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THE OBJECTION IN LAW OF CIVIL PROCEDURE

Meltem Ercan Ozler
Selcuk University, Turkey

Abstract

The objection is one means of defense relevant to defendant's material law. This is an event that prevent the birth of the right or ended the right. In terms of our study the importance of the objection relates to whether it is understood from the case file or not. Because the objection which can be understood from the case file is not mandatory to be put forward in the response time and the judge may consider it all the time. On the other hand it is not possible to consider the objection that can not be understood from the case file ex-officio by the judge. If this objection is not put forward during the response time, it causes the prohibition on expansion and changing of defense. This situation can be removed with only consent of plaintiff and correction. In our study, respectively it will be explained until when the objection can be put forward, to connect the consequences of it and the ways in which these results will be removed.

Keywords: Objection, The Law Of Civil Procedure, Defense, Material Law, Response time, Ex-officio

I. GENERAL INFORMATION

The objection is a means of defence for the defendant corresponding to the substantive law¹. This is an incident which prevents the emergence or prepares the eradication of a right. In other words, the defendant objections claiming another incident which is against the demand of the adverse party, which prevents the constitution of a sufficient connection between the demand

¹ **Tekinay, Selahattin Sulhi**, Medeni Hukuka Giriş Dersleri, 3.B, İstanbul 1978, s.184; **Zevkliler**, Aydın, Medeni Hukuk, Ankara 2000, s.172; **Önen**, Mesut, Hukuka Giriş, İstanbul, s.155; **Eren**, Fikret, Borçlar Hukuku, Genel Hükümler, 11.B, İstanbul 2009, s.72; **Andreas**, von Tuhr, Borçlar Hukuku, Umumi Kısım (Tercüme Eden, Cevat Edege), 1.C, İstanbul 1952, s.26; **İmre**, Zahit: Medeni Hukuka Giriş, İstanbul 1971, s.292-293; **Kuru**, Baki/ **Arslan**, Ramazan/ **Yılmaz**, Ejder, Medeni Usul Hukuku Ders Kitabı, 23.B, Ankara 2012, s.311; **Üstündağ**, Saim, Medeni Yargılama Hukuku, C.I-II, Gözden Geçirilmiş ve Yenilenmiş 7.B, İstanbul 2000, s.343; **Deryal**, Yahya, Hukukun Temel Kavramları, Güncellenmiş 7.B, Trabzon 2011, s.246; **Berkin**, Necmeddin, Medeni Usul Hukuku Rehberi, İstanbul 1982, s.594; **Öztan**, Bilge, Medeni Hukuk'un Temel Kavramları, 29.B, Ankara 2009, s.205; **Postacıoğlu**, İlhan E., Medeni Usul Hukuku Dersleri, 6.B, İstanbul 1975, s.274; **Ulukapı**, Ömer, Medeni Usul Hukuku, 2. B, Konya, 1991 s.253 (**Ulukapı – Usul**); **Pekcanitez**, Hakan/**Atalay**, Oğuz/**Özekes**, Muhammet, Medeni Usul Hukuku, 13.B, Ankara 2012, s.450; **Bilge**, Necip, Medeni Yargılama Hukuku, Ankara 1967, s.402.

and incident or eradicates this connection². For this reason, the adverse party does not have to accept the objection. It is also impossible to waive the objection which is a means of defence³. Because there is an incident and it has occurred, so it is out of question to pretend it has not happened.

Both the defendant and the people whose advantages are harmed can claim the incidents to which the objection is attributed⁴. Using the defence of the objection is left to the salt owner's own will. If the judge learns the incidents to which the objection is attributed from the trial materials, from the response bill of the defendant, from the incidents claimed by the parties or from the documents added to the file, s/he takes ex officio into consideration⁵.

Whether the objection is preventing the emergence of a right or abolishment of a right, examination of these in terms of law of civil procedure is done by taking the objection division which is inferable from the case file or not into consideration. Considering this basis, allegation of the objections in the case will be handled, too.

II. OBJECTION INFERRED FROM THE CASE FILE IN LAW OF CIVIL PROCEDURE

Objections which are not necessary to be alleged by the defendant can be inferred from the case file (from the response bill, events alleged by the parties, documents in the file). Reasons for the objection which can be inferred from the case content or case materials can be exemplified with the precedents. For instance, as a certain amount written in an agreement of bailment is required for validity of the agreement, when this agreement is violated an objection which prevents the emergence of a right becomes a matter of discourse.

A reason for objection which can be inferred from the case file, however included in the file, is not necessary to be alleged with a response bill to be given in its imparlance⁶. Investigation of the objections which can be inferred from the case file which is not necessary to be alleged by the defendant is dependent on the fact that the judge shall take these objections ex officio into consideration. Moreover, as these objections do not have to be alleged with the response bill, their being alleged later is not regarded in the scope of ban of extension or modification of defence. Because, the judge is supposed to take the objections which can be inferred from the case file into ex officio consideration without waiting for them to be alleged.

² **Tekinay**, s.184; **Bilge**, s.402; **Ulukapı – Usul**, s.253; **Pekcanitez/Atalay/Özekes**, s.450; **Postacıoğlu**, s.274; **Berkin**, s.594; **Kuru/ Arslan/ Yılmaz**, s.311.

³ **Eren**, s.73; **Tunçomağ**, Kenan, Borçlar Hukuku, Genel Hükümler,1.C, İstanbul 1972, s.37; **İnan**, Naim, Borçlar Hukuku, Genel Hükümler, 3.B, Ankara 1984, s.42.

⁴ **Eren**, s.73.

⁵ **Eren**, s.73; **Deryal**, s.246; **Tekinay**, Selahattin Sulhi/**Akman**, Sermet/**Burcuoğlu**, Haluk/**Altop**, Atilla, Borçlar Hukuku, Genel Hükümler, İstanbul 1988, s.1385; **Öztan**, s.205; **İnan**, s.42; **Tekinay**, s.186; **Zevkliler**, s.172; **Kuru/ Arslan/ Yılmaz**, s.311; **Pekcanitez/ Atalay/ Özekes**, s.450; **Alangoya**, Yavuz/ **Yıldırım**, Kamil/ **Deren-Yıldırım**, Nevhis, Medeni Usul Hukuku Esasları, 7.B, İstanbul 2009, s.254; **Berkin**, s.594; **Bilge**, s.402; **Ulukapı – Usul**, s.253; **Postacıoğlu**, s.274-275.

⁶ **Üstündağ**, s.344; **Kuru/ Arslan/ Yılmaz**, s.311; **Pekcanitez/ Atalay/ Özekes**, s.450; **Berkin**, s.594; **Alangoya/ Yıldırım/ Deren-Yıldırım**, s.254; **Tunçomağ**, s.37; **Tekinay**, s.186; **Zevkliler-Medeni**, s.172; **Eren**, s.73; **İnan**, s.42; **von Tuhr**, s.24-25; **Ulukapı – Usul**, s.253; **Postacıoğlu**, s.274-275; **Bilge**, s.402.

III. OBJECTION WHICH CAN NOT BE INFERRED FROM THE CASE FILE IN LAW OF CIVIL PROCEDURE

Unlike the objections inferable from the case file, objections which can't be inferred from the case file should be alleged in a certain form of intersection. This intersection is the time given to the defendant for response bill and only in this time could the defendant allege the objections which can't be inferred. Because, in our law of civil procedure, principle of concentration is valid. According to this principle, the defendant has to submit the petition of response in two weeks as of the notification and in this petition s/he has to allege the appeals which can't be inferred from the case file (Law of Civil Courts. Article: 127). Moreover, the defendant is able to submit the defence to the court in which the case has been suited in the collateral limitation granted by the judge on condition that all the conditions are provided (Law of Civil Courts. Article: 127).

If the judge can't infer an incident subject to objection from the information gathered from the statements of the parties or the case file, the judge does not have the authority to carry an ex officio investigation out to search for the reason of objection or to remind the parties of this matter. Because, this situation is a result of the non-competence of the judge to do ex officio investigation on the objections which can't be inferred from the case file. Another result of this issue is that when these objections are not alleged, this leads to the ban of modification and extension on the defence. This ban can only be removed with the approval of the defendant and institutions of amendment⁷

IV. EVALUATION OF THE OBJECTIONS IN LAW OF CIVIL PROCEDURE

1. EVALUATION ABOUT THE TIME OF ASSERTION OF OBJECTIONS

Objections must not necessarily be put forward by the defendant. Because when the judge, his style to the appropriately presented in the case file (from the case materials, answer the phrases, the events put forward by the parties, file the documents) finds out the existence of an objection, considers itself without the defendant put forward⁸. It should be noted here that the objection to be taken into consideration by the judge, to understand the objection by the material of the case or the case file content, otherwise it will not be basically considered in the provision. The fact that the subject of this objection does not matter which party put in that file⁹. When the judge understands the objection which is terminating the right or preventing the birth of right by himself, the objections must be taken ex officio until the case is over. To understand whether the existence of an objection from the case file is determined by the characteristics of the case and what judged should in terms of the procedures accordingly. On the other hand, when the objection can not be understood from the material or teh context of the case in this case, the judge can take into account these objections, and these objections are subjected to strong procedure

⁷ **Yılmaz**, Ejder, Islah, 2.B, Ankara 2010, s.460 vd.

⁸ **Kuru**, Baki, Hukuk Muhakemeleri Usulü, Cilt 2, 6.B, İstanbul, 2001, s.1770; **Üstündağ**, s.344; **Kuru/ Arslan/ Yılmaz**, s.311; **Pekcanitez/ Atalay/ Özekes**, s.450; **Önen**, s.168; **Berkin**, s.594; **Alangoya/ Yıldırım/ Deren-Yıldırım**, s.254; **Tunçomağ**, s.37; **Tekinay (Giriş)**, s.186; **Oğuzman**, s.193; **Zevkliler**, s.172; **Eren**, s.73; **İnan**, s.42; **von Tuhr**, s.24-25; **Ulukapı – Usul**, s.253; **Postacioğlu**, s.274-275; **Bilge**, s.402.

⁹ **Yılmaz**, Ejder, Davada Takas ve Mahsup Talebi, Legal Mihder, S.2, İstanbul 2010, s.274.

rules and prohibitions. The objections which can not be understood from the case file will be presented within other substantive defenses, such as response time, on the contrary, it is going to be considered with the prohibition of extension and changing of defense. This situation can be taken away by the prohibition of extension and changing of defense or correctional institution. For example, the Supreme Court decision which is about the put forwarding the deduction request of one side would not be taken into consideration ex officio, is the same way with this opinion¹⁰. However, most of the decisions of the Supreme Court about the objections show us that in the objections the prohibition of extension and changing of defense is impossible and the objections can be put forward everytime.

As a result, we can say that the objections which can be understood by material from the case, apparently without daring to answer the legal reasons for the objection within the period to be raised, even by the judge may be considered; however, it is understood from the case file and the case of legal objections that are not submitted within the time the answer will not be considered. The reasons for this objection, however, legal in the condition they are claimed within the time the answer will be taken into consideration.

2. EVALUATION ABOUT THE SHAPE OF ASSERTION OF OBJECTIONS

It is possible to use the objections outside of the case or in the court by the opening of the case. Put forward as a defense to the objections that can be understood from the case file is not the case in respect of a special nature. Indeed, such a means of defense, without the need to assert of defendant will be evaluated by taking into consideration ex officio by the judge, the defendant will be judged in terms of a sequel give birth.

The objections which can not be understood from the case file put forward in the case of them as a means of defense and the court listened be the ability of the defendant to be recognized is it linked to the requirement put forward in the reply petition answer will be given in the response time of this right.

Also, as with other substantive defense, can not be understood from the case file objections will be included in the reply petition will be evaluated in the context assertion because when it asserts later it's going to cause the prohibition of extension and changing of defense. The objection which is put forward after response time and in this direction faced with a claimant's decision to expand the objection cannot be connected to the scrutinized by the court. However, to make such an objection by the defense or by consent of the defendant before using correctional institution for the first time and not recourse this way, the court examined the defendant's objection that use defense may be decided on the defensive line.

¹⁰ “The parties take forward the defense can not be deducted from the court file that regard. Search for state courts to decide whether the incident has requested the download will investigate the results of the use of the car. In this way, the results will not change the fact that the parties to object the interim decision. Consequently, contrary to these principles made the decision as a result of the investigation will lead to the lowering of trade receivables is contrary to the principles and laws.” Yrg. 4.HD. 3.6.1968 T. 1965/5088 E. 1965/2958 K (**Kuru**, s.1776, dn.51). Ancak mahsup konusunda da Yargıtay’ın çelişik kararları mevcuttur.

3. EVALUATION ABOUT THE PROHIBITION OF EXTENSION AND CHANGING OF DEFENSE¹¹

When we look at in terms of Law of Civil Courts, “the prohibition of extension and changing of defense” titled reply in response to the Article 141 and claim the claimants and defendants in the reply petition and the second reply petition is given the opportunity to freely expand and modify their defense. The prohibition was brought in terms of preliminary examination and is organized into clear consent of the other party, so in the preliminary examination with clear consent and correctional institution this prohibition can be overcome. Terms of Law of Civil Courts the consent is clearly taken under the provisions. When one party can not take part in the preliminary examination trial without excuse, the other party (who comes to trial) can extend or change his defense without consent of other party. This is also the invitation of preliminary examination trial, will not object to transactions conducted in the absence of the parties to come to the trial and the other side of the form can change expands the claims and defenses without his consent it will also be cautioned with Article 139 of Law of Civil Courts. Indeed, as a result, they could no longer be extended or changed after the prosecution and defense said the preliminary examination stage. When we look at in terms of Law of Civil Courts Article 139, in cases where the application of summary procedure, the prohibition on the expansion of the defense will begin with the reply petition given to the court. Finally we will examine issues related to overcome this prohibition. As a rule, the ones regarding the reasons for the objections that not put forward in the case file in the time or are incomprehensible, there will be a way to be involved these objections in the proceedings. When defendant's objections not put forward in terms of time, claimant's consent allowing the introduction of the retrial for this objections, so it is the first opportunity in relation to overcome this prohibition¹². Another possibility is correctional institution. We will examine the correctional institution under a separate heading due importance.

The claimant's consent may be open or implied. But in terms of Law of Civil Courts, the consent of claimant must be open. Claimant's defense on expansion, the claimant objected to this situation, and if not immediately respond to the basis of expanded defense, defense in this case is deemed to have implicitly approval to expand. Whether in terms of overcoming the prohibition implied or open consent make not any differences. However, consent, it is important to examine the direction is with the extension of the case or looking old form of the case. Whether the court cannot examine there is the expansion of defense, it must have the claimant's objection. Because claimant does not consent to the defendant's objection, this is not the case with the defendant's defense extended form, the old form will be subject to examination and judgment will prevail with this. The claimant if the defendant objected to the expansion of the defense, the court's examination of this appeal would not indicate an interim decision and therefore should be given the opportunity to put forward his defense through reforming the defendant to reply petition¹³. In addition, the defense extension also depends on a specific time. Failure to comply with this time the defense will constitute implied consent to expand. If a defendant expand his defense at trial or during discovery, the claimant's objection about expanding defense must be immediately during the trial or discovery, before the judge decide the basic of the case that the expansion, should

¹¹ Bkz. **Üstündağ**, Saim, İddia ve Müdafanın Değiştirilmesi Yasağı, İstanbul 1963 (**Üstündağ – Müdafaa**).

¹² **Üstündağ – Müdafaa**, s.85.

¹³ “After the court accepted that it is an interim decision about the prohibition of extension and changing of defense, it needs to allow the use of the procedural authority of the defendant.” Yrg. 11.HD. 16.1.1975 T. 1975/4254 E. 1975/185 (**Kuru**, s.1838, dn.254).

review the trial transcript. Because when the claimant, the expansion of the defense of implied consent is deemed to have not made such an objection and is forced to endure the examination expanded form of defense. If objects, the defense shall be taken as consideration in its old form. When the defendant can argue this objection which cannot be understood from the case file at the latest until the end of the trial, the defendant will ensure that their judgment resolve with claimant's consent this objections.

4. EVALUATION ABOUT CORRECTIONAL INSTITUTION

When claimant doesn't consent the expanding defense, defendant expands his defense with doing correctional at reply petition (Law of Civil Courts, Article 141, II). When the objections will not be understood from the case file, the judge is not subject to review defense reasons ex officio, but suggested that in certain sections of the procedures that they can, but it is to be remedied by (claimant's consent or) correctional institution¹⁴. At this point the correction of the parties is an opportunity which allows them to clear their procedural errors and prevents extension prohibition of defense. The correction of the defendant, however, shall not be used in this way before, takes it further with the unilateral declaration directed to the court¹⁵. Whether the objections preventing the birth of the right or ending the right is not understood from the case file, in written answer procedure this objection can be used until sending the reply petition to claimant. In simple procedure can be used from judge reporting defense at first trial¹⁶. Because defendant can expand or change his defense without correctional institute. In terms of Law of Civil Courts, after the completion of the preliminary examination stage, defendants can only be put forward by the defense to fulfill the conditions for correctional institute (Law of Civil Courts, Article 141, II).

It is not a problem for the objections which can be understood from case file. Because when an objection can be understood from case file, the judge considers it ex officio or parties put forward until the trial is finished.

V. EVALUATION ABOUT WHO ASSERT THE OBJECTIONS

1. DEFENDANT'S ASSERTION

The objection we define that preventing the existence or continuation of a right, as the incidents that remove or eliminate hazards, put forward not only by the rights owner, be claimed by anyone who has interest in this event¹⁷. So objections are consequences not only the rights owner (or assert objection) but also in terms of people with interested in these objections.

At this point if defendant put forward an objection about self defense in a case, it results only by himself; but it will have consequences in common with him that the movement in terms of multiple defendants. The judge understands also due to the objection of defense material relating to the law, the case materials, reply petition or finds out one of the documents brought by

¹⁴ Pekcanitez/ Atalay/ Özekes, s.450; Üstündağ, s.344; Kuru/ Arslan/ Yılmaz, s.320; Pekcanitez/ Atalay/ Özekes, s.450; Önen, s.168; Berkin, s.594; Alangoya/ Yıldırım/ Deren-Yıldırım, s.254; Ulukapı – Usul, s.253; Postacıoğlu, s.274-275; Bilge, s.403.

¹⁵ Yılmaz - Islah, s.440 vd.

¹⁶ Yılmaz - Islah, s.460.

¹⁷ Eren, s.73; Kuru/ Arslan/ Yılmaz, s.311.

the claimant will be able to put forward self-examination without waiting. In contrast, in this case the judge can not be understood from the case file or the material presence of an objection, as the judge can not do research himself and the parties will not be found in this issue reminder (Law of Civil Courts, Article 25, I)

2. CASE FRIENDSHIP'S ASSERTION

Passive case friendship includes obligatory and optional friendship¹⁸. When there is obligatory friendship, the case against the defendant and execution combined with the opening of the case, so you will need together jurisdiction of the objection.

In optional friendship claimant has the right which defendants he wants to processes case. In optional friendship, there are cases as the number of optional friendship. Because in optional friendship, every friendship's case is separate from others. Also the optional friendship is also mentioned if the multiple people's friendship's case stacking or multiple people open their cases independently. These cases are only carried out with the authority given by the law in terms of procedural economy. Lawsuits are independent of each other, but both parties with regard to the investigation phase is common for all the defendants to be carried out to reduce the court's workload. In this context, the defendant which is optional friendship, objected that the material relating, we must examine the issue of how the law could be asserted. Like independent cases of optional friendship, they are independent of each other and the defense of the case from each other can be argued separately. However, an optional friendship which not put forward objections, will be able to take further advantage of objections in the case friends¹⁹. But for this, objection must be common for each optional friend. When a optional friend assert a personal objection, the other friends can not use this personal objections. For example, the objection does not comply with the law as it interim bail, should be common in other cases may benefit friends²⁰; because of the incompetence objection is a personal objection, should not benefit the other case friends due to reasons other personal objection.

The case file from understanding that can objection to reason in terms, without the need of a demand in his review of judges, all proceedings friends depending on whether the contested joint or individual, or will only provisions include deciding about the personal objection of his case friends assert.

VI. CONCLUSION

Reasons for objection which are in the case file and inferable from the file context can always be taken into consideration by the judge without allegation of the parties. At the same time, the parties can allege the reasons for objection themselves without being subject to a certain duration or limitation of ban. The reasons for objection which can't be inferred from the case file result in just in the same way as pleas and cause procedural violations if they are not alleged in a certain intersection of procedure. Removal of these violations is only possible through the approval of the suitor and amendment.

¹⁸ **Ulukapı**, Ömer, Medeni Usul Hukukunda Dava Arkadaşlığı, Konya, 2014 (**Ulukapı – Arkadaşlık**), s.40.

¹⁹ **Ulukapı – Arkadaşlık**, s.217.

²⁰ **Ulukapı – Arkadaşlık**, s.217.

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