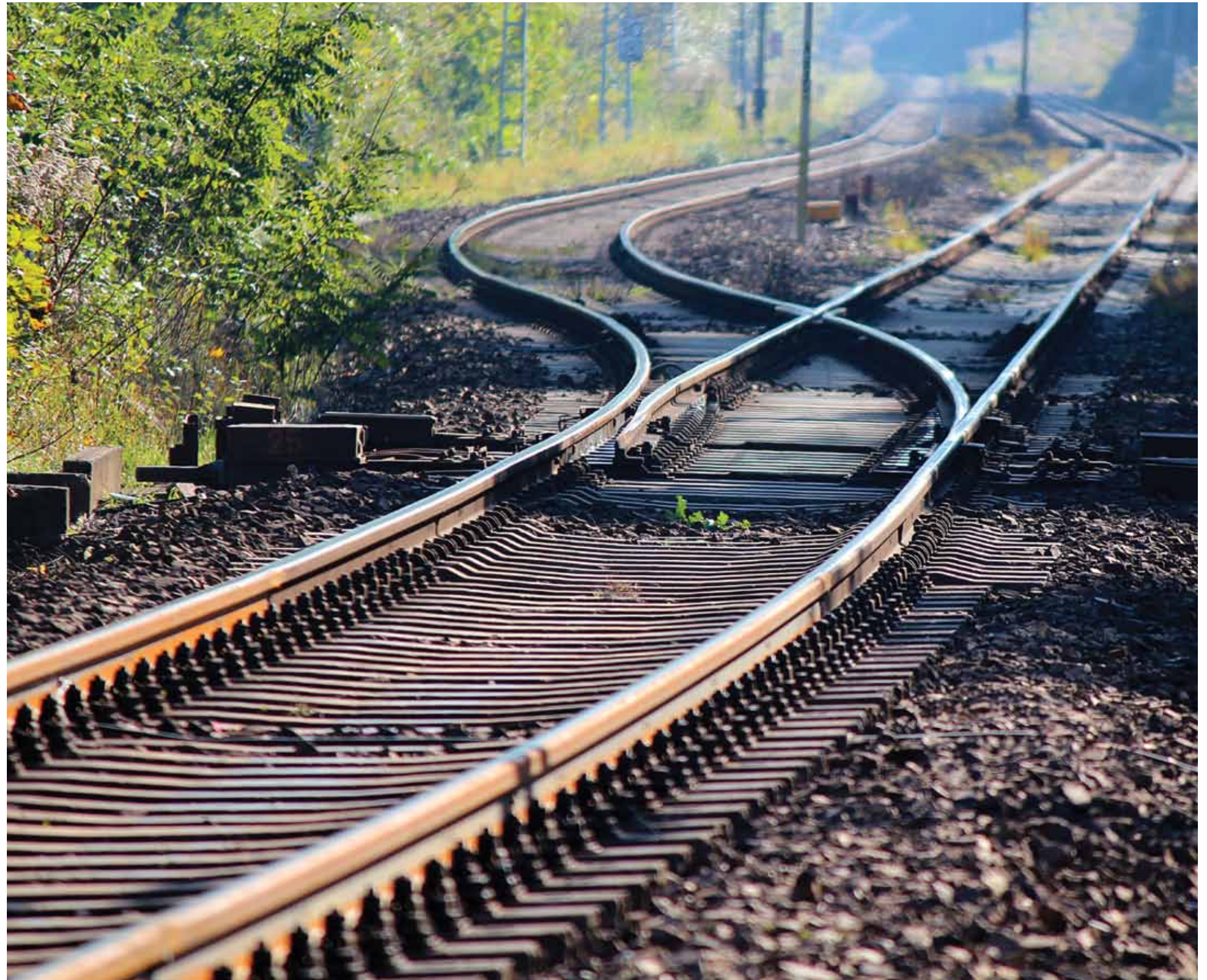


# THE SPIN-OFF PROCESS UNDER THE TURKISH COMMERCIAL CODE NUMBER 6102

**T**HE STEADY GROWTH IN THE TURKISH economy brought forward different needs both for the commercial and the legal systems in Turkey. The Turkish Commercial Code Number 6102 (the “**TCC**”) aims for a modern change in compliance with the European legislation. Along with the other significant matters, one of the untouched subjects in the Turkish Commercial Code Number 6762 (the “**former TCC**”) was the subject Spin-Off; therefore, regulating the Spin-Off in the TCC became inevitable.

While the TCC is silent on the issue, the Joint Communiqué of the Ministry of Finance and Ministry of Industry and Commerce (O.G. No. 25231, dated September 16, 2003) is the primary regulation that governs the partial Spin-Off, in other words, Spin-Off of a joint stock company (the “**JSC**”) or a limited liability partnership (the “**LLC**”). In addition, the Corporate Tax Code Number 5520 regulates the tax implications of the Spin-Off. The regulations mentioned above have not been satisfactory regarding the Spin-Off; hence the TCC contains detailed provisions regarding the Spin-Off compared to the former legislation.

The TCC allows the companies to Spin-Off partially or wholly, accordingly, Spin-Off is the partial or whole transfer of the assets of share capital companies such as JSC or LLC. Transfer is made from a cooperative company called “**Spin-Off Company**” to a “**Transferee company**” while the shareholders of the Spin-Off Company acquire shareholding in the Transferee Company; or the Spin-Off Company acquires shareholding in the Transferee Company. The Transferee Company may either be a newly established company or one that already exists. The Transferee Company must also be a share capital company or a cooperative company, Spin-Off into partnerships or vice versa is not possible. However this may be surmounted by





changing the kind of company; in other words a partnership may first be converted into a share capital company and then Spin-Off.

The whole asset transfer leads to the dissolution of the Spin-Off Company, while with the partial Spin-Off, the Spin-Off company continues to exist with the remaining assets.

Shareholders of the Spin-Off company may acquire shares in the Transferee Company pro rata to either their existing share ratios in the Spin-Off company (symmetric Spin-Off) or according to a new share structure to be envisaged in the Transferee Company (asymmetric Spin-Off).<sup>1</sup>

Example 1: Symmetric Spin-Off

Spin-Off Company Share Structure	
Shareholder 1	%40
Shareholder 2	%40
Shareholder 3	%20

Transferee Company Share Structure	
Shareholder 1	%40
Shareholder 2	%40
Shareholder 3	%20

Post- Spin-Off Share Structure (Spin-Off Company)	
Shareholder 1	%40
Shareholder 2	%40
Shareholder 3	%20

Example 2: Asymmetric Spin-Off

Spin-Off Company Share Structure	
Shareholder 1	%40
Shareholder 2	%30
Shareholder 3	%30

Transferee Company Share Structure	
Shareholder 1	%50
Shareholder 2	%25
Shareholder 3	%25

Post- Spin-Off Share Structure (Spin-Off Company)	
Shareholder 1	%30
Shareholder 2	%35
Shareholder 3	%35

\*\*\* In the above example, Shareholder 2 and 3 will obtain shares in Spin-Off Company against the loss in the Transferee Company.

The Spin-Off process requires a Spin-Off agreement to be executed by and between the Spin-Off Company and Transferee Company. However, in the event that a new company will be established upon Spin-Off, a Spin-Off plan shall be prepared instead of a Spin-Off agreement. This Spin-Off agreement or plan must contain special requirements.<sup>2</sup>

Either way, this agreement or plan must be executed in writing and submitted to the approval of the general assembly.<sup>3</sup> The approval is granted by qualified quorum as explained below:

- In JSC's and limited partnerships divided into shares,  $\frac{3}{4}$  of the votes of the present shareholders in the general assembly on the condition that such shareholders represent the majority shareholding in the said types of companies, and if a company is Spun-Off into limited partnership divided into shares, the written approval of all the active partners in the said partnership,
- In share capital companies, whose shares are to be acquired by a cooperative company,  $\frac{3}{4}$  of the present votes in the general assembly, only if such shareholders represent the majority of the capital,
- In LLC's,  $\frac{3}{4}$  of the votes of all the shareholders, on the condition that such shareholders represent at least  $\frac{3}{4}$  of the capital,
- In cooperative companies, the majority of the  $\frac{2}{3}$  of the votes. However, in case that additional payments and other performance obligations or unlimited liability is envisaged in the articles of association or if such obligations are already present, for the extension of such obligations, the said quorum shall be the  $\frac{3}{4}$  of the votes of all the shareholders registered in the cooperative company,
- In the event that the JSC or a limited partnership divided into shares are to Spin-Off into an LLC and if such acquisition envisages additional obligations and personal performance obligations for the shareholders or if such obligations are already present, for the extension of such obligations, unanimity of the votes.

If the scope of the Transferee Company will be changed in accordance with the Spin-Off agreement, the quorum required for the amendment of the articles of association is also obligatory. Additionally, in asymmetric Spin-Off, the Spin-Off decision has to be approved by at least 90% of the shareholders with voting rights in the Spin-Off Company level.



The Spin-Off process may also require the participant companies to make changes in their capitals. As an example, a partially Spun-Off Company may have to decrease its capital because of the transfer of part of its assets. On the other hand, for any type of Spin-Off, the Transferee Company must increase its capital in order to protect the rights of the Spin-Off Company's shareholders.

In the scope of this capital increase transaction, as per Article 163 paragraph 2 of TCC entitled "Capital Increase", the provision regarding contribution of the assets will not be applied. Also in a capital decrease transaction, as per the article 162 of TCC, in the event that the capital of the company subject to the Spin-Off is decreased due to partial Spin-Off, Articles 473, 474 and 592 of TCC will not apply.

In the event that more than six months have passed between the date on balance sheet and the date on which the Spin-Off agreement is executed or the preparation date of the Spin-Off plan or if significant changes have occurred in the assets of companies participating in the Spin-Off since the last balance sheet date, an interim balance sheet must be prepared.<sup>4</sup>

In addition to the above, either the managing bodies of the participant companies individually prepare a Spin-Off report or such report is prepared jointly.<sup>5</sup> In the event of a new company being formed upon Spin-Off, the new company's articles of association shall be annexed to this report. If unanimously approved by their shareholders, the small-scale companies may decide not to prepare the Spin-Off report.

Republic of Turkey Ministry of Customs and Trade stated within the scope of Article 5 of Communiqué Regarding Changing The Structure of the Companies and Collaboration between the Registries on Contribution to Capital in Kind, that "...assets and rights subject to change of ownership as a result of contribution to the capital in kind must be assessed in value by the official experts. In transactions of merger, spin-off and change of the type of company, value of assets and rights subject to change of ownership is assessed by a Certified Public Accountant or an Independent Accountant and Financial Advisor, or an auditor in companies subject to audition. Following provision of security for the creditors' receivables, the managing bodies of the participant companies submit the Spin-Off agreement or the Spin-Off plan to their general assemblies. Af-

ter the approval of the general assemblies, the managing bodies request the registration of the Spin-Off.”

In the event that the capital of the Spin-Off company is decreased due to the partial Spin-Off, the amendment to the articles of association in this regard shall also be registered. As a result of the Spin-Off, if the Spin-Off Company is dissolved, such dissolution shall be realized upon registration of the Spin-Off with the trade registry.

The Spin-Off becomes effective upon registration with the relevant trade registry. Following registration, all assets and liabilities in the inventory are transferred to the Transferee Company at the moment of registration. For the reason that the inventory is transferred instantly to the Transferee Company, registry records relating to some assets, such as a trademark or immovable assets, may not reflect the updated status following the Spin-Off. In order to amend the registry records, the Transferee Company shall request the amendment of the registry records from the relevant authority in writing. The certified copies of the Trade Registry records proving the asset transfer with respect to the Spin-Off shall also be provided with the said request.

**Guidelines for Shareholders, Employees and Creditors**

Nature of the Spin-Off is essential for the rights of the shareholders, the employees and the creditors of the Spin-Off Company to be protected before initiating Spin-Off transactions.

**With Respect to Shareholders**

In accordance with the TCC, the Spin-Off Company’s shareholders have the right to demand shares and relevant rights in the Transferee Company. The rights to demand is evaluated on the basis of the asset values, dispersion of the voting rights and other important matters of the companies willing to participate in the Spin-Off. When determining the exchange ratio regarding the shares, it may be envisaged that the Spin-Off Company’s shareholders are to receive at most 1/10 of the actual values in the Transferee Company’s shares as compensation. In addition, the shareholders holding non-voting shares in the Spin-Off company have the right to demand non-voting or voting shares in equal value in the Transferee Company. Along with this, shareholders that hold privileged shares in the Spin-Off Company have the right to demand equivalent privileges or an appropriate compensation from the Transferee Company. Moreover, the Transferee Company shall grant equivalent rights to the shareholders holding redeemed shares in the Spin-Off Company or shall buy such shares in their actual values.

If the shareholders reach a consensus, they have the right to leave the Spin-Off Company before the Spin-Off. It is a matter of common knowledge that to expel a shareholder from the JSC is an exceptional issue and for the same reason, the said opportunity brought by the Spin-Off is interesting.

**With Respect to Creditors**

The Spin-Off of a company means the change of debtor for its creditors and thus they need exclusive protection. Therefore, the TCC regulates the subject in depth. Companies willing to participate in a Spin-Off shall invite their creditors to declare the amount of their receivables and to request a security by way of publicizing three times with seven days’ interval in the Trade Registry Gazette and also for share capital companies on their websites.<sup>6</sup>

Within three months of the publication, the companies willing to participate in the Spin-Off shall secure the debts owed to their creditors, which have responded to the invitation. In some cases, the Spin-Off may not endanger the creditors’ receivables the said security obligation becomes optional for the companies in such cases providing they supply a transaction auditor’s report certifying this. In addition, if the remaining creditors’ receivables are not endangered by such payment, some of the creditors’ receivables may be paid directly instead of placing securities.<sup>7</sup>

**With Respect to Employees**

Spin-Off process also has a significant importance for the employees of the Spin-Off Company. Thus, the TCC aims to protect the rights of the employees by including relative provisions. Rights and liabilities arising from the employment agreement until the Spin-Off date shall be transferred to the Transferee Company unless objected by the employee. In the event of objection, the employment agreement is terminated at the end of the legal period of dismissal; and in these circumstances the Transferee Company and the employee shall be liable to fulfill the agreement until that date. The former employer and the Transferee Company are severally liable for the employee’s receivables due before the Spin-Off and for the employee’s receivables which will become due until the date the employment agreement is to expire under ordinary circumstances or until the date it is terminated due to the employee’s objection.<sup>8</sup>

Unless otherwise decided, the employer shall not transfer the rights arisen from the employment agreement to a third party. Moreover, the employees can request their due receivables and their receivables which will be due as

stated above to be secured. Shareholders of the Spin-Off Company who are liable for the company debts before the Spin-Off will continue to be liable in the same way for the debts arising from the employment agreement that are due until the transfer date, for the debts which would become due if the employment agreement was terminated under ordinary circumstances, and for the debts arising until the termination of the employment agreement where the employee has objected.

**Liabilities Arising from Spin-Off**

Liabilities of the participant companies have significant importance in the Spin-Off process. The companies that are assigned to be liable under the Spin-Off agreement or Spin-Off plan are primarily liable parties. If the primarily liable companies do not repay the receivables of the creditors, the other companies participating in the Spin-Off are secondarily liable. In the event that the claims of the creditors are not secured and the primarily liable company has become bankrupt, has obtained a bankruptcy configuration or has become subject to execution proceedings and the conditions to obtain final insolvency certificate have been met, has moved its headquarters abroad and may no longer be prosecuted in Turkey or has moved its location of headquarters abroad and therefore its prosecution has become extremely difficult then the secondary liable companies are subject to execution proceedings.

In terms of personal liability, the shareholders who are liable for the debts of the Spin-Off Company before the Spin-Off continue after the Spin-Off under the condition that these debts must have been incurred before the declaration of the Spin-Off resolution or the reasons causing the said debts must have occurred before such declaration date. The statute of limitations period is three years from the declaration date of the Spin-Off resolution. In the event that the claim becomes due after the declaration date, the statute of limitations period begins from the maturity date. This restriction does not extend to the liabilities of shareholders who are personally liable for the debts of the Transferee Company. Unless otherwise specified in the prospectus, the liability arising from the publicly issued bonds and debentures continue until the date of redemption.<sup>9</sup>

**Conclusion**

With the regulation of Spin-Off under the TCC, it will undoubtedly become much easier for the companies to Spin-Off in a rapid and efficient way. Such current and rational regulations will encourage the foreign investors which will then have positive reflections on the economy. Unlike the legislation in effect, the TCC covers the Spin-Off in depth, providing answers to a wide range of questions as required by the growing Turkish economy and in compliance with the European legislation.

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- 1 Article 161 of Turkish Commercial Code Number 6102.
- 2 Article 167 of Turkish Commercial Code Number 6102.
- 3 Article 166 of Turkish Commercial Code Number 6102.
- 4 Article 165 of Turkish Commercial Code Number 6102.
- 5 Article 169 of Turkish Commercial Code Number 6102.
- 6 Article 174 of Turkish Commercial Code Number 6102.
- 7 Article 175 of Turkish Commercial Code Number. 6102.
- 8 Article 178 of Turkish Commercial Code Number 6102.
- 9 Article 176 of Turkish Commercial Code Number 6102.