

Journal of Human and Social Sciences

Expulsion in Limited Companies in The Light of Court Decisions

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ABSTRACT

There is a need for a strong cooperation and trust relationship between the partners in limited companies which is one of the most established company types in practice. In cases where any of the partners damage this cooperation and trust, it is important to recognize the right of the company to expulse a partner. Forcing the company and other partners to endure this situation may disrupt the harmony of the partnership. A limited liability company partner can be expelled from the company by the decision of the general assembly based on the reason stipulated in the articles of association or by a court decision for justified reasons. Expulsion is the termination of the partner's relationship with the partnership against the will of the partner, and the termination of the partnership title with a general assembly or court order. In this article, grounds for expulsion, applying to court for expulsion, and its consequences will be examined theoretically in accordance with the doctrine and supreme court decisions.

Key Words: Limited company, expulsion, objective justification, case of expulsion, separation deposit.

Research Article

Received: 28.01.2022

*Revision received:
24.04.2022*

Accepted: 28.05.2022

*Published online:
29.05.2022*

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Introduction

Within the scope of the Turkish Commercial Code (TCC), in limited liability companies that are accepted as capital companies, intercompany relations between partners are stronger than those of joint-stock companies. Maintaining a healthy partnership relationship depends on the existence and continuation of trust between partners. When the relations between the partners in limited companies are examined; it is generally seen that it is established among people who know and trust each other (Yasan, 2018, p. 32). Limited companies, with this feature, present an appearance like sole-proprietorship partnerships. Exit and expulsion on justified grounds (TCC art. 638 & TCC art. 640), subjecting the transfer of shares to partnership approval (TCC art. 595/II), loyalty obligations of the partners (TCC art. 613), rights of shareholders to receive and review information (TCC art. 614), and liability of the shareholders due to public debts in the proportion of their own shares (Article 6183 of the AATUHK {Law on The Procedure for The Collection of Public Receivables} regulation 35) brings the limited partnership closer to proprietorship companies (Karayalçın, 1973, p. 335 et al). However, when we look at the provisions of the TCC no. 6102, we can say that the company, unlike TCC no. 6762, is converting its legal structure closer to capital partnerships (Yıldız, 2007, p. 56).

In limited companies, it may be requested or required that the partnership relationship be terminated due to the emergence of various problems and disagreements between partners, failure to meet the company's expectations during the establishment period, or for some financial or personal reasons.

If the partner fails to meet his/her expectations from the partnership, he/she may want to terminate the partnership relationship based on his will, alternatively; even if the partner may not have such a will, the company may request to terminate the partnership relationship. Circumstances where the limited company partner can leave the company with his/her will are organized by TCC art. 638. In return for the right of the partner to exit the limited company, mutual rights equality on the part of the company and its partners regarding the expulsion of the company partner is ensured by TCC art. 640. Thus, in case of the realization of the reasons stipulated in the articles of association, the partner can be expelled from the company by a resolution of the general assembly or in the case of valid reasons by a judicial decision. The objective maintained here is the continuity of the company and its partnership interests (TCC art. 640 justification). The fact that the legal basis of the expulsion is stipulated by the law ensures the protection of the interests of the expelled partner.

I. The Concept of Expulsion

The concept of expulsion can be defined as the termination of the partnership of the partner, which has a negative impact on the operation of the company and threatens its continuity, with the company against his/her will and desire (Çamoğlu, 2020, p. 73; Bahtiyar, 2021, p. 444; Çakır Çelebi, 2021, p. 79). The existence of a partner whose partnership relationship with the company is inconvenient, not beneficial, and cannot maintain a relationship with other partners in an atmosphere of peace and trust may have an adverse effect on the company.

A partner who is not wanted to remain as a partner due to his personality and behavior can be expelled from the company and so the company's interests can be ensured by protecting the continuity of the company. For this reason, the right to expulse a partner of the company is a protective right for the company and other partners (Taşdelen, 2012, p. 207; Yıldız, 2007, p. 181).

It is an annulling formative right since the expulsion will terminate the partner's relationship with the company (Taşdelen, 2012, p. 207).

II. Expulsion Conditions

A. Expulsion in Accordance with the provisions of the Articles of Association

The Former Turkish Commercial Code (ETTK) numbered 6762, did not include a regulation to expulse a limited company partner for the reasons stated in the association. However, 6102 numbered TCC art. 640, allows for the expulsion of a limited company partner from the company through amendments to the company agreement. In accordance with this regulation, it is stated in the articles of association that the reasons for the expulsion of the partner from the company can be foreseen.

Besides TCC article 640/1, TCC art. 577/1 also provides a legal basis for the inclusion of reasons for expulsion in associations. Under the relevant cause of the regulation entitled as binding provisions by company agreements (TCC art. 577/1-1), it is clearly stated that special reasons for expulsion can only be stipulated by the company's articles of association, otherwise they cannot be binding in terms of company law. In TCC art. 577 a limited number of these are specified. According to the reasoning of TCC art. 577, if such provisions are proposed outside the scope of the articles of association, then this agreement will only have the consequences of a code of obligations contract. In that case, if the provisions showing special reasons for the expulsion of the partner from the company are regulated by a contract other than the association, in terms of company law, there will be no sufficient basis for the expulsion of the partner from the company and for the decision of the general assembly to this end. However, if it is proposed that the partner who caused this situation will pay a penal clause or compensation in case of expulsion, these provisions may be applied (Turkish Code of Obligations, art. 179-182).

TTK art. 640/1 is not a mandatory rule of law. Arrangement of expulsion with the articles of association is optional. In limited companies, the reasons for expulsion can be foreseen with the change of contract to be made during the establishment or later. If the right of expulsion is not stipulated in the articles of association, the partner will not be expelled from the company with the decision of the general assembly (Şener, 2022, p. 774). However, in the presence of justifiable reasons, the possibility of the expulsion of the partner through litigation is reserved.

The reasons for expulsion can be determined by making changes in the articles of association afterwards, with the unanimous decision of all shareholders representing the company's capital at the general assembly meeting (TCC art. 621/3). It is not possible to reduce these rates by contract. If the reasons for expulsion are specified during the establishment, the partners can join the company aware of this situation, if they do not agree with it, they can decide not to join the company. However, regulating the reasons for expulsion with a later contract change, the partners will be exposed to a situation they did not know beforehand, so it requires unanimity. With this regulation, the legislator prevents the majority partners from introducing contractual reasons to subsequently expulse the minority from the partnership, thus trying to strengthen the minority protection system (Şener, 2022, p. 774). Expulsion of the reasons for the exclusion stipulated in the articles of association will require an amendment in the agreement, however since it will be considered in favor of the shareholders, under the provision of TCC art. 589, this is only possible with the decision of the partners representing two-thirds of the capital.

It is not valid to make a regulation in the articles of association that the partner can be expelled from the company for no reason. Under the provision of the TCC act. 640/1, if there is a

regulation in the articles of association for expulsion, the reasons must also be specified. Similarly, it is not possible to propose an abstract, unconditional, ambiguous, and indefinite expulsion without any reason in the articles of association (Şahin, 2013a, p. 855). For example, a regulation in the articles of association stating that a decision can be taken by the general assembly regarding the expulsion of the partner only in the presence of justified reasons, without showing concrete reasons, will also be deemed invalid (Şahin, 2013b, p. 191; Öztürk Dirikkan, 2005, p. 51). In our opinion, it is also invalid to include provisions in the articles of association stating that the reasons for expulsion can be determined by the general assembly or the executives without giving any reason and to make arrangements that deviate from the legal regulation regarding the expulsion (TCC art. 640 and TCC art. 577) that will have adverse consequences against the expelled partner.

1. Reasons that can be Proposed in the Association

There are not a limited number of reasons for exclusion that can be foreseen in the association. In each partnership agreement, different reasons can be arranged as the reason for expulsion. The reasons for expulsion are generally the reasons that arise from the person and behavior of the partner and make the partnership relationship unbearable for the other partners. The reasons determined do not have to be justified in terms of expulsion as long as the determined reasons are concrete, clear, and precise. The general, unclear reasons for expulsion specified in the articles of association should be interpreted in favor of the partner and against the company. (Şener, 2017, p. 899). The reasons stated in the articles of association should not be contrary to the imperative legal rules, personal rights, morality, or public order. Proposing reasons that are not related to the company and that can be considered completely personal for the partner, violates personal rights. It is invalid to submit reasons for expulsion such as being a member of a certain party, religion, race, or nationality (Öztürk Dirikkan, 2005, p. 50). It is also invalid to suggest impossible reasons that violate the general and objective principles of law and damage the principle of equal treatment as a reason for the expulsion (Pulaşlı, 2021, p. 777). The principle of equal treatment requires equal treatment of shareholders under equal conditions (TCC art. 357). However, the principle of equal treatment does not mean absolute equality. The loss of qualifications required of some partners in their relationship with the company can be stipulated as a reason for expulsion for these partners (Öztürk Dirikkan, 2005, p. 50).

Violation of the interests of the company that are worth protecting, violation of the competition prohibition, disclosure of company secrets, violation of capital investment debt, at the same time making the company in debt by acting within the framework of the personal interests of the partners who are the directors of the company, betraying the company, failure to fulfill additional payment and side performance obligations, conviction for certain crimes, loss of important professional qualifications and qualifications for the company may be considered as reasons for expulsion in associations (Şener, 2022, 775; Çebi, 2020, 445).

According to ETTK (The Former Turkish Commercial Code) art. 522 and 523, bankruptcy or enforcement proceedings against a partner are counted among the specific reasons that allowed the expulsion of the partner from the limited company. Accordingly, in the event that leads to a partner's bankruptcy, the bankruptcy administration or the creditor who has confiscated the share of one of the partners may request the termination of the company on the condition of giving six months' notice. According to ETTK art. 523/4, in order to prevent termination, the company was issued the right to decide to expulse the partner from the company in exchange for the real value of the capital invested by the partner against whom proceedings were pursued. In its current form, TCC does not include the right of the bankruptcy administration or the personal creditor to request

the termination of the company if a partner is pursued through bankruptcy or foreclosure. Thus, the way for a partner's personal creditor to threaten the company to terminate is blocked. The legal consequences of tracking the partner through bankruptcy or foreclosure are left to general provisions. However, the provisions regarding the expulsion of the bankrupt partner or the partner who has been subject to execution proceedings due to personal debt from the company agreement may be envisaged with the provision to be added to the association. Even if it is not written in the articles of association, regardless of the share ratio and management powers in the company, in most cases a justified reason must be accepted for the bankruptcy of a partner. Whether the execution proceedings regarding one of the partners constitute a valid reason or not; it is stated whether to follow-up is finalized or not, and that the receivable to be monitored must be assessed in consideration of the size receivable, the company's capital, the number of partners and the managerial powers of the debtor partner within the company (Çamoğlu, 2014, p. 13).

Concrete agreements can be made regarding the justifiable grounds for the partners to be expelled under the articles of association. These regulations shall be considered as the reasons for the expulsion specified in the contract. In such a case, the judge shall not evaluate whether the reason specified in the contract is justified or not and shall only examine whether the reason has occurred. Even if the justified reasons are regulated by the articles of association, the partner can be subject to expulsion.

2. Decision of the General Assembly

A limited liability company partner can only be expelled by the decision of the general assembly based on the reasons in the association. Deciding on the expulsion of the partner is one of the non-transferable powers of the general assembly. In the articles of association, one of the partners, the director of the company, or any other person cannot be granted the expulsion right or authority. The general assembly will take into consideration whether the reasons stipulated in the contract have been realized to decide on expulsion. The discretion in this matter belongs to the general assembly. If the reasons for expulsion are tied to certain conditions in the association, the general assembly should also take these conditions into account.

According to the regulation of TCC art. 621/1-h, due to its nature the decision to expulse a partner from the company that is based on the reasons stipulated in the articles of association is an important decision. The decision to expulse the partner from the company based on the reasons in the articles of association can be taken with the same quorum provided that at least two-thirds of the votes represented and the absolute majority of the entire capital holding the right to vote come together (TCC art. 621/1-h). It is stated that the absolute majority of the voting capital is the meeting quorum, and two-thirds of the votes represented in the general assembly are the decision quorum (Çamoğlu, 2012, p. 253).

The general assembly will convene with the absolute majority of the entire capital holding the right to vote and will take decisions with two-thirds of the votes represented at the meeting. There are different opinions on whether the partner who is to be expelled from the company has the right to vote at the general assembly meeting (For detailed information, see Akbay, 2010, p. 231). Deprivation of votes in limited companies is in the judgment of TCC art. 619. According to the relevant article: *“Those who have participated in the management of the company in any way cannot vote on the decisions regarding the release of the managers. In the decisions regarding the acquisition of the company's basic capital share, the shareholder who has transferred the basic capital share cannot vote. The relevant partner cannot vote in the decisions that approve the partner's activities contrary to the obligation of loyalty or the prohibition of competition.”* As can

be seen, it is not stated in the provision that the expelled partner cannot vote at the general assembly meetings regarding the expulsion decision. For this reason, it is stated that the expelled partner has the right to vote in the general assembly since it is not prohibited by the law (Şener, 2017, p. 901). However, it is also stated that it is possible to decide with the articles of association that the partner will not have the right to vote in the decision to be taken about himself (Tekinalp, 2013, p. 495). We agree with the view stating that there is an unconscious gap in the law on this issue, that the decision to be expelled exactly coincides with the reasons and the purpose of the deprivation of voting rights, and that no one can be the judge of his case, and that the expelled partner will not have the right to vote at the general assembly meeting where the issue will be discussed (Çamoğlu, 2014, p. 9; Öztürk Dirikkan, 2005, p. 83). On this matter in TCC art. 255/1, it is stated that in the case of expulsion of a general partnership partner, it is stipulated that the partner who is the target of expulsion is deprived of the right to vote, and it is stated that it should be accepted that the exclusion from a limited partnership also constitutes a situation of deprivation of voting rights (Çamoğlu, 2014, p. 9).

Under TCC art. 640/2, following the notification of the decision through notary public, within three months, the expelled partner may file an action for annulment against the expulsion decision by the general assembly. This period is the lapse of time. Besides the reasons for expulsion, the articles of association can also include conditional forms that bind the exercise of this right. For example, the obligation to notify the partner, the submission of the partner's written defense, and assigning a period can be regulated by the articles of association. However, as the notification of the partner concerning the decision to expulse must be made through notary public, the articles of association cannot determine that this notification can be made in another way (TCC art. 640/2).

Notifications to be made to the expelled partner through a notary public must comply with the provisions of the Notification Law. In a concrete dispute, it was concluded that the decision to expulse the limited liability company partner was not valid, as the reason for not being at the address at the time of notification was not documented in writing following the provisions of the Notification Law (Court of Appeals 11th Civil Chamber., 08.07.2010 T. {date}., 2009/2206 E. {case}, 2010/8119 K. {decision}, www.corpus.com.tr, Access Date: 21.01.2022).

An annulment lawsuit may be filed for reasons such as the expulsion decision made by the general assembly is against the contract, the expulsion conditions or reasons specified in the contract are not fulfilled, sufficient quorum and majority cannot be achieved in the general assembly, and the decision is against the principle of good faith and equal treatment (Poroy/Tekinalp/Çamoğlu, 2019, p. 450). The right to file an action for annulment is an inalienable right. The articles of association stating that an action for annulment cannot be filed against the expulsion decision of the general assembly will be invalid (Yasan, 2018, p. 169).

As a result of the action for annulment, if the court cancels the expulsion decision of the general assembly, the partner will be treated as a partner who has never been expelled from the company. If the court does not annul the decision to expulse, it is deemed to have been expelled from the company and the title of partnership has ended as of the date when the general assembly decided to expulse and this decision was notified to the partner (Çamoğlu, 2014, p. 8).

B. Expulsion by a Decision Based on Cause

TCC art. 640/3 regulates that upon the request of the company, the partner can be expelled from the company with a court decision based on justifiable grounds. Even if no reason is foreseen in the company agreement or the reasons stipulated in the agreement are not fulfilled regarding the

expulsion of a limited liability company partner, he can be expelled from the company with a court decision upon the request of the company if there are justified reasons. Expulsion from the company for justified reasons will be possible as a result of the finalization of the court decision.

1. Decision of the General Assembly

In TCC art. 640, it is stated that the company has the right to request the expulsion of the partner from the company based on a just cause, with a court decision. In TCC art. 616/1-h, requesting the court to expulse a partner is regulated among the inalienable powers of the general assembly. In TCC art. 621/1-h, the decision to apply to the court for the expulsion of a partner from the company based on justified reasons is stated among the important decisions of the general assembly. Even though it is not clearly stated in the text of the following article when the rulings of TCC art. 616/1-h and TCC art. 621/1-h are evaluated together, the result exhibits that for the company to file an expulsion lawsuit, the general assembly must take a decision in this direction. In this case, in a general assembly meeting with the absolute majority of the entire capital represented, and the decision toward the expulsion of a partner for justified reasons is decided with at least two-thirds of the votes, the company may file a lawsuit for expulsion with just cause. Here, the decision to be taken by the general assembly should be aimed at filling a lawsuit to justify the partner (Tekil, 1994, p. 79).

As a matter of fact, on this matter, the Court of Appeals issued that, under 640/2, the decision to expulse can be taken by the general assembly of the limited company, the decision in question is among the inalienable powers of the general assembly, and that the general assembly decision regarding the expulsion of the partner from the company constitutes a prerequisite for the case (Court of Appeals, 11. HD {Civil Chamber}, 03.12.2020, 2020/1157 E. {case}, 2020/5689 K. {decision}, www.corpus.com.tr, Access Date: 20.01.2022).

Another ruling by the Court of Appeals reiterated that a general assembly decision is needed prior to the expulsion lawsuit. In the decision, it is stated that; under TCC 640/3, the company may file a lawsuit for the expulsion of the partner from the company on valid grounds, and under art. 616/1h, it is emphasized that a general assembly order is needed, and the case brought by the company partner is expelled on the grounds that it does not have a legal capacity. This decision is overturned by a local court ruling (Court of Appeals 11. HD. {Civil Chamber}, 08.02.2016 T. {date}, 2016/24 E. {case}, 2016/ 1120 K. {decision}, www.corpus.com.tr, Access Date: 10.01.2022). In that case, before entering the merits of the expulsion lawsuit, it should be examined whether there is a current and valid general assembly resolution for the expulsion of the partner from the company (Çamoğlu, Poroy, and Tekinalp, 2017, p. 440). In the dispute before it, the court will first examine the case on the merits by examining whether there is a general assembly decision to file a lawsuit with the expulsion of the partner and whether this decision has been duly taken.

Although the Court of Appeals does not have a regulation on expulsion in the articles of association, it emphasizes that a decision to “file a lawsuit” against a defendant is a requirement for a lawsuit to be filed with a request for release, and it does not accurately see the establishment of a provision in writing that goes directly to the fundamentals of the business (Court of Appeals 11. HD. {Civil Chamber}, 28.04.2016 T. {date}, 2015/10688 E. {case}, 2016/4780 K. {decision}, www.corpus.com.tr Access Date: 21.01.2022).

2. Filing a Lawsuit with a Request for Expulsion

In the event of justified reasons, under the provisions of TCC 640/3, the shareholder may be expelled from the company by a court decision. TCC 638/2 gave the company the right to expulse a partner for justified reasons in return for the right of the partner to exit in the presence of justified reasons. Even if the association does not specify a way to expulse the partner or the reasons stated in the association have not materialized, if there are justified reasons for the request to expulse a partner, it may be possible through litigation.

The company is entitled to litigation with the request for the expulsion of the partner in the event of justified reasons, and the decision to expulse the legitimate reasons rests with the authority of the judge (Özdoğan Daloğlu, 2019, p. 96).

The provisions of the association, which annuls the company the right to sue and leaves the authority of the court to the General Assembly, are both invalid on grounds of unlawfulness.

a. The Concept of Justified Reasons and Situations That Can Be Considered as Justified Reasons

The TCC does not have a clear provision regarding the justified reasons that can form the basis for the expulsion of a limited company partner. However, in the doctrine, the situations that prevent the continuity of the partnership, render the partnership unbreakable, gives it a deep shock, expulse the conditions at the moment of the association, the condition that the partnership relationship cannot be expected to continue, and that makes it impossible to continue in accordance with the rule of honesty are accepted as justified reasons (Çamoğlu, Poroy and Tekinalp, 2017, p. 428; Öcal, 2003, p. 223; Baştuğ, 1966, p. 56; Öztürk Dirikkan, 2005, p. 43; Pulaşlı, 2018, p. 2785).

Behaviors of a partner that violate the loyalty obligation, fail to perform basic debts and deeds to the company and its shareholders due to insolvency, prevent the partnership from continuing or makes the partnership unbearable, damage the name and reputation of the company, and create discord can be considered as valid reasons for expulsion (Çamoğlu, 2020, s.79).

The provision of TCC art. 245, which regulates this concept in collective partnerships may provide guidance (Şahin, 2013a, p. 852). Limited companies are a mixed type of company that may also be present the qualifications of an unlimited company (Pulaşlı, 2021, p. 766). TCC art. 245 that governs the right of the partner to exit on justifiable grounds in collective companies, that are a sole proprietorship, can be used for defining the concept of justified causes and seeing examples that could be considered as legitimate reasons. According to the relevant provision, justifiable reason is defined as the actual or personal reasons leading to the establishment of the company that have disappeared in a way that makes it impossible or difficult to obtain the subject of the company's operation. The same provision also defines certain justifiable reasons. These are: a) Betrayal of a partner in relation to the administrative affairs or transactions of the company; b) Partner's inability to fulfill his/her principal duties and obligations; c) misuse of trade name or assets of the company for personal interests; d) loss of necessary skills and competence to carry out the business of the company due to a permanent illness or other reasons.

The justified reason can be deemed to be realized if the continuation of the partnership has become unsustainable and unbearable due to similar reasons listed above, or if it is not from other partners to continue the relationship in accordance with the principles of honesty and trust (Çebi, 2020, p. 446). In this respect, the judge will have discretion and will evaluate whether there are any justified grounds for expulsion on any concrete issue (Çamoğlu, 2020, p. 80).

In judicial decisions, there are several decisions that could serve as examples for justifying the expulsion of a limited company partner. Nevertheless, these reasons should be evaluated

separately within the framework of Civil Code (CC) art. 2 based on the incident's characteristics and benefits balance. The existence of justified reasons should be investigated by the judge. In a court ruling, evidence in connection with allegations of the existence of justified reasons was submitted in the petition, and the decision was overturned based on the decision was made on the basis of incomplete examination in written form (Court of Appeals 11. HD. {Civil Chamber}, 21.10.2003 T. {date}, 2003/3548 E. {case}, 2003/9628 K. {decision}, www.corpus.com.tr, Access Date: 20.01.2022). In that case, during the course of the trial asserting legitimate reasons abstractly is insufficient, and the concrete justified reasons should be proven by evidence.

Distrust and disagreement between partners, actions that disturb trust, animosities, heavy accusations or allegations made against the partners, attitudes that damage the company's commercial reputation, prevention of the company from operating, negative attitudes and behaviors that cause harm to the company, conviction decisions made due to certain crimes, damaging the company with intentional or malicious actions or behavior, etc. can be accounted as justifiable reasons (Çamoğlu, 2020, p.79).

In a ruling by the Court of Appeals, against the allegations that the company has lost all its capital and the need for capital increase is mandatory in terms of the continuity of its activities, obtaining a report from an expert in the following field that evaluates the necessity of the capital increase, the local court order was overturned on the grounds that the blocking of the capital increase is an abuse of rights under CC art. 2, and such a decision should be based on the outcome on whether the blockage of the capital can serve as a justifiable reason for expulsion (Court of Appeals, 11. HD. {Civil Chamber}, 11.04.2011 T. {date}, 2009/11292 E. {case}, 2011/4126 K. {decision}, www.corpus.com.tr, Access Date: 21.01.2022).

The Court of Appeals did not approve defaulting on paying the capital debt incurred because of participation in the capital increase and did not accept this debt as a reason for justified expulsion from the company by itself as there is the possibility to collect this debt by means of execution proceedings. The partner subjected to the expulsion shall not be deprived of paid shares, and deprivation may only be made for the shares of the method of expulsion (Court of Appeals, 11. HD. {Civil Chamber}, 08.01.2018 T. {date}, 2016/5785 E. {case}, 2018/48 K. {decision}, www.corpus.com.tr, Access Date: 21.01.2022).

The provision of TCC art. 636/3 entitles limited company partners to claim termination of the company on justifiable grounds. Instead of arbitration, the court may find that the claimant partner must be paid the true value of his/her share and the expulsion of the claimant partner from the company or can suggest some other acceptable or pertinent solution. In this rightful termination lawsuit, the court may find the reasons for termination of the company adequate but also decide on other remedies in consideration of the company's continuing interests and the expulsion of the plaintiff or can oversee other rightful interests.

In a ruling by the Court of Appeals, it was stated that it may be possible for the defendant's limited company to continue its legal personality as a single partner, also under TCC numbered 6102 art. 636/3 a local court decision stating that instead of termination the plaintiff partner's share may be ordered for expulsion from the company by paying the actual value was overturned (Court of Appeals 11. HD. {Civil Chamber}, 13.01.2014 T. {date}, 2013/1151 E. {case}, 2014/573 K. {decision} www.corpus.com.tr, Access Date: 19.01.2022). In accordance with TCC 636/3, the court may order the real value of the plaintiff's share to be paid to the partner at the request and expulsion of the plaintiff from the company, or some other and acceptable solution can be ordered. As stated, this lawsuit is not a lawsuit about expulsion, but a lawsuit for the rightful termination of the company. However, as a matter of law, the court will be able to protect the company and the

partners from the irreversible consequences of termination (Court of Appeals 11. HD. {Civil Chamber}, 15.05.2017 T. {date}, 2015/15797 E. {case}, 2017/2896 K. {decision}, www.corpus.com.tr, Access Date: 20.01.2022).

b. The Fault in the Formation of Justified Reason

The partner intended for expulsion for justified reasons usually causes this situation by his/her flawed behavior. If there are good reasons derived from the partner's own fault, the company can ask for expulsion (Taşdelen, 2012, p. 85). However, based on reasons like illness, aging, and loss of capacity, the company may request that the partner be expelled from the company. In fact, the Court of Appeals in its decision numbered 11. HD (Civil Chamber) 11.05.1998 T. (date), E. (case) 1915, K. (decision) 3246 accepted that if the partner is detected by a forensic report as being continuously paralyzed can be ruled as a justified reason for expulsion (Çamoğlu, 2020, p. 80). So, the partner does not necessarily must be at fault for expulsion (Öztürk Dirikkan, 2005, p. 70; Taşdelen, 2012, p. 223; Çebi, 2020, p. 446). Although there is no need for a partner to be at fault for expulsion, the expulsion of a partner of no fault is insufficient on its own. If the existence of reasons not attributable to the partner's fault, prevents the partner from carrying out his/her duties within the company or results in the loss of important capabilities the company is looking for, and this situation became unreasonable, then it could be regarded as a justifiable reason.

The rightful reason for expulsion should stem from the partner himself and the following reason should make the retention of the partner in the company imperceptible to other parties (Çebi, 2020, p.446). However, expulsion should not stem from other partners' fault. In situations where the defect originates from other partners, ruling against the plaintiff would be against the rule of honesty (Çamoğlu, 2020, p. 80). In case of a mutual defect, and if the partner has less fault, then the lawsuit should be overruled on the grounds that no one shall be entitled to the legal benefits from his/her own fault (Court of Appeals 11. HD. {Civil Chamber}, 08.06.2015 T. {date}, 2015/2292 E. {case}, 2015/7902 K. {decision} www.corpus.com.tr, Access Date: 10.04.2022).

c. Parties in an Expulsion Case

The authority to request for expulsion of a limited company partner belongs to the company (TCC art. 640/3). The defendant is the partner intended for expulsion. The lawsuit should be filed by the company manager(s) at the commercial court where the company headquarters are located. If the partner intended for expulsion is a company manager, then the request should be filed by the other manager. In cases when a new manager has not been appointed by the general assembly, then under CC art. 426/3 the trustee appointed by court can file the lawsuit.

In a decision of the Supreme Court; noting that each partner has the right to leave the company based on the reason for leaving the company or just cause, if any, but the right to expulse from the company is only given to the company, and a partner cannot file an expulsion lawsuit against another partner, since the right to file an expulsion lawsuit is granted only to the company, by one partner to another partner. In the objection case, the court has upheld the decision of the court that expelled the case because the plaintiff partner did not have the capacity to be actively hostile and the main contract of the plaintiff company did not contain a special regulation regarding the expulsion (Court of Appeals 11th HD. {Civil Chamber}, 21.03.2016 T. {date}, 2015/8194 E. {case}, 2016/3123 K. {decision}, www.corpus.com.tr, Access Date: 14.06.2019).

As stated above the Court of Appeals stated that in limited companies, the other partners cannot appeal to the court for the expulsion of a partner, and such a case can only be brought by

the company. The lack of active legal capacity was cited as the reason for preventing partners to apply for other partners' expulsion on valid grounds.

In the event of a dispute submitted to court, the Court of Appeals states that for filing an expulsion of a partner a decision by the general assembly with at least 2/3 of the votes which represents the simple majority of the principal capital should be taken, and in the absence of such a decision the case should be expulsed (The Court of Appeals 11. HD. {Civil Chamber}, 05.06.2017 T. {date}, 2016/709 E. {case}, 2017/3376 K. {decision}, www.corpus.com.tr, Access Date: 21.01.2022). However, the objection letter disagreed with the majority opinion based on: *“Under TCC art. 621/1-h, even if the company’s general assembly’s qualified majority vote is required for both share capital and the number of shareholders to apply to court for expulsion request, this is not applicable for companies with only two partners. As it is impossible to secure a two-thirds majority vote with two partners. Therefore, in companies with only two partners, the general assembly does not have any function. So, for companies with only two partners the general assembly should be regarded as having a function, a 2/3 votes ratio can only be accepted for companies with more than three partners, and a partner with more than 2/3 votes should be acknowledged as having the right to file a lawsuit for expulsion on justifiable reasons. As a matter of fact, at the time of number 6762 TCC art. 551 despite the fact that a decision was conditioned to be taken at the board of partners, it was accepted in the doctrine that one partner could apply to the court to expulse the other partner, and it was pointed out that the termination of the company would come to the agenda in case of a single partner.”* Upon reviewing the Court of Appeal decisions on the subject, it is stated that the company has the ability to file a lawsuit, because of the partners' lack of capacity. However, in dissenting votes, it is stated that in two-partner limited companies, one of the partners can apply to court upon the request for expulsion without a general assembly decision. When one of the partners of a two-partner limited liability company requested the expulsion of a partner, the court referred to the decisions of the Court of Appeals and stated that TCC art. 621 should not be applied with respect to companies with two partners (Çakır, 2018, p. 245). Thus, a ruling by the Court of Appeals emphasizes the following: *“... In many decisions of our department, it is agreed that the company will be considered as presented in cases in which a partner from a two-partner company sues the other partner (31.10.2012 T. {date} 2011/8987-2012/17007; 14.01.2014 T. {date} 2012/9121-2014/728 etc.). So, in the event of concrete evidence, the plaintiff’s legal entity partner has the right to represent the non-litigation company on his/her own, and under TCC art. 640/3 the case must be acknowledged as being filed by the company.”* (Court of Appeals 11. HD. {Civil Chamber}, 06.02.2017 T. {date}, 2016/ 2664 E. {case}, 2017/607 K. {decision}, www.corpus.com.tr, Access Date: 21.01.2022).

When the doctrine views on this issue are reviewed, opinions stating that the existence of a general assembly decision should be sought in order to file an expulsion lawsuit based on just cause (Şahin, 2013b, p. 196; Erdil, 2010, p. 146), opinions stating that in situations in which it is not possible to pass a resolution at the general assembly the problem can be covered through a termination lawsuit (Taşdelen, 2012, p. 222), opinions expressing that in limited companies with two partners, the other partner should be able to apply to the court without seeking a general assembly decision in order to expulse the partner who created the justifiable reason (Çakır, 2015, p. 763; 2018, p. 247) are seen.

In TCC art. 621, which covers the title of important decisions of the general assembly, it is stated that a general assembly resolution may be passed if at least two-thirds of the votes are represented, and a simple majority of the capital with voting rights are present. As can be seen, when the provisions of TCC art. 621 are examined, a majority is not sought for the number of

shareholders in order to make the decision for expulsion, an arrangement is made based on the majority of the capital and majority of votes (Kendigelen, 2016, p. 553; Şahin: 2013b, p. 195-196.). The provision aims to prevent the majority shareholders from being expelled from the company easily by minority shareholders. (Üçışık, 2003, p. 202). A general assembly decision can only be made if the quorum required by law is met. If necessary, quorum for the expulsion decision is obtained by one of the shareholders in limited companies with two partners, a decision for expulsion may be taken by the general assembly, and a lawsuit may be filed for expulsion on justifiable grounds. If a partner does not possess the quorum required to pass a resolution at the general assembly, then he/she will not be able to file a lawsuit. There is an opinion for two-partner companies that criticizes that one of the partners has the possibility to file a lawsuit and the other does not have this right, on the grounds that the essence of the right is touched (Çakır, 2018, p. 246). It should not be forgotten that limited companies are capital companies even though they may carry the characteristics of a sole proprietorship. Therefore, in accordance with TCC art. 621; regardless of the number of partners, the partner or the partners who have the capital and majority of the votes required by the law will be able to provide the quorum required in the general assembly and enable a lawsuit for expulsion with justifiable reason. If an expulsion lawsuit is not filed due to the lack of a majority in the general assembly, despite the existence of justifiable reasons among the partners, the partners who do not accept this situation are entitled to exit the partnership (TCC art. 638/2) or apply to the court for termination of the company on valid grounds (TCC article 636/3).

However, the main problem here is in two-partner limited companies in which the partners have a 50% share, as the share and majority vote will not be obtained in the general assembly, it is not possible to file a lawsuit for expulsion on justifiable grounds. Accordingly, the Court of Appeals when the company has two partners and 50% equal shares, has upheld the court ruling stating that it is not possible to take a general assembly decision in light of the current state of the company (Court of Appeals 11. HD. {Civil Chamber}, 25.01.2021 T. {date}, 2020/1316 E. {case}, 2021/254 K. {decision} www.corpus.com.tr, Access Date: 21.01.2022). The applicable part of the ruling is as follows: "...the applicant's application for appeal in accordance with TCC 621/1-h of TCC no. 6102 is overruled, as filing a lawsuit with the court is required for expulsion with justifiable reasons, a general assembly resolution should be passed by the majority votes that represent at least 2/3 of the votes and the aforementioned resolution was not passed by the plaintiff's company, it is not possible to apply to court for the expulsion of the defendant due to current share state of the company, and on the ground of the first-instant decision is in accordance with the law in terms of procedure and substance. The decision of the Regional Court of Justice was appealed by the plaintiff's attorney...Since it was considered that the decision was in accordance with the procedure and the law, it is necessary to uphold the decision of the Regional Court of Justice."

In cases where it is not possible to pass a resolution at the general assembly, there are opinions that the problem may be resolved on justifiable grounds through a termination lawsuit (Şahin, 2013b, p. 196; Erdil, 2010, p. 146). However, the acceptance of this solution results in directing the partners who cannot file a lawsuit of expulsion toward the termination of the company. In TCC art. 636/3, it is stated that in the presence of justifiable grounds each partner may request the court to terminate the company, and that the court may order to expulse the claimant partner from the company, or to award a solution as appropriate. In that case, the partner who wants to expulse the other partner and continue operations will be facing the possibility of expulsion. As a result, directing the partner that cannot file an expulsion lawsuit towards a

termination lawsuit does not serve the purpose of both provisions, and the principle of protecting the assets of the company. It is noted in the reasoning of TCC art. 636/3, this right, which is included within the Swiss preliminary bill, would strengthen the partner's position towards the majority. *A justified termination action shall ensure that in the presence of both the majority and minority in limited liability companies, the minority partners are protected against the majority. The right to bring a rightful termination lawsuit is an important weapon against the majority, but using it in a way can damage the interests of the partners* (Çakır, 2018, p. 249; Şahin, 2013c, p. 23, 32; Erdem, 2010, p. 10; Çelik, 2013, p. 296).

In two-partner limited liability companies, we agree with the view of the doctrine stating that there is a hidden gap in the provision of TCC art. 640/3 (Aker, 2016, p. 104-105). In the regulation of TCC 640/f of TCC no. 6102, as the provision of TCC 551 of TCC no. 6762 was adopted without any material change; it was overlooked that in two-partner limited companies, in some exceptional cases, the decision to hold the general assembly to file a lawsuit due to the lack of majority votes would be problematic. For this reason, the judge should accept that until a legal regulation is made, within the judge's power to create law in two-partner limited companies - limited with the exceptional cases where a general assembly decision cannot be taken- each partner can apply to the court for a just cause without seeking general assembly resolution.

d. Official, Competent Court, and Proceedings

The justified reason lawsuit is organized by TCC art. 640/3. Civil claims arising from the matters regulated in TCC are commercial cases (TCC art. 4). Unless stated otherwise, the commercial court of the first instance shall be responsible for dealing with all commercial cases and unconsented commercial matters, regardless of the value or number of things being sued (TCC art. 5).

According to CCP (Code of Civil Procedure) art. 14/2, the authorized court is the court located at the location of company headquarters. *“The district court, limited by the partnership or membership relations, is located at the headquarters of the relevant legal person is strictly authorized to hear any lawsuit brought by private legal entities against a partner or a member of that legal entity, or others in that capacity”* (CCP, art. 14/2).

The lawsuit regarding the expulsion request with justified reasons is according to the TCC art. 1521 is subject to a simple trial procedure. *“In commercial companies, cases arising from the partnership between partners or stakeholders and the company, or suits against board members, managers, executives, liquidators or auditors of the company simple proceedings should apply”* (TCC art. 1521). (The simple trial procedure is issued in detail between the provisions of TCC arts. 316-322 of TCC no. 6100). Trial procedures have been reduced and shortened to facilitate the conclusion of simple, easy, and timely proceedings in the written trial procedure.

With TCC art. 5/A *“... before taking legal action, the requirement of applying with the mediator is acknowledged as the condition of the action”*. In cases where litigation (compulsory) mediation is in question, first, the parties should apply for mediation, and if there is no agreement between the parties, then a lawsuit should be filed. Cases filed without resorting to mediation will be rejected on procedural grounds (Law on Mediation in Legal Disputes art. 18/A; *“In case it is found that a lawsuit has been filed without resorting a mediator, then the lawsuit will be formally expelled due to absence of action requirement*). It is not necessary to consult a mediator before filing a commercial lawsuit regarding the request for expulsion from the partnership for justified reasons. Because the subject matter of the case is not related to the request for a certain number of receivables and compensation. According to TCC art. 641, the partner who is leaving the

partnership is entitled to demand the withdrawal fund that corresponds to the actual value of the basic capital share. The withdrawal fund is calculated based on the value on the date on which the court order is finalized. If a withdrawal fund is not paid to the partner who left for the aforementioned reasons, a receivable lawsuit may be filed. It is mandatory to consult a mediator before submitting this case.

An arbitration agreement can be concluded between partners of the limited liability company to resolve the disputes arising from the expulsion from the company by the arbitrators instead of state jurisdiction (Öztürk Dirikkan, 2005, p. 85, fn. 222). An arbitration agreement is an agreement between the parties to resolve all or some disputes that have arisen or may arise out of an existing legal relationship, whether arising from the contract or not (CCP art. 412). The arbitration agreement may be executed either by the arbitration clause set in the original contract or by a separate agreement.

e. Precautions to be Taken During the Litigation

A partner's exit for justifiable cause is only possible once the court order is finalized. Decisions taken at the end of the trial will be deemed to constitute an annulling novelty and will have consequences upon the finalization of the verdict. Therefore, the partner continues to be a partner until the court decision is finalized.

Since the proceedings in expulsion cases take a long time, the continuation of the rights and obligations of the partner throughout the litigation period may create unfavorable aspects for both parties. Since it would be inappropriate for the partner who wants to leave the partnership to use the rights arising from the partnership, or to fulfill debts during the lawsuit, a regulation in TCC art. 638/2 was made to secure the partner's situation in this process (reason for provision in TCC art. 638/2). Thus, despite the existence of a provision regarding the measures to be taken during the exit lawsuit, it is criticized that there is no similar provision in the expulsion lawsuit (Kendigelen, 2016, p. 913). Yet, this regulation, stipulated in the Swiss Code of Obligation art. 824 to include both exit and expulsion (Özdoğan Daloğlu, 2019, p. 100). Regarding the right to exit is the second sentence of TCC art. 638/2 should also be applied to cases of expulsion.

It is stated in TCC art. 638/2, the court can decide on freezing some and all the rights and liabilities of the claimant to secure the status of the claimant partner during the litigation process. Regarding this issue, examples such as freezing the capital debt installments or appointing a trustee to decide on reduction transactions with the approval of the trustee can be given (Çamoğlu, Poroy, and Tekinalp, 2017, p. 430). The doctrine states that the second sentence of TCC art. 638/2 provision should also be applied to the cases of expulsion by analogy (Şener, 2017, p. 872, 913; Şahin, 2013b, p. 181).

III. Consequences of Expulsion

When a limited company partner leaves the company, his/her capacity as a partner and the rights and obligations related to the partnership expires, the right to demand payment of the severance payment should also arise. Partners who leave the partnership lose their original capital share and the rights provided by the share. To preserve the economic status of the partner while the partnership continues, the partner who leaves the company is given the authority to demand his/her right corresponding to the capital share on the company's assets (Çamoğlu, Poroy, and Tekinalp, 2017, p. 447).

Upon the fulfillment of the conditions for expulsion, the title of the partnership terminates immediately, without seeking the determination or payment of the withdrawal fund. The request

for payment of the severance fee should be directed to the legal entity of the company. Other partners are not responsible for the payment of severance payment (Öztürk Dirikkan, 2005, p. 153). A decision of the Court of Appeals states that the lawsuits filed against the company for severance and exit from partnership should be filed against the corporate legal entity, the company shareholders do not have the capacity as a defendant, and the court order decides the plaintiff should be allowed to leave the partnership, and the plaintiff's lawsuit filed against the other defendants should be expelled from the lack of capacity (Court of Appeals 11. HD. {Civil Chamber}, 14.03.2018 T. {date}, 2016/8848 E. {case}, 2018/1959 K. {decision}, www.corpus.com.tr, Access Date: 19.01.2022).

The separation fund should be calculated based on the value on the date of the separation of the partner. If the exit decision has been made following the court decision, the exit share shall be calculated based on the date of the court decision finalized. The court's decision constitutes an annulling novelty and will have consequences for the future (Yıldırım, 2012, p. 60). The legal relationship between the company and the partner ends as soon as the court decision is finalized. A decision by the Court of Appeals states that in the case of a dispute relating to a request for the abolition of a cautionary attachment decision, the court rejected the objection because the arbitral decisions need to be finalized, however, stating that the arbitrator decision, which was based on the injunctive attachment decision, was related to the request to exit and exit from the limited company, emphasized that the decision to exit is a constructive one and that the share of calculation and accrual-based on this decision is from the receivables that can be executed only upon the finalization of this decision (Court of Appeals 11. HD. {Civil Chamber}, 12.03.2015 T. {date}, 2015/1027 E. {case}, 2015/3429 K. {decision}, www.corpus.com.tr, Access Date: 19.01.2022).

Results and Discussion

Expulsion is the termination of the relationship of the partner with the company without the will and desire of the partner which adversely affects the operation of the company and endangers its continuity. A partner who is not wanted to remain as a partner due to his/her personality and behavior can be excluded from the partnership and the company's interests can be ensured by protecting its continuity. The right to expulse a company partner is a right of protection for the company and its stakeholders. It is a right that creates annulling novelty since the expulsion will terminate the partner's partnership relationship with the company.

Provision of TCC art. 640 shall apply to the amendment of the articles of association to expulse the limited company partner from the company. Arrangement of expulsion with the articles of association is optional. It is not valid to stipulate an abstract, unconditional, ambiguous, and indefinite expulsion without any reason in the articles of association. Regulation in the articles of association stating that the general assembly can decide on the expulsion of the partner only in the presence of justified reasons, without showing concrete reasons, will also be deemed invalid. It is invalid to include provisions in the articles of association stating that the reasons for expulsion can be determined by the general assembly or the executives without giving any reason and to make arrangements that will have consequences against the expelled partner, who deviated from the legal regulation regarding the expulsion. In each partnership agreement, different reasons can be arranged as the reason for expulsion. The reasons for expulsion are usually due to reasons arising from the person and behavior of the partner and which make the partnership relationship unbearable for other partners. The reasons determined do not have to be justified in terms of expulsion as long as the determining causes are concrete, clear, and precise. According to the

regulation of TCC 621/1-h, the expulsion of a partner based on the reasons stipulated in the articles of association is an important decision. The general assembly will convene with the absolute majority of the entire capital holding the right to vote and will take decisions with two-thirds of the votes represented at the meeting. We agree with the opinion stating that there is a gap in the law as to whether the partner who is to be expelled from the company has the right to vote at the general assembly meeting, and that the expelled partner will not have the right to vote at the general assembly meeting where the issue related to him/her will be discussed. The expelled partner may file an action for annulment within three months from the notification of the decision through the notary public. The right to file an action for annulment is an inalienable right. The articles of association stating that an action for annulment cannot be filed against the expulsion decision of the general assembly will be invalid.

Upon the request of the company, the partner can be expelled from the company with a court decision based on a justifiable reason. The general assembly resolution of the partners regarding the expulsion of the partner from the company constitutes the prerequisite for the lawsuit. If the continuation of the partnership with the partner to be expelled has become unsustainable and unbearable, if it is not expected from the other partners to continue the partnership relationship with the partner to be expelled by the principles of honesty and trust, the justifiable cause element should be deemed to have been realized. The judge has discretion in this matter and will evaluate whether there is a justifiable reason for expulsion in each concrete case. It is not sufficient to assert the just reasons abstractly during the trial, and concretely justifiable cause claims need to be proven with evidence. While being defective is not a condition for expulsion, the expulsion of a partner who has no faults should not be considered sufficient on its own. If the existence of reasons not caused by the partner's fault prevents the partner from fulfilling his duties in the company, causes the company to lose the important qualities it seeks in the partner, if continuing this situation has become unexpected for the company, it can be accepted as a justified reason.

The authority to request the expulsion of the limited company partner based on justified reasons belongs to the company. In two-partner limited liability companies, at the point of the expulsion of a partner, we agree with the view of the doctrine that states a gap in the provision of TCC art. 640/f.3. During the regulation of TCC art. 640/f.3 in of TCC no. 6762, as the provision of art. 551 has been adopted without any fundamental changes, it has been overlooked that in limited liability companies with two partners, taking the general assembly resolution required to file an expulsion lawsuit will create problems in some exceptional cases where the majority of votes and capital are not in question. For this reason, the judge should accept that until a legal regulation is made, within the judge's power to create law in two-partner limited companies - limited with the exceptional cases where a general assembly decision cannot be taken- each partner can apply to the court for a just cause without seeking general assembly resolution. Despite the existence of a provision regarding the measures to be taken during the lawsuit (TCC art. 638/2), it is criticized that there is no similar provision in the expulsion lawsuit. The provision regarding the measures to be taken during the trial can also be applied to cases of expulsion by analogy. When the partner of the limited company leaves the company, the right to demand the payment of the withdrawal fund will arise, as well as the termination of the partnership title and the rights and debts attached to the partnership.

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