are composed of secured and unsecured creditors, there must be separate categories for the secured and unsecured creditors in the project.
4. In the cases of nonexistence of another pledge or charge on encumbered property which secures a claim, a separate category can be constituted for this claim.
5. If one claim has been secured with more than one pledge, or there are other pledges on the same properties, this claim can be evaluated in different categories at the same time. However, the conditions to which this claim will be subject must be equitable in terms of the priorities and degrees of all other secured claims in each category.
6. If more than one claim has been secured by only one property, all the encumbered claims which are secured by this property are placed in the same category.
7. As a result of a proper valuation of the encumbered property, if the value of the encumbered property meets only a part of a secured claim, the part which is not met by pledge is classified as unsecured claim.

The condition accepted in the method of restructuring by conciliation stating that "the claims having largely similar legal characteristics must be allocated in the same category" must be evaluated for each project separately.²⁹ However, a provision to prevent the debtor from using the classification against the creditors occurs neither in the CEB nor in the RR. This point can only be controlled in court pursuant to the Article 309/p/1 of the CEB,³⁰ or be asserted by the creditors as an objection³¹ to the project at the confirmation hearing. Therefore, if a charge in the direction of acting equitably while classifying the

Yapılandırılması, 1 J. YEDİTEPE UNIV. FAC. L. 231 (2005). It is also accepted in American restructuring law that creditors with similar rights can be classified into different categories on the condition that the classification is rational and just. See Jay Lawrance Westbrook, *Amerika Birleşik Devletleri'nde 11'inci Bölüm Yeniden Örgütlenme Usulü*, in: TÜRK, İNGİLİZ VE ABD HUKUKUNDA İŞLETMELERİN ÖDEME GÜÇLÜĞÜ SORUNLARI VE BANKA İLİŞKİLERİ SEMPOZYUMU 285 (Çev. Ali Cem Budak ed., 1993).

²⁹ ERTEN, *supra* note 15, at 71.

³⁰ CEB art. 309/p/1. If the court is convinced that the debtor has applied for restructuring in good faith, it decides to confirm, otherwise to reject the application not later than 30 days.

³¹ RR art. 18, subsection II.

claims into categories and including the classification criteria in the scope of elements of the project was imposed on the debtor in the CEB as well, like the one in the German Insolvency Code SS 222 (2),³² it would be appropriate.³³

In German legal doctrine, it is accepted that different equitable classifications according to different economic profits having similar legal status can be made. In this respect, for instance, it seems possible to classify the claims as the claims of the creditors that provide loans of money, the claims of the suppliers and the partners of the company, the claims arising from family law, and public claims.³⁴ This kind of classification is legitimate in the Turkish law, too.

Pursuant to Article 6/II of the RR, “the project can not include discrimination among the impaired creditors which are in the same category or any solution that is not fair. In so far, all the creditors who are affected from the discrimination or the unfair solution could accept that obviously.” This provision, which originates from the United States Bankruptcy Code (BC),³⁵ is a reflection of the principle of intraclass equality, which is one of the most important principles of restructuring procedure.³⁶ According to BC § 1123 (a)(4), unless accepted by the creditor, the creditors in the same category have to be subject to the same procedure in the restructuring plan. For instance, some of the creditors cannot be paid cash while the others in the same category are paid with long term debt.³⁷

In the way of German total debt collection plan, there is a stringent equality in the categories as well.³⁸ Pursuant to the German Insolvency Code § 226 (1), a total debt collection plan should propose equal rights to all the creditors in the same category. Although applying a different procedure to the creditors in the same category is only possible with the creditors’ approval as it is in the American restructuring procedure, different from the American system, pursuant to the German Insolvency Code §226 (2) all

³² Pursuant to the German Insolvency Code § 222(2), the classes should be formed justly. The criteria that will be used in classification should be indicated in the scheme.

³³ ERTEN, *supra* note 15, at 71.

³⁴ See EBERHARD BRAUN & WILHELM UHLENBRUCK, UNTERNEHMENSINSOLVENZ: GRUNDLAGEN, GESTALTUNGSMÖGLICHKEITEN, SANIERUNG MIT DER INSOLVEZORDNUNG 592-598 (1997).

³⁵ 11 U.S.C. § 1123(a)(4)

³⁶ The method of restructuring differs from concordat with this point. See Oğuz Atalay, *Yeniden Yapılandırma Projesinin Tasdiki ve Uygulanması*, in: İCRA İFLÂS KANUNUNDAKİ DEĞİŞİKLİKLER ÇERÇEVESİNDE SERMAYE ŞİRKETLERİ VE KOOPERATİFLERİN BORÇLARININ YENİDEN YAPILANDIRILMASI 23 (2004).

³⁷ ERTEN, *supra* note 15, at 72.

³⁸ LUDWIG HÄSEMAYER, *INSOLVENZRECHT* 764 (2007).

the proper declarations of all those concerned who accept different procedure have to be added to the total debt collection plan compulsorily.³⁹

C. The Elements of the Restructuring Scheme

The points that the project should include are contained in Article 309/n of the CEB. Pursuant to this article, the project which will be prepared by the debtor company must regulate and have clearness about the conditions to which the creditors will be subject, the effects of the project on the contracts to which the debtor is party and to the power of disposition of the debtor, whether a new loan will be taken or not, the methods that will be adopted for improvement, by whom the project will be examined, and that the claims' of creditors who dissent the project being subject to the same conditions with the claims that have similar quality.⁴⁰

I. The Conditions to Which the Impaired Creditors by the Project Will Be Subject and How the Equality Will Be Provided Between the Creditors Having Similar Claims

Pursuant to Article 309/n/l/1 of the CEB, the conditions to which the impaired creditors of the project will be subject and the way that will be adopted in order to provide equality among creditors having similar claims should be regulated in the restructuring scheme.⁴¹ According to this requirement, first, the conditions to which the impaired creditors will be subject must be indicated in the scheme.⁴²

³⁹ *Id.* at 764; DIRK HERZIG, DAS INSOLVENZPLANVERFAHREN 26 (2001).

⁴⁰ These are the minimum elements of the project, therefore it is possible to deal with matters other than these in the project. However, even if the project is approved, in accordance with CEB Article 309(p) it must be examined during the confirmation hearing whether the project includes those matters or not. See ERTEN, *supra* note 15, at 75. It is commonly accepted in American law that the following matters should take place in the restructuring project: 1) Abatement in a certain rate in the amount of the debts, 2) the proposal of company's certificates of stock to the creditors in return of debts, 3) extension of maturity of debts or non-payment of some debts, 4) financial regulations made with creditors of loan. See Jay Lawrance Westbrook, *ABD Şirket Kurtarma Usulü Kanunu-Şirketlerin "Going Concern" Olarak Alacaklılara Karşı Korunması*, in: TÜRK, İNGİLİZ VE ABD HUKUKUNDA İŞLETMELERİN ÖDEME GÜÇLÜĞÜ SORUNLARI VE BANKA İLİŞKİLERİ SEMPOZYUMU 19 (Çev. Ali Cem Budak ed., 1994). In American law in order to be confirmed, the restructuring scheme must pass the "best interest of creditors test," unless the contrary is agreed unanimously. See Mustafa Özbek, *Amerika Birleşik Devletleri İflas Hukuku Sisteminde Alacaklılara ve Borçlulara Ait Haklar*, 12 TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ 43 (2002).

⁴¹ In German law it is accepted that it is compulsory to show the criteria in the restructuring scheme which are used to classify the creditors with similar legal status. See WILHELM UHLENBRUCK, *INSOLVENZORDNUNG KOMMENTAR* 2589 (2003).

⁴² Maintenance of the debtor company and its enterprise and to overcome the liquidity handicaps will be possible only by specific creditors renouncing some parts of their claims. See HERZIG, *supra* note 39, at 81; ERTEN, *supra* note 15, at 75.

Additionally, by requiring the determination of the way by which the equality will be provided among the creditors that have similar claims, the provision mentioned has caused different ideas to be put forward in the doctrine. Taşpınar Ayvaz⁴³ interpreted this provision as not discriminating between the creditors unimpaired and impaired by the project that have similar claims, and as the necessity of providing equality between them. On the other hand, according to Erten,⁴⁴ providing equality between the creditors impaired and unimpaired by the project is not in question here. Moreover it is contrary to the aim of restructuring by conciliation. As the restructuring by conciliation will be held only with the impaired creditors by the project, it is not binding on the creditors unimpaired by the project. Even in legislative statement, in article 4, this matter is mentioned as “the conditions that the impaired creditors will be subject to and how the equality will be provided between them.”

The debtor can make different offers to pay to each category. But the financial and structural restructuring methods and precautions⁴⁵ which will enable these payments must be the same for all of the creditors without discrimination.⁴⁶

It is difficult to say that the principle of equality becomes true in case of only extension of maturity of the debt, without an abatement in the claim of the impaired creditor. Yet the impaired creditor will collect his claim later than the unimpaired creditor. However the equality can be asserted to be ensured if interest for the impaired creditor is paid to equalize the situation because of its later collection.⁴⁷ In the method of restructuring, the debtor's restructuring of the rights, advantages and claims of the creditors whom he chooses is a regulation which can cause great and immeasurable injustices. Therefore it would be appropriate to set a bench mark concerning how the debtor will make this choice.⁴⁸

⁴³ TAŞPINAR AYVAZ, *supra* note 11, at 306.

⁴⁴ ERTEN, *supra* note 15, at 76.

⁴⁵ The restructuring scheme may contain financial and structural methods and precautions such as changes in financial and business structure, sale of assets, cancellation of debts, and so on. See DİRENİSA, *supra* note, at 182; Article 309(n)(1/5) and Article 309(ö)(IV-V) of the CEB.

⁴⁶ ATALAY, *supra* note 36, at 23-24; YARICI, *supra* note 18, at 53.

⁴⁷ TAŞPINAR AYVAZ, *supra* note 11, at 303.

⁴⁸ *Id.* at 307.

II. The Effect of the Scheme to the Contracts to Which the Debtor Is A Party

Pursuant to Article 309/n/l/2 of the CEB, in the restructuring scheme, the effect of the scheme on the contracts to which the debtor is a party must be indicated. With this regulation a great liberty is vested in the debtor in preparing the restructuring scheme. The debtor will explain the effect of the project on its own power of disposition.⁴⁹ In the doctrine it is stated that the authorities of the project auditor can also be determined in this context.⁵⁰ But as the authority of the auditor consists of auditing the implementation of the project and giving report to the creditors,⁵¹ if the debtor's authorities are limited, delegation of these authorities to the auditor is not possible. This prohibition means that the debtor cannot do these transactions during the scheme, and the auditor will inform the creditors and the court whether it has acted pursuant to this prohibition or not within the scope of auditing the implementation of the project.⁵²

Regarding the effect of the restructuring scheme on the power of disposition of the debtor, in the doctrine it is claimed especially that the restructuring scheme must indicate the outcome of undue contracts, contracts with perdurable performances, contracts of rent, and contracts concluded before the application of restructuring but whose performances were not completely fulfilled. It is also asserted that, regarding these effects mentioned here, the rules about the effect of the bankruptcy to the contracts can be applied in the restructuring procedure by analogy as well.⁵³ But because of the main differences between the institutions of bankruptcy and restructuring, application of these rules will not be very appropriate.⁵⁴

The effects of the scheme on contracts to which the debtor company is a party should be handled within the framework of financial and technical precautions⁵⁵ directed at the organization which will be stipulated in the project by the debtor company pursuant to the Article 309/n/l/5 of the CEB. For instance, the maturities of the debts of the debtor company may be extended, or the debtor company may merge with another company or

⁴⁹ *Id.* at 315.

⁵⁰ ALTAY, *supra* note 26, at 1285.

⁵¹ CEB art.309/p/II.

⁵² CEB art. 309/t/l; CEB Art. 309/p/II.

⁵³ ALTAY, *supra* note 26, at 1285.

⁵⁴ TAŞPINAR AYVAZ, *supra* note 11, at 315.

⁵⁵ See CEB art. 309/n/l/5. See discussion *infra*, Part V "Precautions To Ensure The Feasibility Of The Scheme."

other companies. Thus these effects can differ according to the qualification of each project and the conditions of the contracts to which the debtor company is a party.⁵⁶

III. The Effect of the Scheme to the Power of Disposition of the Debtor on Its Assets

Pursuant to Article 309/n/1/3 of the CEB, the debtor will regulate the effect of the restructuring scheme on its power of disposition on its own assets in the restructuring project. Different from the German restructuring procedure,⁵⁷ in Turkish restructuring procedure, power of disposition of the debtor company on its own assets, thus, its capacity to administrate and represent its own assets, is not subject to any restriction or auditing during the restructuring.⁵⁸ Therefore the restructuring by conciliation is divergent from bankruptcy, in which all the powers of disposition are restricted,⁵⁹ and from concordat, in which the power of disposition is subject to the control of the trustee in composition.⁶⁰ Thus, the debtor should use the power of disposition on its assets freely. But this power must be limited to normal use. For other use other than normal, the approvals of the transition period auditor and the project auditor, which are appointed by the court, are necessary. If the court has charged the transition period auditor with undertaking of forwarding and administrating all the activities of the debtor, it must be accepted that the debtor cannot do even the normal use without the approval of the auditor.⁶¹ In restructuring by conciliation, the restriction of the debtor's power of disposition on his

⁵⁶ ERTEN, *supra* note 15, at 77.

⁵⁷ In the German insolvency method, the authority of representation of the debtor's assets and power of disposition on the debtor's assets is vested to the insolvency administrator as a rule. The German Insolvency Code acts from the thought that the debtor who could not avoid the state of insolvency is not the proper person to administrate the assets that are subject to its insolvency. However, in accordance with the German Insolvency Code §270, the debtor is allowed to represent and administrate its own assets under specific circumstances. See ERTEN, *supra* note 15, at 77 (n. 11). In this respect Turkish law is similar to American law, in which an insolvency administrator is not appointed as a rule. Yet in American law the debtor has the power of disposition and keeps his right to speak about the progress of the procedure. See Reinhard Bork, *Der Insolvenzplan*, 4 ZEITSCHRIFT FÜR ZIVILPROZESSRECHT 480-481 (1996); U.S. Courts, *Chapter 11: Reorganization Under the Bankruptcy Code*, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html#debtor> (last visited 24 Feb. 2010).

⁵⁸ But in American law, the procedure of reorganization does not affect the debtor's power of disposition. A debtor in possession can make any act of promise within the limits of the customary commercial activity and can dispose of the assets of the company. See Hanife Doğrusöz, *Amerikan Hukukunda Ödeme Güçlüğü İçindeki Şirketlerin Yeniden Yapılandırılması*, 1 J. YEDİTEPE UNIV. FAC. L. 216 (2005). However it has to obtain the court's allowance for the transactions other than customary commercial activity. See Ali Cem Budak, *Amerika Birleşik Devletleri Hukukunda Şirket Kurtarma*, in: TÜRK, İNGİLİZ VE ABD HUKUKUNDA İŞLETMELERİN ÖDEME GÜÇLÜĞÜ SORUNLARI VE BANKA İLİŞKİLERİ SEMPOZYUMU 354 (1994).

⁵⁹ CEB art. 191.

⁶⁰ ERTEN, *supra* note 15, at 77; CEB arts. 287, 290.

⁶¹ Böke, *supra* note 28, at 238.

assets is possible⁶² by means of such a statement by the debtor in the restructuring scheme or in accordance with the Article 309/ö/II/1 of the CEB.⁶³

In the doctrine it is criticized that there is not any provision in the CEB about the effect of scheme on the power of disposition of the assets. Accordingly, although leaving such an important subject to the consensus of the debtor and the creditors seems theoretically compatible with the rationale of debate and conciliation, it would be appropriate if the legislature made a clear regulation about this subject, since these kinds of contracts have importance, as they can be used as a funding source after the application.⁶⁴

IV. Whether the Debtor Can Obtain Additional Debt Financing

Pursuant to Article 309/n/I/4 of the CEB, it should be determined in the project whether the debtor can apply for financial resources such as loans, in case these resources are necessary for restructuring of the debts. The debtor company which applied for restructuring by conciliation does not have enough money resources in order to administrate its business, to pay the salaries of its employees, to provide raw material and to meet other needs of the enterprise. Because of this, a restructuring scheme which proposes to improve the debtor company or its enterprise will need rehabilitation loans in order to be successful, as a rule.⁶⁵ This subject, which is called “financing after application” in American law, is very important for the debtor that wants to benefit from restructuring. In American bankruptcy law, because of the importance of ensuring financing of the enterprise after application, the lenders that will provide this financing are privileged by establishing a pledge in favor of them which is prioritized over the pledge rights of the creditors before the application. But in our code there is no explanation about this. However it is not right to assert⁶⁶ that the same privilege exists in our law as well. In Article 309/t/I of the CEB, the authority to demand the bankruptcy of the debtor by having recourse to the court is vested in the creditors that provided the debtor with financing as secured or unsecured before the approval of the scheme, if they could not collect their

⁶² TAŞPINAR AYVAZ, *supra* note 11, at 315.

⁶³ The court, at the demand of the debtor or one of the creditors, immediately takes measures directed at the protection of the debtor’s assets which it sees necessary with respect to the debtor’s activities for the period until the final decision is rendered on the application.

⁶⁴ YARICI, *supra* note 18, at 59. In fact, according to the reorganization provisions of the American Bankruptcy Law, especially undue contracts and the contracts with perdurable performances are separated as profitable and unprofitable contracts from the debtor’s perspective, and an action is defined according to this. In this way, by supporting the authority to benefit from profitable contracts and by invalidating the unprofitable contracts, the authority of bringing the debts arising from these contracts in the degree of an ordinary bankruptcy claim is given to the debtor. *See* Westbrook, *supra* note 28, at 279-283.

⁶⁵ HÄSEMEYER, *supra* note 38, at 790; AYVAZ, *supra* note 11, at 316; ERTEN, *supra* note 15, at 79.

⁶⁶ ALTAY, *supra* note 26, at 1286.

claims partially or completely. But no priority has been given to these creditors on the bankrupt's estate.⁶⁷

The debtor company's indication in the restructuring scheme that it is going to apply for loans and other financing instruments is important in terms of strengthening the belief of impaired creditors' that the project will succeed.⁶⁸ But if the debtor company has no property that can be pledged as security, the creditors who will provide rehabilitation loans should be specially secured in case the restructuring project fails.⁶⁹ As there is no restriction in the CEB about from whom the debtor company will obtain the loans, it is possible for the debtor company to obtain the new loans from impaired creditors or from third persons with whom he was involved in a debtor-creditor relationship previously.⁷⁰

Pursuant to Article 309/ö//IV of the CEB, in the interim period between applying for restructuring by conciliation until the approval of the scheme, the debtor company is allowed to apply for financing instruments like loans, provided that it is compulsory for the maintenance of the enterprise or necessary for the protection or increase of the assets of the enterprise. In Article 309/t/I of the CEB, the right of informing the court about the violation of the scheme by the debtor is vested to the creditors that provided the debtor with sources of secured and unsecured financing before the confirmation of the scheme, but could not collect these claims partially or completely, even if they are not impaired by the project. But no priority is given to these creditors in the bankruptcy.⁷¹ In the procedure of restructuring by conciliation, the state of not vesting any priority to the creditors that provided loans to the debtor company will cause banks, who are one of the important loan providers, not to lean towards this procedure.⁷²

V. Precautions to Ensure the Feasibility of the Scheme

As the restructuring is a way of rehabilitation in a broad sense, different from concordat, it has to include not only financial but also technical precautions directed at the organization.⁷³ Thus, according to this thought, it is stipulated in Article 309/n/I/5 of the CEB that the methods which may provide the feasibility of the scheme, such as acquisition

⁶⁷ Yarıcı, *supra* note 18, at 62.

⁶⁸ TAŞPINAR AYVAZ, *supra* note 11, at 316; ERTEN, *supra* note 15, at 79.

⁶⁹ HÄSEMEYER, *supra* note 38, at 790.

⁷⁰ TAŞPINAR AYVAZ, *supra* note 11, at 316; ERTEN, *supra* note 15, at 79.

⁷¹ TAŞPINAR AYVAZ, *supra* note 11, 317.

⁷² ERTEN, *supra* note 15, at 80 (n. 125).

⁷³ *Id. at* 81.

of the debtor's enterprise partly or completely, merger with another company or other companies, amendment of the structure of capital or the articles of incorporation, determination of the people who will take part in the management of the debtor enterprise, extension of the maturities of the debts, changing the interest rates, or issuance of securities should be included in the restructuring scheme. Technical and financial methods directed at the organization which the debtor company may include in the restructuring scheme are included as examples in the CEB, as in the BC § 1123(a)(5).

In this context the debtor will be able to issue certificates of stock in return for his debts, increase his capital, reduce his interest rates of bonds, replace his preferred stock with common stock, or enter into a partnership with other companies. Even the creditors' running the businesses of the enterprises of the debtors can come to the forefront.⁷⁴ In fact the method of "transforming debts into capital" is one of the methods commonly used in American restructuring procedure. Thus, by giving certificates of stock to the creditors of the enterprise in return for their claims, creditors become shareholders of the enterprise and so the instability between the internal resource and external sources, which occurs in the structure of capital of the enterprise, is eliminated.⁷⁵

VI. Project Auditor

Pursuant to Article 309/n/I/6 of the CEB, it is compulsory to determine in the restructuring project prepared by the debtor by whom and how the implementation of the scheme will be controlled after the decision of confirmation, if the project is confirmed. The authorities of the project auditor, that is one of the incumbent organs stipulated by the method of restructuring by conciliation, are determined in Article 309/p/II of the CEB as "auditing only the principals concerning the implementation of the project and informing the creditors about the situation regularly." Pursuant to the same provision, the project auditor or auditors will be appointed by the court regarding the opinions of the debtor and the creditors. If the debtor and the creditors do not select any auditor or they are not able to come to an agreement on an auditor, the court will select an auditor *ex officio*. Also pursuant to Article 19/IV of the RR, the project auditor will be selected from independent and sworn-in Certified Public Accountants who have the qualifications necessary for the nature and fulfillment of the duty. The auditors, whose responsibilities and duties may be defined in the project, must not be involved in a profit relationship with the impaired creditors or the debtor.⁷⁶

⁷⁴ Böke, *supra* note 28, at 229-230; TAŞPINAR AYVAZ, *supra* note 11, at 317.

⁷⁵ Ali Cem Budak, *Ödeme Güçlüğü İçindeki İşletmelerin Rehabilitasyonu ile İlgili Usullerin Amacı Işığında İcra ve İflas Kanunu'ndaki 5092 sayılı Kanun Değişikliği*, in: İSTANBUL BAROSU MESLEK İÇİ EĞİTİM SEMİNERLERİ 8 (2004).

⁷⁶ Erten, *supra* note 15, at 81.

At this point, the conflict between Article 309/n and Article 309/p/II of the CEB draws attention. Thus determination of the project auditor is stipulated as a part of the minimum and compulsory elements of the project and the default of this compulsion is imposed with the sanction of disapproval of the project.⁷⁷ Therefore it can be said that the provision of the Article 309/p/II of the CEB becomes invalid in the face of Article 309/n/l/6 of the CEB.⁷⁸

In the doctrine it is asserted that the scope of the authorities of the project auditor can be regulated along with the debtor's explanations on his own power of disposition in the project.⁷⁹ But authorization of the project auditor like the transition period auditor in such a way that will cause the restriction of the debtor's power of disposition is not possible, because the duty of the project auditor consists of auditing whether the project is being implemented in the way it is confirmed and informing the court and the creditors of the result of the audit.⁸⁰ Therefore, if the debtor stipulates to restrictions of its own power of disposition in the project during the duration of the project, the debtor cannot delegate the authorities which it restricted for itself to the project auditor.⁸¹

VII. Equal Treatment

The last matter which the debtor company should include in the restructuring scheme is that the claim of the creditor who rejects the scheme will be subject to equal treatment with claims that are similar to it in terms of quality, as long as this creditor does not explicitly accept less than the right determined for his own category.⁸²

D. Result

The institution of restructuring is accepted in Law Number 5092, and following this law, with the Regulation of Restructuring of Capital Companies and Cooperatives by Conciliation. The objective was to regain the financially distressed companies to the national economy by providing them the ability to be rescued and rehabilitated. But some provisions of the mentioned laws and regulations are in conflict with one another. Besides these conflicts, the regulations regarding some important subjects, like the classification of the creditors, the status of the debtor's power of disposition during the restructuring process, and the effect of the restructuring scheme to the contracts to which the debtor is

⁷⁷ YARICI, *supra* note 18, at 64; TAŞPINAR AYVAZ, *supra* note 11, at 318; ERTEN, *supra* note 15, at 82.

⁷⁸ TAŞPINAR AYVAZ, *supra* note 11, at 318; ERTEN, *supra* note 15, at 82.

⁷⁹ ALTAY, *supra* note 26, at 1285.

⁸⁰ CEB art. 309/t/l.

⁸¹ TAŞPINAR AYVAZ, *supra* note 11, at 315; YARICI, *supra* note 18, at 61.

⁸² ERTEN, *supra* note 15, at 82.

party, are inadequate. These deficiencies have to be eliminated with the amendments that will be made in the related legislation after examination of the legislation and practices of foreign countries.