GLOBAL LEGAL INSIGHTS

Litigation & Dispute Resolution

Second Edition

Contributing Editor: Michael Madden

Published by Global Legal Group

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Turkey

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Efficiency/integrity

The main and most commonly used method for resolving disputes in Turkey is litigation. The Civil Procedural Law numbered 6100 ("Procedural Law"), which abrogated and replaced former Civil Procedural Law numbered 1086 dated October 4th, 1927, was enacted by the Turkish Parliament on January 12th, 2011, and came into force as of October 1st, 2011. One of the major purposes of this legislation is to increase efficiency in the litigation process. In this respect, significant steps were taken in order to fulfill the principle of efficiency regarding court procedures. These significant steps will be introduced in brief, hereunder.

According to the Procedural Law, Turkish litigation generally involves six stages: exchange of petitions; preliminary investigation; court hearing; court investigation; court decision; and appeal (if any). Depending on the complexity of the lawsuit, a civil proceeding may take from one-and-a-half to three years including, as the case may be, the period of time to elapse for appeal proceedings.

All the time periods regarding the litigation phases are standardised by Procedural Law, so as to provide that all are either one week or two weeks, in order to avoid tens of different time periods for different litigation phases. Additionally, with respect to the costs, the Procedural Law introduces a new institution named advance expense fees − which will be evaluated in detail below, in the section "Costs and funding" − to enhance efficiency. With respect to efficiency, as per Article 30 of the Procedural Law, the judge is in charge of ensuring that proceedings are performed in reasonable time, in order, and without incurring unnecessary expense.

The Procedural Law adopts also a different system regarding the first instance court to be resorted to, when initiating a lawsuit. The former Civil Procedural Law numbered 1086 stipulated two different types of court of first instance, which were mainly distinguished from each other by the value of the amount corresponding to the legal dispute at hand. Although current Procedural Law preserves the dual structure in principle, it brought a very clear distinction between the two courts of first instance and separated their jurisdiction precisely, so as to prevent any further complexity. The aim of this change was also to decrease the number of the lawsuits initiated before the courts − which lack jurisdiction, considering how burdensome these wrong proceedings are.

Article 137 of Procedural Law introduces a new process to civil litigation known as the preliminary examination, where the judge examines the prerequisites of bringing a lawsuit before the court, the preliminary objections which may arise, designates the matters of the legal dispute, initiates the proceeding of obtaining relevant evidence, and encourages the parties for settlement. The preliminary examination phase commences once the parties submit their replication and rejoinder petitions as well as their evidence before the case file. During this phase, the judge first examines whether the prerequisites of bringing a lawsuit are fulfilled and then examines the preliminary objections, without scheduling a hearing, by merely conducting the examination on the documents and evidences submitted. If the court deems necessary, it might hold a preliminary examination. This hearing is held only once, unless it is unavoidably necessary to have another.

One of the main intentions of the legislator in introducing this process is to 'fasten' the litigation process by providing an opportunity for the judges to study the facts of the case and get even more

familiar with the lawsuit at hand, before an actual hearing is held. Another intention of governing the preliminary examination phase is to encourage the parties to settle or to apply for mediation, which is in fact a different means for settlement. During this phase, the court would create a convenient environment for amicable solutions between the plaintiff and the defendant, and thus endeavours to prevent the dispute from spreading to further litigation phases. While the former Civil Procedural Law was in force, there arose cases where the hearings were postponed and thus the whole process took more time due to the technical and complex nature of the lawsuits, for which the judges required more time to get acquainted with the subject of the lawsuit. In this regard, the preliminary examination process will help judges to be more familiar with the subject within a shorter time. The courts, now, are entitled to conduct a preliminary examination on the lawsuit file, even without scheduling a hearing date, and are able to save both the court's and the parties' time in this respect, in case the preliminary examination phase is realised properly. That being said, the defenders of the opposite view claim that the preliminary examination process is an unnecessary and an extra burden on the system.

As for the impartiality of the judiciary, Articles 34, 35 and 36 of the Procedural Law respectively stipulate the challenge of the judge, in which event the judge must stop hearing the lawsuit without the need for any objection or upon objection from the parties, in which latter event the parties have the right to object to the judge and request the removal of her/him. In some situations the court prohibits the judge from hearing the case, for example, kinship by blood, or affinity by marriage with one of the parties. In such cases, the judge has to leave the lawsuit regardless of the presence of a demand.

While the Procedural Law preserves what is stipulated under former Civil Procedural Law, one significant change is made regarding the impartiality of the judge. Current Procedural Law stipulates that in case the parties bring a lawsuit disputing impartiality of the judge, the lawsuit should be initiated against the state, whereas the former Civil Procedural Law ruled that the defendant should be the judge in such cases. This enables a greater opportunity for security for the plaintiff, as her/his loss will be covered by the state.

Enforcement of judgments/awards

Enforcement of a local judgment is regulated under Turkish Enforcement and Bankruptcy Code ("EBC") numbered 2004, dated 19 June 1932. According to EBC, if the defendant does not comply with the court's judgement, the claimant can apply to the execution office for the enforcement of the decision. If the defendant does not comply with the enforcement order within seven days of the serving date of the execution order, the assets that the defendant may have, can be confiscated on the request of the claimant.

International Private and Procedural Law numbered 5718 ("International Procedural Law") stipulates the recognition and enforcement of foreign judgments in Turkish courts. As per Article 50 of International Procedural Law, the enforcement of civil court rulings of foreign courts in Turkey depends on the granting of a decision of approval by a competent Turkish court.

Article 54 of International Procedural Law stipulates the conditions upon which a court may grant a decision of approval. Accordingly, the first condition sought is reciprocity between Turkey and the foreign country where the ruling took place. The second condition set out by the relevant article is that the ruling of the foreign court should not be on a subject which is at Turkish courts' sole discretion. Thirdly, the ruling of the foreign court should not bear any distinctive conflict with public order. Lastly, there is one other condition regarding the representation of the person, against whom a decision of approval is requested, before the relevant foreign court.

With respect to Turkish courts' examination of the recognition and approval requests, the simple proceeding system is adopted. The reason why the legislator preferred adopting this procedure is to fasten the litigation process; accordingly, the decision of recognition and the execution of rulings of foreign courts will be made in the shortest time. The Procedural Law further stipulates the provisions regarding the simple proceeding system in detail. Once the foreign rulings are approved and recognised by the Turkish courts, they are deemed to be ruled by Turkish courts. Accordingly, general provisions of Turkish execution legislation apply with respect to the execution of the foreign rulings which are approved and recognised by Turkish courts.

On a final note, as for the recognition and enforcement of foreign arbitral awards, the main legislations on the enforcement of arbitral awards in Turkey are International Procedural Law and the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") which was ratified by Turkey on July 2nd, 1992 and entered into force on September 30th, 1992. Enforcement of a foreign award in Turkey shall be subject to the provisions of the New York Convention only if such decision is rendered in a signatory country to the New York Convention. Turkey made two reservations and limited the applicability of the New York Convention by declaring that it will apply the New York Convention for the recognition and enforcement of foreign awards granted in another state that is a signatory to the New York Convention on the basis of complete reciprocity, and only for conflicts arising from contractual or non-contractual relationships that are deemed to be of a commercial nature under its national law.

If the award is rendered in a state that is not a signatory to the New York Convention, then the enforcement of the award shall be subject to the Turkish International Procedural Law. According to the International Procedural Law, a foreign award can be enforced in Turkey provided that such award is final and binding under the applicable procedure law. The procedures foreseen for enforcement of a foreign award by the International Procedural Law are similar to the provisions of the New York Convention. Yet, International Procedural Law requires that a standard of reciprocity be met before a foreign award can be recognised or enforced. If there is an agreement that exists between Turkey and such country regarding reciprocal enforcement, or a provision in the foreign law permitting the enforcement of a Turkish award, or a *de facto* practice that enables enforcement of Turkish awards, then reciprocity is deemed to exist. In order to enforce an award, it is a requirement that an enforcement lawsuit be initiated before the civil court of first instance. According to International Procedural Law, if the judgment is rendered on an issue that is not within the exclusive authority of the Turkish courts, if it is explicitly against public order, or if the person against whom the enforcement is requested was not properly summoned, or was not represented in court, the court can avoid enforcement of the judgment, provided that the relevant party raises these objections before the Turkish court. Domestic awards are enforced in the same way as judgments rendered by Turkish courts.

Cross-border litigation

According to Article 57 of International Procedural Law, foreign judgments that are enforced by a Turkish court are executed as if they were rendered by a Turkish court.

The concept of cross-border litigation in Turkey allows evidence, either oral or documentary, to be obtained from foreign countries provided that an international agreement exist thereof. Being the case, Turkey is a signatory of the 14th Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of the Hague Conference on Private International Law ("Convention"), concluded on November 15th, 1965. Pursuant to Article 1 of the Convention, it shall apply in all lawsuits, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. The Convention was ratified by Turkey on June 11th, 1968. The Central Authority of which Article 2 of the Convention stipulates the designation, is the Ministry of Justice. The Central Authority is appointed to undertake to receive the requests for service coming from another signatory party, and proceed in conformity with the Articles 3 to 6 of the Convention.

Although Turkey is a signatory, the notification procedure concerning foreign parties could still raise problems, as Turkey declared an opposition with respect to Article 10 of the relevant convention. Article 10 of the Convention regulates the freedom to send judicial documents, by postal channels, directly to persons abroad. Turkey, by putting an opposition with respect to the relevant matter, regulated that the persons living abroad should be notified through the Ministry of Justice. As a result, notifications coming from abroad cannot be notified directly to the persons residing in Turkey and *vice versa*, but only through The Ministry of Justice Directorate of Legal Affairs. In practice, there have been cases where the notification period went up to almost a year.

Privilege and disclosure

According to Article 27 of Procedural Law, the parties of the lawsuit and other relevant persons have

the right to be heard before the court in connection with their rights. Nevertheless, as per Article 29 of Procedural Law, while they have been using this right, they have to act in conformity with the principle of correctness. On the investigation stage, the court may duly summon both parties, and hear them about the facts asserted.

As per Articles 240-243 of Procedural Law, the persons who are not the party of the lawsuit may be heard as witnesses. The witnesses are summoned by the court; yet the witnesses who are present at the court can also be heard. Article 149 of Procedural Law allows electronic disclosure of the parties, witnesses and experts providing that the consents of parties are present, and that the video and audio is transferred to the court immediately.

According to Article 159 of Procedural Law, all petitions and documents submitted to the court are filed by the court clerk after they are referred to the judge or chief clerk. Under the monitoring of the court clerk, the parties may review the lawsuit file and may obtain copies of the documents from the lawsuit file. The persons related to the lawsuit may review the lawsuit file with the permission of the judge. The documents that are decided to be kept in secret can only be reviewed with the explicit permission of the judge.

Additionally, the client confidentiality with regard to criminal law is regulated by Criminal Procedure Law numbered 5271. As per Article 154 of Criminal Procedure Law, suspect or accused shall always meet with the defence counsel without requesting for a power of attorney, in an environment where nobody can hear the conversation. The correspondence of these people with defence counsel may not be reviewed.

Advocacy Law numbered 1136 also protects client confidentiality. According to Article 36, lawyers are forbidden to disclose the information that they have learnt under the favour of their jobs. Attorneys shall witness with regard to the lawsuit, provided only on the consent of their clients. Yet, even if the consent is given, attorneys could refuse to testify. The choice hereby does not cause any legal or penal responsibility.

Finally, Article 36 of the Turkish Bar Association Code of Practice offers a comprehensive regulation on conflict of interests. In a dispute, a lawyer who provides legal assistance to one of the parties may not represent the other party with whose interest is conflicted, and can provide no legal aid. Moreover, lawyers who work in the same office are also obliged not to represent people whose interests have conflicted.

Costs and funding

According to Article 326 of Procedural Law, with the exception of the situations written on Procedural Law, costs of proceedings are paid by the party against whom the judgment is rendered. Although the basic principle that the party which loses the lawsuit pays is preserved, Article 120 of Procedural Law introduces an institution named advance expense fee. As per the relevant article, the plaintiff has to pay the litigation fees and the expenses, as stipulated annually by the Ministry of Justice, while initiating a lawsuit. In case it is determined that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted a two-week term to realise the payment.

As per the Tariff on Procedural Law Advance Expense Fee ("Tariff"), the advance expense fee covers all fees such as the notification expenses, expenses related to witnesses, expert examinations, investigations, etc. If any amount remains from the advance expense fee which is paid by the plaintiff while initiating a lawsuit, the remaining advance expense fee is returned to the plaintiff regardless of whether she/he loses the relevant lawsuit or not.

On a different note, as for the securities provided to the parties under Turkish legislation, in certain situations listed within Article 84 of Procedural Law, the court may order the plaintiff to provide appropriate warrant which will meet possible proceeding costs of defendant. These are the situations where the plaintiff has (i) no habitual residence in Turkey, (ii) where she/he is proven to be in financial difficulty such as bankruptcy, or (iii) where other circumstances necessitating collateral occurred during the case.

According to Article 87 of Procedural Law, the type and amount of the warrant is defined by the judge.

However, if the parties determined the warrant with an agreement, the warrant would be determined in accordance with this agreement. If the warrant is not provided in a certain time, the lawsuit shall be rejected based on the procedural ground hereby.

Additionally, if the plaintiff is a person who does not have the ability to pay the costs of proceedings, she/he may benefit from legal aid providing that she/he forms an opinion that they are right. The costs suspended due to legal aid and advance payments made by the State are withdrawn from the party which loses the lawsuit at the end of the litigation.

As for the obligatory security which is to be submitted by foreign legal or real persons in case they were to initiate a lawsuit or an execution proceeding in Turkey; the first matter to be taken into consideration is that in case the relevant party is not a party to the Convention of March 1st, 1954 on Civil Procedure, and in case there does not exist any other bilateral agreement signed between the relevant party and Republic of Turkey regarding the matter, the relevant party shall submit a security amount, the amount of which is at the court's discretion: we have seen cases where such amount went up as much as 10% of the amount in question. It should be noted that the relevant amount is at the court's discretion, and is thus subject to change.

Interim relief

The concept of interim relief, which set forth under Article 389/1 of Procedural Law, gives parties who wish that a counter party may not dispose of its property, the right to request from the court that an interim relief on the counter party's movable and immovable properties is granted. Accordingly, the court may grant a suitable interim remedy with respect to the subject of the dispute at hand, in cases where there is an emergency situation which may cause the current situation to be changed, that may inevitably obstruct acquiring a right, or where substantial damage is expected to occur.

Three main types of judgments regarding the interim relief available under Procedural Law are: (i) judgments for performance, which include all kinds of monetary judgments and judgments for specific performance; (ii) judgments for a declaratory judgment; and (iii) judgments for the establishment or change of a right or legal status. Furthermore, if so requested and upon the ruling of the court, a default interest (to be calculated at a statutory rate) may be payable on monetary claims. An interim relief request shall be made prior to or during the litigation process.

As per Article 393/1 of Procedural Law, execution of the interim relief decision shall be requested within one week of the decision's date. Otherwise, an interim relief decision, by itself, shall no longer be executed even if the lawsuit has been brought within the legal period. The counter party shall object to the interim relief decision provided to it not being heard as the interim relief subject. The objection shall not cease the execution proceedings unless otherwise provided.

Furthermore, pursuant to Article 392/1 of Procedural Law, the party which requests an interim relief shall ensure a security for the presumptive damages that the counter party or the third person would suffer in case he/she could be found unfair. The court, provided that the reason of its decision has to be explicitly indicated, shall decide for the non-performance of the security, if the claim would rely on an official document or conclusive evidence and where the conditions or the situations require thereof. The party benefiting from the legal aid is not obliged to provide any security.

International arbitration

Domestic arbitration, applied on arbitrary disputes if they are subject to national law and designated the Turkish courts as being authorised, is regulated under Procedure Law. On the other hand, international arbitration is governed by the Turkish Act on International Arbitration Law ("Arbitration Law") numbered 4686, which is enacted, to a great extent, under the influence of the UNICITRAL Model Law.

Arbitration Law provides benefits for foreign investors by shortening the resolution time of their dispute and minimising the state court's interference in order to reach final and enforceable awards. Indeed, the contractual parties, for instance, may waive partially or wholly their right of request for setting aside of an award, and challenge the award even before the arbitration proceedings are initiated, provided that both parties' domiciles are outside Turkey. In that sense, Arbitration Law is

applicable for the resolution of disputes borne from contracts containing a foreign element, and is applicable where it is selected as applicable law either by parties or by the arbitral tribunal.

As per Article 4 of Arbitration Law, an arbitration agreement should be formed in writing between parties. The written form required is complied with if the arbitration agreement is included in a written document signed by the parties. If an agreement is made by way of an exchange of letters, telex, telegrams, fax or other means of telecommunications, then the existence of an agreement may be put forward only in case of an acceptance of the other party. Additionally, the Arbitration Law adopts the principle of autonomy in terms of the appointment of arbitrators. Although parties shall freely decide the number of the arbitrator, such number should be odd.

The Turkish Union of Chambers and Commodity Exchanges Court of Arbitration, Istanbul Chamber of Commerce Arbitration Institution, and Turkish Football Federation Arbitration Board are the main institutions that offer arbitration services in Turkey.

As the domestic arbitration, Procedural Law is regulated in line with international law and UNCITRAL principles; there will be no significant difference between the application of the international law and the Turkish Law with respect to arbitration process. Nevertheless, the major regulations are as follows:

First of all, Article 408 of Procedural Law stipulates that it is forbidden to bring right *in rem* disputes on immovable properties and transactions lacking the will of the parties before arbitral bodies.

Furthermore, Article 414 of Procedural Law draws attention to an important issue, which is the authorisation of the arbitrators regarding the ruling of injunctive relief and recording of evidence. However, this should not lead to the conclusion that the arbitrators are entitled to give a ruling of execution by themselves and overruling an authorised national court. On the other hand, as the arbitrators may change or dismiss the execution ruling that the national court has given, the balance between the arbitrators and the courts are well protected.

In addition, Article 423 regulates the transparency and the principle of equity in the prosecution process and Article 424 underlines the principle of freedom of contract, keeping mandatory rules reserved.

Moreover, Article 439 of Procedural Law, which is another distinguished regulation regarding the appeal process, states that there is only one way to appeal and that is the annulment of the arbitrators' ruling. This decision of annulment may be appealed, however. Even though the decision should be taken promptly, this does not interfere with the execution process.

As within the current legislation, we clearly see that the independence of the arbitrators and the will of the parties are widely protected, and as the arbitrators' authorisation does not preclude the jurisdiction of the national courts; a balance between them is well reserved.

Mediation and ADR

The new Law on Mediation on Civil Disputes numbered 6325 ("Mediation Law"), published on June 22th, 2012 in the Official Gazette, and its provisions, will come into force one year after its release date, i.e. June 22nd, 2013. Mediation Law, as an alternative dispute settlement method in Turkey, shall only apply to the resolution of civil law disputes arisen from matters and proceedings, including those bearing foreign elements. Nevertheless civil disputes containing allegations of family violence does not fall within the scope of Mediation Law.

The mediator facilitates a resolution through a process of communication and is obliged to provide equality amongst the parties. The parties are free to resort to a mediator, and to sustain, terminate or renounce a process of mediation. As per Article 13 of Mediation Law, parties may agree to apply for a mediator, prior to or during the litigation process. The mediator shall be selected by the parties, unless otherwise agreed. Pursuant to the Article 15, the mediator may not take any action on matters that fall within the jurisdiction of a judge. Additionally, Mediation Law also ensure the right of the parties and therefore stipulates that, the period, beginning from the initiation of mediation process until its termination, shall not be taken into account whilst calculating the lapse of time and statute of limitation.

With regard to confidentiality, a delicate subject of the mediation process, Mediation Law obliges the mediator to keep confidential all information, documentation and any other forms issued for, or arising out of, or in connection with, the mediation.

According to Mediation Law, the mediator has to be: a Turkish citizen; a graduate of a faculty of law with at least five years of seniority in the profession; may not have been sentenced for an international crime; has to have an absolute ability in addition to the obligatory training that ought to be completed; and have passed a written and practical exam.

Additionally, Article 35/A of Advocacy Law also stipulates that attorneys may invite parties for settlement on the issues that may be resolved upon the relevant parties' will and mutual consent.

On a separate note, with respect to Article 320 of Procedural Law, on the pre-examination process (which is significant to gather a great amount of evidence and ascertain the dispute broadly), the judge shall encourage the parties towards settlement or mediation following the determination of the dispute.

Furthermore, pursuant to the concept of reconciliation stipulated under Article 253 *et seq*. Criminal Procedure Law, there shall be an attempt to reconcile between the suspect and the victim, or the real or legal person who has suffered damages from the crimes investigated and prosecuted upon complaints, crimes of intentional wounding, negligent wounding, violation of immunity of domicile, kidnapping, revealing the information or documents of a commercially secret, banking-secret or consumer-secret nature, regardless of whether they require to be claimed or not. In order to apply the concept of reconciliation, excluding crimes of those investigated and prosecuted upon a claim, within the scope of other codes, there should be an explicit provision. Nevertheless, crimes against sexual integrity and crimes allowing the application of effective remorse provisions are excluded, even where they are investigated and prosecuted upon a claim. The proposal for the reconciliation shall be deemed as refused in case where the suspect, the victim or the person who has suffered damages from the crime does not notify the decision as to the reconciliation within three days of its proposal. The reconciliation shall not be applied again once it has been deemed inconclusive.

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