



## **A New Era in Courts: e-Hearing**

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### **1. Introduction**

Recently, major amendments were introduced to Turkish legislation within the scope of the Turkish Judicial Reform. In this regard, the Law Amending the Civil Procedure Law and Certain Laws No. 7251 (“**Law No. 7251**”) was published in the Turkish Official Gazette on July 28, 2020. Law No. 7251 brought along amendments that concern various laws and matters, including Turkish Civil Procedural Law No. 6100 (“**CPL**”).

Along with various changes introduced to Article 149 of CPL, loosening the criteria to hold a hearing through video and audio transfer (“**e-Hearing**”) is the most remarkable amendment made in the aforesaid article. Prior to the amendment, Article 149/1 of CPL regulated that holding an e-Hearing was only permissible provided that all parties consented to holding the hearing via those means. The amendment introduced to Article 149 of CPL removed the requirement of the parties’ consent for conducting e-Hearings and made the conduct of an e-Hearing subject to the request of one of the parties.

Likewise, previous version of Article 149/2 of CPL read that the court may allow a witness, an expert, a specialist or a party could be heard through simultaneous video and audio transfer, provided that all parties gave their consents. With the amendment made to Article 140 of CPL, the court may now decide to listen a witness, expert or specialist via video and audio transfer, upon one of the parties’ request or *ex officio*.

In light of the foregoing, the present work is aimed to evaluate the reasons behind this amendment, as well as examine the amended Article 149. Also, even though the text of Article 149 explicitly states that procedures and principles regarding the implementation of this article shall be determined by a by-law, this work seeks to create an idea of what to



expect in this regard, by incorporating Online Hearing Rules and Procedures published by Istanbul Arbitration Centre (“*ISTAC*”) herein.

It is important to note that subsequent to facilitation of e-Hearings through amended Article 149 of CPL in the Turkish judicial system, Turkish Ministry of Justice started to make efforts to integrate e-Hearings in Turkish litigations. Currently, e-Hearing system is being tested to make it ready to be used during judicial proceedings.

## **2. The reason behind inclusion of e-Hearings in the Turkish judicial system**

The importance of holding a hearing to resolve a dispute is indisputable. Nevertheless, travelling from one city to another, waiting hours in the courthouse, having back to back hearings in different courthouses, spending hours to attend a hearing but then learning that the counterparty submitted an *essoign* petition, having an injury which prevents one from travelling therefore attending a hearing are accepted to be far from ideal in our fast-paces lives. In other words, the requirement to physically attend a hearing is capable of causing significant delays in resolution of a dispute, it can be highly time consuming for parties, also, it is not cost effective, specifically, when one must travel from one city to another.

On top of these regular challenges, the novel COVID-19 outbreak reminded us the necessity of adopting a new approach to conventional hearings: e-Hearings. To elaborate; after the first COVID-19 case was recorded in Turkey, the courts took a measure to postpone the hearings. Consequently, in Turkey, all hearings (apart from certain exceptions, such as matters considered to be urgent) were postponed between mid-March and mid-June, i.e. approximately for three months. Even though the courts approached this postponement carefully and made an effort to proceed with the steps which do not require conduct of a new hearing, there were many lawsuits which necessitated holding a new hearing before moving forward. Also taking into consideration the courts’ tight hearing schedules, this inevitably caused significant delays in thousands of case files.

In this regard, many justifiably argued that courts needed to continue to operate despite the health risks of COVID-19 and appropriate measures should have been implemented to ensure continuous operation of the courts. The reason behind this is the fact that justice system is essential to the rule of law, which provides the framework for a democratic society<sup>1</sup>. In this regard, as courts need to continue to function, it became even more evident that it is a requirement, instead of being a mere discretionary act, to adopt new practices that permit the administration of justice without delay, specifically as to COVID-19, without any health risk<sup>2</sup>.

By highlighting the significance of courts' adaptability, the former US High Court Chief Justice Murray Gleeson stated that "*the court of the future will need to embrace, and respond appropriately to, the demands of the future, while remaining a court.*"<sup>3</sup> In this regard, utilisation of technology could be the key for ensuring courts' adaptability in an ever-changing world.

### **3. Online hearing rules and procedures**

#### **3.1. The text of Turkish Civil Procedure Law**

Before delving into the matter of e-Hearing rules and procedures, it is important to closely examine the changes made in the text of Article 149 of CPL, with a view to understand the exact novelties that the new version of Article 149 of CPL brings.

Previous to the amendment introduced through Article 17 of Law No. 7251, Article 149 of CPL provided that:

***“Conduct of a hearing through transmission of audio and video***

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<sup>1</sup> Michael Legg, “The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality” (2021). Forthcoming (2021) Federal Law Review, UNSW Law Research No. 20-46, p. 1, 2. Available at SSRN: <https://ssrn.com/abstract=3681165> (accessed September 29, 2020).

<sup>2</sup> *Ibid.*

<sup>3</sup> Chief Justice Murray Gleeson, “The Judicial Method: Essentials and Inessentials”, *The District and County Court Judges' Conference*, Sydney, 25 June 2009, 6-7.

*(1) The court may allow the parties or their attorneys to attend the hearing from their whereabouts and to carry out procedural proceedings, through simultaneous transmission of audio and video, provided that parties have consent to do so.*

*(2) The court may allow a witness, an expert, a specialist or a party to be elsewhere while they are heard, provided that parties have consent to it. Hearing shall be transmitted to the courtroom simultaneously as voice and video.”*

In consideration of the various issues arisen during the application of the previous version of Article 149 and with a view to increase courts’ adaptability, the legislators amended the respective article as below:

***“Conduct of a hearing through transmission of audio and video or elsewhere***

*(1) Upon the request of one of the parties, the court may decide for the requesting party or its attorney to attend the hearing from their whereabouts and to carry out procedural proceedings, through simultaneous transmission of audio and video of them.*

*(2) The court may, ex officio or upon one of the parties’ request, decide for a witness, an expert or a specialist to be heard from their whereabouts, through simultaneous transmission of audio and video of them.*

*(3) The court may ex officio decide for those concerned to be heard from their whereabouts for the lawsuits and deeds which the parties can freely control.*

*(4) The court may decide to hold hearings elsewhere within the provincial boundaries in case of a factual obstacle or a security reason, upon the opinion of appropriateness of the Justice Commission of the Regional Court of Appeals within its jurisdiction.*

*(5) The procedures and principles regarding the implementation of this article shall be determined by a by-law.”*

As it can be seen from the text of the amended Article 149, the changed introduced through Article 17 of Law No. 7251 loosened the criteria to hold an e-Hearing, also rendered it possible to conduct a hearing elsewhere. That said, the text of Article 149 does not specify the e-Hearings rules, rather left it to be determined in the future by a by-law. At the time of

writing this work, no by-law has been published on the procedures and principles regarding the implementation of Article 149 of CPL. Nevertheless, e-Hearing guidelines of the courts in other jurisdictions, as well as alternative dispute resolution mechanisms might be of assistance to form an opinion on what to expect.

### **3.2. A guideline: Istanbul Arbitration Centre’s Online Hearing Rules and Procedures**

Amidst the impacts of COVID-19 outbreak, ISTAC took a considerably crucial step to use technology to mitigate unnecessary delays in arbitration proceedings and therefore facilitated the process of e-Hearings. In this regard, ISTAC recently published “Online Hearing Rules and Procedures”.<sup>4</sup> Accordingly, the main rules and procedures set forth for online hearings are as follows:

- At the request of any party or in cases where the Sole Arbitrator or the Arbitral Tribunal deems appropriate, hearings or meetings may be conducted through video conference or teleconference. (Article 2)
- The Sole Arbitrator or the Arbitral Tribunal, after having consulted the parties, shall determine: the software to be used for the purpose of the hearing; the necessary measures to be taken to ensure the confidentiality and the safety of the hearing, phone numbers, links, user names or passwords or any other matters necessary for participation in the hearing; the technical infrastructure of the hearing, and shall inform the parties of such. (Article 3)
- Hearing participants shall be responsible for providing the technical equipment and software required for their participation, and shall ensure that the place in which they are located is adequate and safe for the hearing to take place. (Article 3)

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<sup>4</sup> ISTAC Online Hearing Rules and Procedures. Available at: <https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/> (accessed September 29, 2020).

- The Sole Arbitrator or the Arbitral Tribunal or the parties, may request technical support from the ISTAC Secretariat regarding the hearing. The ISTAC Secretariat will provide explanations regarding technical issues and technical support to the parties and the arbitrators, within its means. (Article 3)
- Before the hearing, the parties shall notify the Sole Arbitrator or the Arbitral Tribunal of the hearing participants. (Article 4)
- During the hearing, no third party other than those notified to and permitted by the Sole Arbitrator or the Arbitral Tribunal may attend the hearing. (Article 4)
- During the hearing, only one person shall speak at any one time and all other participants shall have their microphones muted so that image and sound quality are not affected. The party seeking to speak, shall do so by permission of the Sole Arbitrator or the Arbitral Tribunal. (Article 5)
- During the hearing, with the permission of the Sole Arbitrator or the Arbitral Tribunal, documents may be transmitted electronically. (Article 6)
- The Sole Arbitrator or the Arbitral Tribunal shall make every effort necessary to ensure that the parties and any others concerned have the opportunity to attend the hearings and that their right to be heard is not violated. (Article 7)
- The Sole Arbitrator or the Arbitral Tribunal, in cases where it is convinced during the hearing that right to be heard has been violated, may end the hearing at any time and give its reasons for doing so. (Article 7)
- In cases where it is decided that a witness or an expert will be heard during an online hearing, the witness or the expert shall attend the hearing through video conference or video call. The witness or the expert attending an online hearing shall be present in front of the camera with their face clearly visible. (Article 8)

- The Sole Arbitrator or the Arbitral Tribunal shall decide whether any documents can be made available for the witness or the expert. The Sole Arbitrator or the Arbitral Tribunal may allow a particular document to be made available to the witness during the hearing. In cases where the Sole Arbitrator or the Arbitral Tribunal deems it appropriate, the documents to be presented to the witness can be transmitted electronically during the hearing and questions can be asked regarding those documents. (Article 8)
- The Sole Arbitrator or the Arbitral Tribunal, in cases where it is deemed necessary, may allow the use of an interpreter. In such cases, the party requiring translation will provide an interpreter to attend the hearing. The credentials of the interpreter will be provided to the Sole Arbitrator or the Arbitral Tribunal in advance. The interpreters may attend the hearing together with the person for whom they shall interpret or they may attend the hearing from a third location. (Article 9)
- The Sole Arbitrator or the Arbitral Tribunal may, by informing the parties, decide that the hearing shall be recorded by audio or video. Such recordings shall be shared with the parties following the end of the hearing. (Article 10)
- The Sole Arbitrator or the Arbitral Tribunal may, at the expense of the parties, decide to have the recordings transcribed. (Article 10)
- It is forbidden to record any audio or visuals during any stage of the hearing, without leave of the Sole Arbitrator or the Arbitral Tribunal. (Article 10)

Even though the rules of e-Hearings in courts are yet to be determined, the rules regulated by ISTAC might light the way for the application of Article 149, as well.

#### **4. Conclusion**

This work has sought to make a thorough evaluation of the amendment introduced to Article 149 of CPL through Article 17 of Law No. 7251. While examining the novelties brought by



the aforementioned article, the importance of the possibility to holding e-Hearings was underlined, as well.

Furthermore, it is addressed that COVID-19 pandemic and related health considerations demonstrated the need to adopt technology to ensure continuous operation of courts and therefore to prevent any delay in justice. In this regard, it is incontrovertible that courts' ability to respond to changes and maintain their operation in times of crisis is fundamental in a democratic society.

Lastly, it is noted that Article 149 regulated that the procedures and principles regarding e-Hearings will be determined by a by-law. Even though at the time of writing this work no by-law has been published in this regard, this work has aimed to constitute a guideline on possible procedures and principles for conducting e-Hearings.

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