hi!

HUKUK İNGILIZCESI
VE KÜLTÜRÜ
DERGISI

YIL -2018- YEAR
AY -II- MONTH
SAYI -2- ISSUE

*QUASI CONTRACTS * AİHM KARARI ÇEVİRİSİ *
*JARGONDAN BİR İFADE "Signed, Sealed and Delivered"
*KARŞILAŞTIRMALI HUKUK "Unjust Enrichment"

KAPAK KONUSU

Sözleşmeler - 2

hi! EDİTÖR'DEN

Sizlere ikinci sayımızla birlikte tekrar merhaba diyoruz. "Hi !" Hukuk İngilizcesi ve Kültürü Dergisi **Kasım** ayı sayısında "**Sözleşmeler**" konu başlığına kaldığımız yerden devam ediyoruz. Birçok temel noktaya temas eden yazı içeriklerimiz sonunda o yazı ile ilgili kelimelerin bir derlemesini bulabileceksiniz. **Avrupa İnsan Hakları Mahkemesi** veritabanından seçtiğimiz bir kararı, karşılaştırmalı metinler halinde inceleyebilir ve İngilizce kelime ve yapıları kendi bağlamında görebilirsiniz. **Hukuk Jargonundan Kelimeler** bölümünde bu sayımızda Signed, Sealed and Delivered kalıbını masaya yatırdık. **Karşılaştırmalı Hukuk** sayfamızda ise Sebepsiz Zenginleşme konusunda çeşitli ülkelerin kanunlarında yer alan hükümler siz değerli okuyucularımızı bekliyor. Dergimiz bu sayı itibari ile de fasikül görünümündedir. Hukuk İngilizcesi alanında aşağıda linklerini bulabileceğiniz **websitemizi**, **Instagram** ve **Twitter** hesaplarımızı da takip etmenizi tavsiye ediyoruz.

Keyifli Okumalar...

Hukuk İngilizcesi

Contract and Quasi-Contract

Most laws acknowledge a category which exists alongside the contract: the category of **quasi-contracts**, which brings together different concepts, which have in common the fact that they borrow certain aspects of their legal regime from contract. It appears interesting to compare the national approaches to this category, to assess whether it is sufficiently homogenous and determine whether the quasi-contract should be included.

Article 1371 of the French Civil Code provides that "quasi-contracts are purely voluntary acts of man, from which there results some undertaking towards a third party, and sometimes a **reciprocal undertaking** of both parties". The will of the parties is, in this case and unlike in relation to contract, a material act which produces effects which are organised by law, effects which are partly borrowed from the contractual regime (see for example the negotiorum gestio which borrows certain aspects from the regime of representation). The will of the parties does not play the same part as in the formation of the contract, because it is not directed towards the creation of obligations: the law recognizes the obligations because it considers it fair and useful.

However, certain effects are different from a defined contractual model, which suggests that the effects of quasi-contracts are specific. For example with regard to **negotiorum gestio**, it is accepted that the manager may carry out material acts, and not only legal acts as is the case for an agent, in respect of which he will be able to be reimbursed by the owner. In the same way, **unjust enrichment** can be the consequence, on the one hand, of non-contractual situations (for example the de in rem verso action brought by the person whose paternity is questioned against the real father for the alimony which was paid to the child in his place) and, on the other hand, of a number of varied contractual situations which appear to borrow elements from various contractual regimes. Similarly, the payments made under a mistaken belief cannot be merely treated as a contract for **a loan** just because it requires the **delivery of goods** or a sum of money, which is the usual consideration in a contract.

The courts have tended to show some flexibility when considering the conditions necessary for the existence of quasi-contracts. (See for example the body of case law according to which situations of voluntary assistance fall within the definition of negotiorum gestio).

They have also used the notion of quasi-contract to **impose** the obligation on the organiser of a prize draw to pay all of the promised prize money if he fails to show the existence of a random draw.

In England and in the United States, the idea that unjust enrichment was based on an intentional element has been abandoned. Whilst for a long time, unjust enrichment was considered to be an implied contract, it is now based on concepts of equity and natural justice according to which an unjustified imbalance between the parties must be rectified.

American law proposed a general definition of unjust enrichment: article 1 du Restatement of Restitution 1936 provides: "a person who receives a benefit by reason of an **infringement** of another person's interest or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment". English law does not adopt a global approach: it offers several specific rights of action for each type of unjust enrichment. Certain of these actions, however, go beyond the framework of quasi contracts as it is defined in France. For example, the action "for money had and received" applies in a particular case: it enables the plaintiff to recover money to which he is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain.

Neither English nor American law, however, recognize negotiorum gestio. There is no right of action, in principle, to recover expenses incurred by a person who voluntarily managed another's affairs. Under English law, the action which is closest to the French "gestion d'affaires" is the "quantum meruit" action. In particular, this action authorises, subject to certain conditions, the **compensation** of a party who intervened in favour of another. It is therefore related to the protection of the

manager of another's affairs, but is based on the principle of restitution.

Moreover, the courts have progressively accepted that an action based on unjust enrichment should be brought in two cases: the case where the intervention occurs following pre existing contractual relations ("agency of necessity"), and the case where the interference occurs without any pre existing contractual relations ("necessitous intervention").

Under German law, negotiorum gestio and unjust enrichment are referred to in the BGB under paragraphs 677 and following (for negotiorum gestio) and 812 and following (for unjust enrichment). Without ever naming them as quasi-contracts, German law considers both negotiorum gestio and unjust enrichment as autonomous sources of obligation, which exclude a meeting of wills on the part of the parties. Paragraphs 683 and 684 of the BGB distinguish two types of negotiorum gestio: justified or legitimate management on the one hand, and unjustified or illegal management on the other. The management is legitimate if it corresponds to the true intention, or in the absence of true intention, the presumed intention and to the objective interest of the owner.

In the absence of this element, the rights of the manager are limited. It is therefore the intention or the interest of the owner and not the behaviour of the manager which determines the amount of compensation.

Paragraph 812 of the BGB provides that "any person who acquires something without legal cause by reason of another person's performance or by other means to the detriment of such other person, is under an obligation to restitute such thing". The performance is the performance carried out by the aggrieved party on the basis of legal or contractual relations which **binds** him to the enriched party. The action can be brought to impose upon the buyer the restitution of the goods and of the ownership in the event that the contract of sale is annulled – indeed, under German law, the passing of title is separate from the agreement of the parties to the sale agreement. Regarding unjust enrichment arising out of other means, this most generally refers to the case of an act which affects another party's property, carried out by the enriched party, the **aggrieved party** or a third party.

Finally, in 2000, German law imposed a legal obligation on a professional who has sent a promise of a prize to a consumer, to pay such prize to the consumer (§ 661a of the BGB). A number of problems have arisen in trying to place such an obligation in a category. Indeed, certain provisions of the general legal regime applicable to juridical acts apply to the promise, for example, the rules relating to legal capacity, representation and lack of consent.

As for private international law, German courts, after initially insisting on treating the obligation as **delictual**, finally followed the ECJ which categorizes this obligation as contractual as per art. 5 no 1, 13.1 no 3 of the Brussels convention. However, this private international law treatment of the obligation has no **incidence** on the internal private law position, in accordance with the principle of relativity of legal notions and of the autonomous interpretation of international law.⚖

quasi-contracts	sözleşme benzeri
reciprocal undertaking	karşılıklı taahhüt
negotiorum gestio	vekaletsiz iş görme
unjust enrichment	sebepsiz zenginleşme
loan	ödünç para, istikraz
delivery of goods	mal teslimi
impose	uygulamaya koymak
infringement	ihlal, anlaşmayı bozma
compensation	tazminat
In the absence of	yokluğunda, giyabinda
aggrieved party	zarar gören taraf
delictual	kanunu ihlal eden
incidence	etki, yansıma
bind	borç altına sokmak

Privity of contract, discharge, and remedies

Privity of contract

The principle of privity of contract means that a third party can neither be bound by nor enforce a term of a contract to which they are not a party, even though the contract was intended to confer a benefit on them. However, since the enactment of the Contract (Rights of Third Parties) Act 1999, such a party may be able to enforce contractual rights depending on the circumstances. If appropriate, it is now usual for contracts to include a clause which provides that such rights are not to apply. There are other ways in which a third party can be affected by the terms of a contract:

- A contract may be made by an agent on behalf of his principal. Such a contract may be enforced by and against the principal.
- It is usual for a contract to contain an express provision relating to assignment. The obligations under contract cannot be assigned, that is, transferred, without the consent of a party entitled to the benefit of such obligations.
- In novation of contract, a subsequent agreement between the original parties and a third party may have the effect of entirely replacing the original contract.

Discharge of contract

Parties may be released from their contractual obligations, that is, may be discharged, by performance, by breach, by agreement, or by frustration. If a contract is substantially performed, the terms are entirely carried out and there is no right to repudiate the contract, that is, to reject it. If a contract is partly performed, a breach of condition is committed. However, if the innocent party accepts the partial performance, a claim to remuneration may be raised in a court. If there is defective performance, for example a condition is breached, the innocent party may have the right to repudiate the contract and treat it as terminated once he or she has communicated acceptance of the breach of contract.

A contract may be discharged by agreement between the parties in a process known as accord and satisfaction. If it becomes impossible to perform, for example due to the nonoccurrence of a particular event which forms the basis of the contract, or the death of a party, the contract is discharged by frustration.

Remedies for breach of contract

An award for damages - money claimed as compensation for loss - is the primary remedy for a party who suffers a breach of contract. In some circumstances, the courts may use their discretion to compel a defaulting party to perform his contractual obligations. This is known as a decree of specific performance. It may not be appropriate if the obligation is not sufficiently clearly defined, or if enforcement would require the continual supervision of the court over a long period of time. In other circumstances, the court may grant an injunction to restrain a party from breaking the contract. In certain circumstances, for example misrepresentation, parties may rescind, that is, cancel, a contract and by rescission be restored to the same position they were in before the contract was made.⚖

accord	anlaşma, sulh olma
on behalf of	..'nin adına
benefit	yarar, fayda
breach	ihlal
compel	mecbur etmek, zorlamak
confer	müzakere etmek, görüşmek
consent	rıza, muvafakat etmek
defective	kusurlu, ayıp, noksan
discharged	ödenmiş, boşaltılmış
enactment	kanunlaştırma, irade
grant an injunction	tedbir kararı vermek
novation	yenileme
principal	asli, ana
privity of contract	sözleşmenin şahsiliği prensibi
remedies	dava yolu, yasal haklar
remuneration	ücret
repudiate	ödememek, reddetmek
rescind	iptal etmek, feshetmek. ilga etmek
restrain	kısıtlamak, zapt etmek

Standard terms in the sale and supply of goods

Using standard terms

Using standard terms in business transactions is extremely common for standard terms and conditions of business to be used by companies whose trade involves entering into numerous similar transactions, either as a supplier or purchaser. The aim is to standardise how commercial transactions are to be effected, so as to produce uniformity and increase efficiency, and reduce the need for detailed negotiation in each transaction by production of standard terms favourable to the company.
The standard terms of any company will always be subject to legal restrictions, either statutory or common law. The terms must be regularly reviewed to ensure that they don't conflict with new legal developments and that they continue to reflect the aims of the company.

Incorporating terms

Because it's a basic principle of contract law that new terms cannot be introduced after a binding contract has been made, the proposed standard terms must be incorporated into the offer. For a seller then, it will be essential to ensure that an offer to buy is on the seller's terms, for example on a standard order form which incorporates the seller's standard terms and conditions. The offer from the buyer can then be confidently accepted by the seller without the need for further qualification. However, an apparent 'acceptance which is stated to be on the following terms' could actually constitute a counter offer and lead to an unwelcome battle of the forms, when both parties seek to impose their own standard terms.

In order to avoid such situations, sellers generally incorporate standard terms in all their communications, including catalogues, brochures, confirmations of order, and delivery notes. In the event of doubt that standard terms have been effectively incorporated into a contract at the offer/acceptance stage, it may be possible to show that they have been incorporated during the course of dealing between the parties, for example where there has been regular and consistent trading between the parties.

The object of standard terms and conditions is often to limit the liability of the seller, or to increase it in the case of standard conditions produced by the buyer. Such limitation or exclusion of liability is affected by statutory provisions. In addition, these may impose implied terms and conditions in contracts for the supply of goods and services in such a way which overrides the provision of some standard terms and conditions. Many countries' laws impose implied terms in contracts for the sale of goods, including warranties that the goods sold are 'free from undisclosed charges or encumbrances (liability or charge) and that the buyer will enjoy quiet possession of the goods. In other words, if you buy something, you should be able to use it without interference. In most of the relevant statutes, there is a distinction made between consumer contracts and those which are between businesses.⚖

binding	bağlayıcı, ilzam edici
buyer	alıcı, satın alan
charges	mükellefiyetler, masraflar
encumbrances	engeller, külfetler
goods	mal, ticari eşya
implied	zımni, kastedilen
incorporate into	dahil etmek, derç etmek
override	üstün gelmek, hükümsüz kılmak
possession	malik olma, sahiplik
provisions	hükümler
purchaser	alıcı, satınalıcı
supply of goods	mal tedariki
seller	satıcı
statutory	kanunla konulan, yazılı hukuk
transaction	muamele, ticari işlem
warranty	garanti belgesi, teminat, yükümleme

Buying and selling commercial property

Commercial conveyancing

This is a study about conveyancing - the transfer of the ownership of property in United Kingdom. Common Law regulates issue as below:

The principle of caveat emptor applies to the transfer of property in the UK. Contract provisions reinforce this by acknowledging that the purchaser has had an opportunity to make full investigation of the title, that is, the right of ownership, and to check the property's physical condition and any other factors which might affect the property and its intended use.

Generally, a commercial agent will market a commercial property. The property particulars, or details, will specify the terms on which the property, or the lot in the case of auctions, is to be sold. The particulars show whether it is to be sold by auction - sold to the person who makes the highest offer at an auction - or sold by private treaty - the seller and buyer reach an agreement.

Sale by auction

If the sale is to be by auction, a legal pack, prepared by the seller's solicitor, will be available to prospective purchasers. It will contain the special conditions and the auction conditions relating to the sale, as well as copies of appropriate searches - documents which prove inspection of records, for example about land use and restrictions on its use, such as Local Authority searches and environmental searches. It will also contain planning permissions, warranties, or guarantees, and other documents relevant to the property and to the transfer of ownership, such as investigation, or legal evidence, of the seller's title to the property.

The prospective purchasers must be satisfied with the seller's title and the other information. If necessary, they may raise further enquiries in advance of the bidding for the property. The signing of the sale memorandum by the purchaser or their agent at the auction constitutes the contract to purchase. Sale, known as completion, when payment is made and the deed of transfer is passed to the purchaser, usually takes place at a completion date specified in the special conditions.

Sale by private treaty

In a sale by private treaty, the seller and the purchaser may negotiate detailed terms, either directly or via agents. The purchaser will consider searches instructed by his solicitor. A full survey may be instructed and the seller will be asked to provide replies to pre-contract enquiries, for example about the property's physical state and the property's boundaries. Commercial property solicitors frequently use published sets of commercial property pre-contract enquiries. When the principal terms have been agreed, they may be set out in a document and circulated as 'Heads of Terms'. The seller's solicitor will then produce a draft contract, also known as a sale agreement, which will reflect the Heads of Terms. Conditions of sale common to most property contracts, governing, for example, proof of title, how the deposit is dealt with, etc., may be incorporated into the contract by reference to published Standard Conditions.

Once the purchaser is satisfied with all the information and the form of contract, that is, the terms and conditions, has been agreed, the parties may proceed to exchange contracts. This constitutes a contractual obligation to complete the sale or purchase on the terms in the contract, and penalties will arise in the event of default. A conditional contract, where completion is to take place within a specified period of something happening, will usually contain a longstop date - a final date - at which point the parties may rescind the contract - cancel it - if the conditions have not been achieved.⚖

acknowledging	onaylama
auction	açık artırma ile satış
bid for	ihale teklifi vermek
caveat emptor	sorumluluğun alıcıya ait olması
circulate	devretmek, deveran etmek
conveyancing	devir, temlik işlemi.
default	kusur, temerrüt
enquiries	gözden geçirmeler
investigation	tetkik, inceleme
reinforce	teşvik etmek, desteklemek
rescind	feshetmek
search	muayene etmek, yoklamak

Use of technical legal words and terms

There are two main factors which influence the use of technical legal words and terms in drafting a legal document.

A. Nature of document

The extent to which technical legal words and terms are used in a legal document will depend on its nature and purpose. If its purpose is to communicate rights and obligations to consumers, the use of technical legal words and terms should be kept to a minimum and if they are unavoidable they should, where appropriate, be explained in language the reader is likely to understand. For example, an agreement for the hire of a car or a residential tenancy agreement
should avoid technical legal words and terms.

If, however, the document is intended mainly for use by other lawyers as, for example, a settlement, it may be assumed that they are aware of the legal meaning of technical legal words and terms used. Indeed, they are likely to read the technical legal words and terms as used in their technical legal sense.

If the document will be referred to mainly by non-lawyers, who have expertise in the field to which it relates, it is likely that they will understand most, if not all, the technical legal words and terms in that field so that their use would be appropriate. For example, a commercial lease is likely to be consulted by lawyers and surveyors who are likely to understand the technical legal terms used in leases.

B. No suitable non-legal term

Technical legal words and terms have an established and precise meaning. They should only be replaced by non-technical terms if the latter will not result in a loss of precision, or would not result in the possibility of a different construction to that desired. If it is felt that either of these consequences might follow, technical legal words or terms should be preferred. For example, it would be difficult to find suitable alternatives for 'goodwill', 'frustration' or 'per stirpes' as used in the technical legal sense. In the case of 'per stirpes', there is no suitable non-technical term available to act as a convenient substitute to indicate distribution by stocks of descent. To seek to explain the concept it embodies in alternative non-technical language would risk uncertainty. Another reason for using technical legal words and terms is because what may be perceived to be alternatives in fact have different technical legal meanings.

For example, the terms 'children' and 'issue' require care in drafting a will, since the
expression 'issue' is wider than 'children' and includes descendants of any degree. Thus, a lawyer who is instructed to draft a will leaving the testator's residuary estate to his 'children' in equal shares would not have fulfilled his instructions in drafting the gift as one to the testator's 'issue' in equal shares.⚖

descendants	altsoy, füru
descent	miras intikali, miras kalma
frustration	beklenmeyen hal, iptal
goodwill	iyi niyet, hüsnüniyet
intended	kasıtlı, planlanmış
lease	kira, kiraya vermek
perceived	fark edilen, algılanan
precision	kesinlik, hassasiyet
referred	atfedilmek, yönlendirilmek
residuary	bakiye, artık
settlement	yerleşim, tasfiye, uzlaşma
stocks	hisse senetleri
testator	muris, vasiyet sahibi

Exercises for Contracts

A. Complete the definitions. Look at page of ***"Privity of contract, discharge, and remedies"*** to help you.

1 .....- a person who represents another in matters relating to a contract

2 .....- a person who, although not party to a transaction between two others, is in some way affected by it

3 .....- the relationship between parties to a contract which makes the contract enforceable between them

4 .....- a transaction in which a new contract is agreed by all parties to replace an existing contract

5 .....- a clause stating a specific condition in a contract

6 .....- to compel the performance of a condition

7 .....- to give money or advantage to someone

8 .....- contractual duties

9 .....- the legal transfer of duties

B. Make word combinations using a word or phrase from each box. Then use appropriate word combinations to complete the sentences below. Look at page of ***"Standard terms in the sale and supply of goods"*** to help you.

BOX 1	BOX 2
enter into	uniformity
produce	legal restrictions
reduce	favourable to
reflect	standard terms
subject to	transactions
terms	the aims of
use	the need for
conflict with	legal developments

1 The following provisions set out the entire financial liability of XYZ Ltd .....

2 Customers are invited to purchase goods on an applicable order form or otherwise in writing ..... to make an offer.

3 The Interpretation or Definitions section of the Standard Terms is intended to ..... discussion about the meaning of terms and to avoid ambiguity.

4 It is important that the Standard Terms and Conditions of Sale ..... of your organisation, but they also need to be amended in the light of any changes to the law.

C. Complete the definitions (1-7) then use appropriate words to complete. Look at page of "***Buying and selling commercial property"*** to help you

1. ..... .- law and procedures relating to the sale and purchase of property

2 ..... .- property sold at auction

3 ..... .- the right to hold property

4 ..... . - offers competing to purchase

5 ..... . - the contract to purchase document

6 ..... . - owner of a property who transfers the ownership for money

7 ..... . - specified time when the payment is to be made and the property deed transferred

D. Choose the correct word or phrase in brackets to complete the sentences. Look at page of "***Buying and selling commercial property"*** to help you.

1 The (purchaser/seller/solicitor) considers searches.

2 Parties may (complete/rescind/exchange) the contract in the event that the conditions have not been achieved.

3 A (full survey / pre-contract enquiry / sale agreement) is drafted by the seller's solicitor.

4 The parties (consider/exchange/instruct) contracts once all terms are agreed.

5 Standard Conditions can be (instructed/incorporated/completed) into the contract.

6 The seller is asked to provide replies to (searches / investigation of the title of the property / pre-contract enquiries).

7 Terms are (completed/negotiated/instructed) by seller and purchaser.

8 The (investigation of title / full survey / form of contract) is agreed by both parties.

S.S. Y. KONUT YAPI KOOPERATİFİ/ TÜRKİYE DAVASI	CASE OF S.S. Y. KONUT YAPI KOOPERATİFİ v. TURKEY
Başvuru no. 10375/08	Application no. 10375/08
USUL	PROCEDURE
1. Türkiye Cumhuriyeti aleyhine açılan davanın (no. 10375/08) temelinde, bir Türk kooperatifi olan S.S. Y. Konut Yapı Kooperatifi'nin ("başvuran") 12 Şubat 2008 tarihinde Avrupa İnsan Hakları Mahkemesine ("AİHM" veya "Mahkeme") İnsan Hakları ve Temel Özgürlüklerin Korunmasına ilişkin Sözleşme'nin ("Sözleşme") 34. maddesi uyarınca yapmış olduğu başvuru bulunmaktadır.	1. The case originated in an application (no. 10375/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish cooperative, S.S. Y. Konut Yapı Kooperatifi ("the applicant"), on 12 February 2008.
2. Başvuran kooperatifin eski yöneticileri ve mevcut tasfiye memurları tarafından imzalanan yasal izine dayanarak, başvuran İzmir Barosuna bağlı Avukat C. V. tarafından temsil edilmiştir. Türk Hükümeti ("Hükümet") ise kendi görevlisi tarafından temsil edilmiştir.	2. The applicant was represented by Mr C. V., a lawyer practising in Izmir, based on a written authority signed by the former managers and the present liquidators of the applicant cooperative. The Turkish Government ("the Government") were represented by their Agent.
3. Başvuru 8 Şubat 2016 tarihinde Hükümete tebliğ edilmiştir.	3. On 8 February 2016 the application was communicated to the Government.
OLAYLAR	THE FACTS
I. DAVANIN KOŞULLARI	I. THE CIRCUMSTANCES OF THE CASE
4. Başvuran S.S. Y. Konut Yapı Kooperatifi, Türk hukuku kapsamında İzmir'de faaliyet gösteren bir konut inşaatı kooperatifidir.	4. The applicant, S.S. Y. Konut Yapı Kooperatifi, is a housing construction cooperative under Turkish law operating in İzmir.
5. 1993 yılında, üçüncü taraf bir kooperatif,12.000 metre karelik bir arazi satın almış ve arazi bu kooperatif adına tapu siciline kaydedilmiştir. Söz konusu arazide 1995 yılında inşaat çalışmaları başlamıştır.	5. In 1993, a third party cooperative bought a plot of land measuring 12,000 square metres and the title deed of the land was registered in its name. In 1995, construction works started on the land in question.
6. Orman idaresi, 2000 yılında Menderes Asliye Hukuk Mahkemesi önünde arazinin kamuya ait ormanlık alanın bir parçası olduğunu iddia ederek, tapunun iptal edilmesi için dava açmıştır. Bu sırada üçüncü taraf kooperatif başvuran kooperatifle birleşmiş ve arazi başvuran kooperatifin adına tapu siciline kaydedilmiştir.	6. In 2000, the forest administration initiated proceedings before the Menderes Civil Court of First Instance for the annulment of the title deed to the land, alleging that it was part of the public forest area. In the meantime, the third party cooperative had merged with the applicant cooperative and the land had been registered in the Land Registry in the name of the latter.
7. Menderes Asliye Hukuk Mahkemesi 26 Aralık 2002 tarihinde, arazinin 9.322 metrekarelik kısmının kamuya ait ormanlık alanın bir parçası olduğu gerekçesiyle Hazine adına tescil edilmesine hükmetmiştir. Menderes Asliye Hukuk Mahkemesi ayrıca arazinin bu kısmında inşa edilmiş olan binaların yıkılmasına hükmetmiştir.	7. On 26 December 2002 the Menderes Civil Court of First Instance ordered that 9,322 square metres of the land be registered in the name of the Treasury as it was part of the public forest area. It also ordered that the buildings constructed on this part of the land be demolished.
8. Akabinde, başvuran Devlet'in tapu sicil kayıtlarının tutulmasından doğan bütün zararlardan dolayı sorumlu olduğunu öngören Türk Medeni Kanunu'nun 1007. maddesi uyarınca Menderes Asliye Hukuk Mahkemesi	8. Subsequently, the applicant brought a case before the Menderes Civil Court of First Instance and sought pecuniary damages from the Treasury under Article 1007 of the Civil Code which provided for the State's responsibility for

önünde dava açmış ve Hazine'den maddi zararlarının karşılanmasını talep etmiştir.

9. Menderes Asliye Hukuk Mahkemesi 4 Şubat 2005 tarihinde başvurana 138.917.600.000 Türk lirası (eski Türk Lirası- ilgili tarihte yaklaşık 81.716 avro) tazminat ödenmesine hükmetmiştir.

10. Yargıtay 4. Hukuk Dairesi 7 Şubat 2006 tarihinde, tapu sicili yetkililerinin, başvuranın kaybı ile ilişkilendirilebilecek, yasaya aykırı herhangi bir işlem ya da eylemde bulunmadıkları gerekçesiyle Menderes Asliye Hukuk Mahkemesinin kararını bozmuştur.

11. Başvuran Menderes Asliye Hukuk Mahkemesine 6 Temmuz 2006 tarihinde başka bir dilekçe sunmuş ve Yargıtay 1. Hukuk Dairesinin, Yargıtay 4. Hukuk Dairesinin kararıyla çelişen bir kararı bulunduğuna işaret etmiştir. Bu bağlamda, başvuran davasının Yargıtay 1. Hukuk Dairesinin 7 Mayıs 2002 tarihli ve E.2002/3549 K.2002/5807 sayılı kararı temelinde kabul edilmesi gerektiğini öne sürmüştür.

12. Menderes Asliye Hukuk Mahkemesi 20 Ekim 2006 tarihinde Yargıtay 4. Hukuk Dairesinin kararına uymuş ve başvuranın talebini reddetmiştir.

13. Başvuran kararı temyiz etmiştir. İddialarını yineleyerek ve Yargıtay 1. Hukuk Dairesinin 7 Mayıs 2002 tarihli kararına atıfta bulunarak, tazminat talebini yinelemiştir.

14. Başvuranın temyiz başvurusu Yargıtay 4. Hukuk Dairesi tarafından 1 Mayıs 2007 tarihinde reddedilmiştir. Bu karar kesinleşmiştir.

15. Menderes Asliye Hukuk Mahkemesi ve Yargıtay 4. Hukuk Dairesi kararlarında neden Yargıtay 1. Hukuk Dairesinden farklı bir sonuca vardıkları ile ilgili bir sebep belirtmemişlerdir.

C. Yargıtay 1. Hukuk Dairesinin 7 Mayıs 2002 tarihli ve E.2002/3549 K.2002/5807 sayılı kararı

20. Yargıtay 1. Hukuk Dairesi (bundan böyle"Daire" olarak anılacaktır) 7 Mayıs 2002 tarihli ve E.2002/3549 K.2002/5807 sayılı kararında bir arazi sahibinin kamuya ait ormanlık alanın bir parçası olduğu belirlenen arazisinin tapusunun iptali üzerine, Türk Medeni Kanunu'nun 1007. maddesi uyarınca bulunmuş olduğu tazminat talebini incelemiştir. Söz konusu davada Daire, kamu görevlilerinin bir kusurunun olup olmadığına bakılmaksızın tapu sicil kayıtlarının tutulmasından doğan bütün zararlardan Devletin sorumlu olduğunu kaydetmiştir. Böylece Hazine, arazi sahibi araziyi aldığında tapu sicil kayıtlarında kamuya ait ormanlık alanla ilgili bir bilgi bulunmadığı gerekçesiyle arazi sahibinin hasarını ödemek mecburiyetinde kalmıştır.

any damage resulting from the keeping of the land registry records.

9. On 4 February 2005 the Menderes Civil Court of First Instance awarded 138,917,600,000 Turkish Liras (TRL – approximately 81,716 euros (EUR) at the time) to the applicant.

10. On 7 February 2006 the Fourth Civil Division of the Court of Cassation quashed the judgment of the Menderes Civil Court of First Instance on the ground that there was no illegal act or action on the part of the land registry officials that might have had a causal link with the applicant's loss.

11. On 6 July 2006 the applicant submitted a further petition to the Menderes Civil Court of First Instance and indicated that there was a decision of the First Civil Division of the Court of Cassation which was in contradiction with the decision of the Fourth Civil Division. In this context, the applicant alleged that its case should be accepted according to that decision of the First Civil Division issued on 7 May 2002 and numbered E.2002/3549 K.2002/5807.

12. On 20 October 2006 the Menderes Civil Court of First Instance followed the decision of the Fourth Civil Division of the Court of Cassation and dismissed the applicant's claim.

13. The applicant appealed. Reiterating its allegations and referring to the decision of the First Civil Division of the Court of Cassation of 7 May 2002, it repeated its compensation request.

14. On 1 May 2007 the applicant's appeal was rejected by the Fourth Civil Division of the Court of Cassation. This decision became final.

15. In their decisions, neither the Menderes Civil Court of First Instance nor the Fourth Civil Division of the Court of Cassation expressed any reason about why they had reached a different conclusion from the First Civil Division of the Court of Cassation.

C. The decision of the First Civil Division of the Court of Cassation dated 7 May 2002 and numbered E.2002/3549 K.2002/5807

20. In its decision of 7 May 2002, numbered E.2002/3549 K.2002/5807, the First Civil Division of the Court of Cassation (hereinafter "the Division") examined a compensation request of a landowner under Article 1007 of the Civil Code following annulment of his title deed to the land which had been designated as part of the public forest area. In that case, the Division noted that the State was responsible for any damage resulting from the keeping of the land registry records regardless of whether or not there had been a shortcoming on the part of the public officials. The Treasury thus had to compensate the owner's damage as there was no information in the land registry records relating to the public forest area when the owner had bought the land.

HUKUKİ DEĞERLENDİRME

II. SÖZLEŞME'NİN 6 § 1 MADDESİNİN İHLAL EDİLDİĞİ İDDİASI HAKKINDA

B. Esas Hakkında

26. Başvuran Yargıtay tarafından oldukça benzer davalar ile ilgili verilen çelişen kararların hukuki güvenlik ilkesine zarar verdiğinden ve bu durumun Sözleşme'nin 6 § 1 maddesi kapsamındaki adil yargılanma hakkının ihlal edilmesine neden olduğundan şikâyetçi olmuştur.

27. Hükümet başvuranın şikâyeti hakkında herhangi bir yorumda bulunmamıştır.

29. Somut davada, Mahkeme, iç hukuk kapsamında gerçekleşen yargılamalarda, başvuranın yalnızca Yargıtay 1. Hukuk Dairesi tarafından 2002 yılında verilen ve kamuya ait ormanlık alanının bir parçası olarak sınıflandırıldığı gerekçesiyle arazi tapusu iptal edilen davacının lehine hüküm verildiği tek bir karara atıfta bulunduğunu değerlendirmektedir.

Yargıtay 4. Hukuk Dairesinin 2006 ve 2007 yıllarında görünüşte oldukça benzer olan davada farklı sonuçlara vardığı doğru olsa da, ilgili içtihadında "derin ve uzun süredir devam eden" farklılıklar bulunduğu söylenemez. Ayrıca, Mahkeme davacılar açısından doğrudan erişilebilir olmasa da, 2797 sayılı Yargıtay Kanunu'nun 15(2-b) maddesi uyarınca, Yargıtayın farklı hukuk dairelerinin verdiği kararlar arasında tutarsızlık olan davalarda Yargıtay Hukuk Genel Kurulunun içtihatlara ilişkin bu ihtilafı çözen, yasal açıdan bağlayıcı bir hüküm vereceğini kaydetmektedir.

Bu hususlar göz önünde bulundurulduğunda, Mahkeme yukarıda bahsi geçen yargısal bazı tutarsızlıkların üstesinden gelinmesine ilişkin hükmün somut davada uygulanıp uygulanamayacağı ve ne ölçüde uygulanabileceği hususunun incelenmesi için herhangi bir neden bulunmadığına karar vermiştir. Bu koşullar kapsamında ve yorumlamanın yargının işleyişinin doğasında bulunduğu göz önünde bulundurulduğunda, (içtihatların özünde evrimsel olması nedeniyle) ve benzer davalara ilişkin olarak verilseler bile yerel mahkemelerin farklı kararlarını karşılaştırma hususunun Mahkemenin görevi olmadığı gerekçesiyle, Mahkeme Yargıtay 1. ve 4. Hukuk Dairelerinin kararları arasındaki yorum farkının tek başına Sözleşme'nin 6 § 1 maddesinin ihlalini teşkil etmediğini değerlendirmektedir.

30. Ancak, Mahkeme adaletin düzgün şekilde yönetimi ile ilgili bir ilkeyi yansıtan yerleşik içtihadına göre, mahkemelerin kararlarının dayandığı sebepleri yeterli ölçüde belirtmesi gerektiğini tekrar etmektedir.

31. Somut başvuruda, yerel yargılamalarda, başvuran Menderes Asliye Hukuk Mahkemesinin

THE LAW

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

B. Merits

26. The applicant complained that the contradictory decisions given by the Court of Cassation in respect of very similar cases had undermined legal certainty and that this had breached its right to a fair trial under Article 6 § 1 of the Convention.

27. The Government did not submit any comment on the applicant's complaint.

29. In the present case the Court notes that, during the domestic proceedings, the applicant cited only one decision rendered by the First Civil Division of the Court of Cassation in 2002 which had found in favour of the claimant, whose title deed to a plot of land had also been annulled as the land had been classified as part of the public forest area.

While it is true that the Fourth Civil Division of the Court of Cassation reached different conclusions in a seemingly very similar case in 2006 and 2007, it cannot be said that there were "profound and long-standing differences" in the relevant case-law. The Court further notes that, although it is not directly accessible to claimants, under section 15(2-b) of the Court of Cassation Act (Law no. 2797), in cases where there is inconsistency between decisions of the different civil divisions of the Court of Cassation, the plenary Court of Cassation (civil divisions) shall render a legally binding ruling settling the conflict of case-law.

Taking these aspects into consideration, the Court finds no reason to further examine whether the aforementioned provision for overcoming the judicial inconsistencies could have been applied in the instant case and to what effect. In these circumstances, and bearing in mind that interpretation is inherent in the work of the judiciary (as case-law is evolutive in essence) and that it is not the Court's function to compare different judgments of national courts, even if delivered in respect of similar proceedings, the Court considers that the difference of interpretation between the decisions of the First and the Fourth Civil Division of the Court of Cassation does not, in itself, constitute a violation of Article 6 § 1 of the Convention.

30. The Court, however, reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.

31. In the present application, during the domestic proceedings, the applicant drew the

ve Yargıtay 4. Hukuk Dairesinin dikkatini, kamu görevlilerinin bir kusurunun olup olmadığına bakılmaksızın kamuya ait ormanlık alanın bir parçası olarak sınıflandırılmış arazinin tapu sicilinin tutulmasından doğan bütün zararlardan Devletin sorumlu olduğuna hükmeden Yargıtay 1. Hukuk Dairesinin 2002 tarihli kararına çekmiştir. Ancak, ilk derece mahkemeleri ve Yargıtay önündeki yargılamalarda yerel mahkemeler, tapu sicil yetkililerinin yasaya aykırı herhangi bir işlem ya da eylemlerinin bulunmadığı gerekçesiyle başvuranın tazminat talep etme hakkının bulunmadığı hükmünü verirken başvuranın iddialarını değerlendirmemişlerdir. Mahkemeye göre, somut davada Yargıtay 1. Hukuk Dairesi tarafından daha önce verilen kararın ilk derece mahkemesi ve Yargıtay 4. Hukuk Dairesinin yaklaşımlarıyla uyuşmazlık içerisindeyken, başvuranın anılan karar ile ilgili iddiası yeterli ve açık bir yanıt gerektirmiştir. Böyle bir yanıtın yokluğunda, yerel mahkemelerin başvuranının iddialarını ele almayı ihmal edip etmedikleri veya başvuranın görüşünü reddetme niyetinde olup olmadıkları ve niyetleri bu yönde ise, bu kararı verirken gerekçelerinin ne olduğunu tespit etmek imkânsızdır.	attention of the Menderes Civil Court of First Instance and of the Fourth Civil Division of the Court of Cassation to the First Civil Division of the Court Cassation's decision of 2002 ruling that the State was responsible for any damage resulting from the keeping of registry records of the land classified as part of public forest area, regardless of whether or not there had been a shortcoming on the part of the public officials. However, neither during the first-instance proceedings nor in the cassation proceedings did the domestic courts consider the applicant's submissions when concluding that the applicant did not have a right to compensation on the ground that there was no illegal act or action on the part of the land registry officials. In the Court's opinion, while an earlier judgment delivered by the First Civil Division was in conflict with the approaches of the first-instance court and the Fourth Civil Division in the present case, the applicant's submissions regarding the said judgment required an adequate and express response. In the absence of such a response, it is impossible to ascertain whether the domestic courts simply neglected to deal with the applicant's submission or whether they intended to dismiss its argument and, if that was their intention, what their reasons were for so deciding.
33. Dolayısıyla, yerel mahkemelerin kararlarında yeterli gerekçelerin bulunmaması sebebiyle Sözleşme'nin 6 § 1 maddesi ihlal edilmiştir.	33. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the absence of adequate reasoning in the domestic courts' decisions.
IV. SÖZLEŞME'NİN 41. MADDESİNİN UYGULANMASI HAKKINDA	IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION
40. Başvuran adil tazmin talebinde bulunmaya davet edilmesine rağmen bu hususta herhangi bir adil tazmin talebinde bulunmamıştır. Bu koşullarda, Mahkeme Sözleşme'nin 41. maddesi uyarınca herhangi bir tazminata hükmedilmesi için sebep bulunmadığına karar vermiştir.	40. The applicant did not submit any claim for just satisfaction although invited to do so. In these circumstances, the Court holds that there is no reason to award any sum under Article 41 of the Convention.
BU GEREKÇELERLE, MAHKEME OY BİRLİĞİYLE,	FOR THESE REASONS, THE COURT, UNANIMOUSLY,
1. Yerel mahkemelerin kararlarının yeterli bir şekilde gerekçelendirilmediğine ilişkin şikâyetin kabul edilebilir olduğuna ve başvurunun geri kalanının kabul edilemez olduğuna;	1. Declares the complaint concerning the adequacy of the reasoning in the domestic courts' judgments admissible and the remainder of the application inadmissible;
2. Sözleşme'nin 6 § 1 maddesinin ihlal edildiğine karar vermiştir.	2. Holds that there has been a violation of Article 6 § 1 of the Convention.
İşbu karar İngilizce olarak tanzim edilmiş ve AİHM İçtüzüğü'nün 77. maddesinin 2 ve 3. fıkraları uyarınca 10 Ekim 2017 tarihinde yazılı olarak tebliğ edilmiştir.⚖⚖	Done in English, and notified in writing on 10 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.⚖⚖

“ Signed, sealed and delivered”

Signed, sealed and delivered is a phrase with a good ring to it, but is it really necessary?

THE MEANING. For most documents, signed, sealed and delivered means no more than "signed”. When used for deeds it has a more precise meaning. In New South Wales the formal requirements of a deed include being signed, sealed, delivered and attested.' But the words signed, sealed and delivered do not necessarily mean what they seem.

SIGNED. Oddly enough, under common law the phrase signed, sealed and delivered did not necessarily mean a deed was signed, but it did have to be sealed and delivered (and in writing). A deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered.
Generally a signature is the handwritten name of the person executing the document, given with the intention of authenticating the document as that of, or binding on, the person signing it.

However, when common law was developing, because so many people could not write or sign their names, any individual mark could be used as a signature. Initials, a rubber stamp, even a printed name on a piece of paper, could be used.

SEALED. Though early courts did not insist on a person's signature on a document, they did insist on sealing for authentication. Melted wax or red wafers (thin disks of flour mixed with gum or gelatine) were used to seal the document so that no one could read it without breaking the seal. To make tampering more difficult, the person could impress the wax or wafer with a metal die or perhaps a fingerprint. However, even in 1871 actual sealing was not vital if other evidence existed as to the intention of the parties.

Today a deed must still be “sealed” but the term is interpreted liberally.. It may be sufficient that the document is plainly a deed on its face, even without using the word "deed”.

DELIVERED. The law concerning delivery also dates from early times. “As a deed may be delivered to the parties without words, so may a deed be delivered by words without any act of deliverie."

Unlike contracts for sale of land which need to be exchanged, "delivery” in this sense does not mean "handed over" to the other side. It means delivery in the legal sense of “an act done so as to evince an intention to be bound.That is, the maker only needs to show an intention to be bound by the document. “It is also not necessary that the other side formally accept or take away the document to make delivery complete."

This is a question of fact. Using the word "delivery" today is unclear because it suggests the need to deliver or physically transfer the document from one person to another. Instead the document only needs to show the intention to be bound.

A PLAINER ALTERNATIVE. While signed, sealed and delivered technically describes three of the four requirements of a deed, the phrase is unclear and misleading to people who do not know the technicalities of satisfying those requirements. We suggest a more useful alternative is one clearly conveying that the person signing the deed intends to be bound by it. A signature (or mark) authenticates the document, and the word "signed" at the end of a document can show who must sign and where. If a company is making the deed, then use the word "made”, followed by the normal formal requirements of the company seal and so on. Stating it is a deed can show the necessary intention. Specifying the date on the document can show when the deed becomes binding. We suggest using “signed (or made) by [name] as a deed and taking effect on [date]”.⚖⚖

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signed, sealed and delivered resmi olarak imzalanmış
conveyance of title tapu devri
deed resmi evrak, vesika, senet, tapu
attested onaylı, tasdikli
duly usulüne uygun olarak
deliverie mal teslim edilen kimse
authenticate tasdik etmek, onaylamak
proxy vekaletname
affixing mühürleme
evince açığa çıkarmak, göstermek
tampering bir belgede gizlice bir takım değişiklikler yapma

German Civil Code

Section 812 Claim for restitution

(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.

(2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.

Swiss Obligation Code

Obligations deriving from Unjust Enrichment

Art. 62 A. Requirement / I. In general

1 A person who has enriched himself without just cause at the expense of another is obliged to make restitution.

2 In particular, restitution is owed for money benefits obtained for no valid reason whatsoever, for a reason that did not transpire or for a reason that subsequently ceased to exist.

Banque Financière de la Cité v Parc (Battersea) Ltd (United Kingdom)

English courts have recognised that there are four steps involved in establishing a claim to restitution for unjust enrichment. This analytic framework was developed by academics such as Professor Peter Birks. The four steps were expressly endorsed by the House of Lords (now Supreme Court) in Banque Financière de la Cité v Parc (Battersea) Ltd in the form of four questions

(...) After all, unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations. Four questions arise: (1) Has OOL benefited or been enriched? (2) Was the enrichment at the expense of BFC? (3) Was the enrichment unjust? (4) Are there any defences? (...)

Polish Civil Code

Article 405. Concept.

Anyone who without legal grounds has gained a financial benefit at the expense of another person is obliged to hand over the benefit in kind, and if this is not possible, to return its value.

Mexican Federal Civil Code

Article 1882 Illegal Enrichment

The enriched without cause over another, is required to compensate for their impoverishment to the extent that he has been enriched.