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Turkey

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Efficiency/integrity

The new Civil Procedural Law Numbered 6100 ("New Procedural Law") came into force on October 1st, 2011. One of the major purposes of this new 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 the court procedures. These significant steps will be introduced in brief, hereunder.

Firstly, all the time periods regarding the litigation phases are standardised so as to provide 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 New Procedural Law introduces a new institution, named advance expense fees, which will be evaluated in detail below under the section of "Costs", to enhance efficiency.

Additionally, the New Procedural Law adopts a different system regarding the first instance court to be resorted to, while initiating a lawsuit. The Old 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 the New Procedural Law preserves the bi-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.

A vital change, and a breath of fresh air, is brought to the litigation processes with Article 137 of the New Procedural Law. Article 137 introduces a new process to the civil litigation, titled 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 evidences before the case file. During this phase, the judge first examines whether 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 inevitably necessary to have another. One of the main intentions of the legislator in introducing this process is to accelerate 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 to 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 Old 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 case 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. This being said, the defenders of the opposite view claim that the preliminary examination process is unnecessary and an extra burden on the system.

As for the impartiality of the judiciary, Articles 35 and 36 of the New Procedural Law respectively stipulates in which events the judge must stop seeing the case without need to any objection or upon objection from the parties, and in which events the parties have the right to object to the judge and request the removal of her/him. While the New Procedural Law preserves what is stipulated under Old Procedural Law almost the same, one significant change is that the New Procedural Law stipulates that in an event where the parties will bring a lawsuit disputing impartiality of the judge, the lawsuit must be initiated against the state, whereas the Old 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.

However, there are some arguments claiming that the judiciary is not as impartial as it should be, based on the following explanations. The Constitution of 1982 establishes a High Board of Judges and Prosecutors ("Board") to provide the independence of the courts. The Board's main duties include deciding upon the admittance of the prospective judges and prosecutors, to inflict disciplinary punishments on judges and prosecutors, where necessary, and to transfer and promote the judges and prosecutors. The Board consists of 22 primary members, and the Justice Minister is the head of Board. The Justice Minister and the Undersecretary of the Justice Minister are natural members of the Board. Four primary members are chosen by the President, three primary members are chosen by the members of the High Court of Appeals, two primary members are chosen by the members of Council of State, one primary member is chosen by the members of the Turkish Justice Academy, seven primary members are chosen among civil judges and prosecutors by themselves and, finally, three primary members are chosen among administrative judges and prosecutors by themselves. The relevant article of the Constitution of 1982 regarding the structure of the Board has been amended and adopted as to what is explained above. Subsequent to the newly adopted structure, there have been many pro and con arguments regarding impartiality of the judiciary. The most significant con view is regarding the increasing effect of the executive organ on the judiciary and, therefore, on the assignment of the judges indirectly, and the most pro view is that the independence of the judges and prosecutors were increased through the newly adopted structure.

On a final note, one issue which hinders efficiency in matters involving international disputes is the service of notifications. Although Turkey is a signatory to various reciprocal agreements, including the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"), 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.

Enforcement of judgments/awards

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

Article 54 of the International Private and 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 is not on a subject which is at the 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 duly representation of the person, against whom a decision of approval is requested, before the relevant foreign court.

With respect to the Turkish courts' examination of the recognition and approval requests, the simple proceeding system is adopted. The reason the legislator preferred adopting this procedure is to accelerate the litigation process; accordingly, the decision of recognition and the execution of rulings of the foreign courts will be made in the shortest time. The New Procedural Law further stipulates the provisions regarding a simple proceeding system in detail.

Once the foreign rulings are approved and recognised by the Turkish courts, they are deemed as though they are 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 the Turkish courts.

On a final note, as for the recognition and enforcement of foreign arbitral awards, Turkey has been a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since July 2nd, 1992. Thus, the recognition and enforcement process of an international arbitral award in Turkey is subject to the aforementioned convention rather than the legislation explained above.

On a different note, under Turkish procedural legislation, parties have been provided with the right to enter into a written agreement through which they specifically determine which court would have jurisdiction in settling and resolving legal disputes. One of the significant differences between the Old Procedural Law and the New Procedural Law is that the New Procedural Law stipulates that such an agreement could only be made between merchants and/or public corporations, whereas the old Turkish Procedural Law Numbered 1086 did not stipulate any such restriction. With this change, if the persons other than merchants and/or public corporations enter into such an agreement, it will be void. The other difference is that, as per the New Procedural Law, once the parties enter into such an agreement to determine the competent court, that court would have exclusive jurisdiction over the disputes. However, the Old Procedural Law governed that such an agreement would not abolish the competency of the courts that are stipulated under the laws. One of the purposes of the legislator for stipulating such restriction is to protect the weak party in a situation where a non-merchant party, e.g., a consumer, and a merchant, e.g., a bank, enters into a contract. The same protective approach is also seen to be adopted by the New Turkish Law of Obligations Numbered 6098.

Privilege and disclosure

Turkey has no specific fully-fledged law governing the privacy of personal data.

The applicable legislation in this respect is: (i) Articles 20 and 22 of the Constitution of 1982, which generally protect privacy of personal life and communication, respectively; (ii) Article 24 of the Turkish Civil Code Numbered 4721, which entitles individuals, whose personal rights are unjustly violated, to file a civil action; (iii) Article 75 of Labor Law Numbered 4857, which stipulates the employer's liability to use employee information in good faith; and (iv) Articles 135, 136 and 138 of the Turkish Criminal Code Numbered 5237, which regulate unlawful storage of, transmission or reception of, and failure to destroy personal data, respectively.

Additionally, there is a draft law on the protection of personal data ("Draft Privacy Law"), which has been submitted to the General Assembly of the Turkish legislator parliament for ratification, however no progress has been made since the Draft Privacy Law was put on the agenda in 2006 and currently the Draft Privacy Law is declared as being void in the Turkish parliament's online records.

As for the transfer of personal data to foreign countries, there is no legislation which specifically deals with it other than the aforementioned Draft Privacy Law. Thus, as also realised for the governance of the privacy of personal data, the transfer thereof is realised by the general provisions of Turkish civil legislation as well, namely: (i) Article 24 of the Turkish Civil Code Numbered 4721, which entitles individuals whose personal rights are unjustly violated to file a civil action and stipulates that any

attack on personal rights is against the law unless there is the consent of the person, whose personal rights were violated, there is a superior private or public benefit or unless such case arose from the use of authority granted by law; and (ii) Article 75 of Labor Law Numbered 4857, which stipulates that the employer is obligated to use any information, which it obtains about the employee, in good faith and in compliance with the law and not to disclose any information which the employee has a benefit in keeping confidential.

As for the criminal aspect of the matter at hand, Article 136 of the Turkish Criminal Code Numbered 5237, without making a distinction between international and domestic data transfers, states that anyone who unlawfully transfers personal data shall be sentenced.

In light of the foregoing, although there is no one specific law dealing specifically with the protection and transfer of personal data to foreign countries, person(s) who deal with and or transfer(s) personal data to foreign countries should do so in compliance with the aforementioned provisions.

As for the rules of disclosure and the scope for ordering disclosure from the third parties with respect to legal disputes, the main principle regarding the handling of hearings and the announcement of decisions is that they are done so in public, Article 28 of the New Procedural Law stipulates that a part or whole of the hearings can be held in private upon the request of the parties or by the court itself, only if the general ethics and the public safety so requires. The court then warns the persons, who are present, not to disclose any information regarding the relevant litigation, and on the consequences thereof under the Turkish Criminal Code.

Additionally, regarding client-attorney privilege and mechanisms in place for the protection of legal advice and documents prepared in respect of litigation, Article 36 of Attorneys Law Numbered 1136 stipulates that it is forbidden for attorneys to disclose any information they learned through their profession. The attorneys may testify before the court regarding the aforementioned information only upon approval of their client. Even in the event of approval, attorneys may avoid testifying regarding information they learned through their profession. Such avoidance will not result in any legal or criminal liability.

Costs and funding

Turkish procedural legislation accepts the main principle where the loser pays for the prosecution costs of all parties, and other types of costs. This principle is preserved within Article 326 of the New Procedural Law.

Although the basic principle that the loser pays is preserved, Article 120 of the New Procedural Law introduces a brand new institution, named the advance expense fee. As per the relevant article, the plaintiff has to pay the litigation fees and the amount as stipulated annually by the Ministry of Justice, while initiating a lawsuit. In case it is seen that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted with a two-week term to realise the payment. As per the Tariff on the Procedural Law Advance Expense Fee ("Tariff"), the advance expense fee cover all fees such as the notification expenses, expenses related to witnesses, experts, investigation, etc. If any amount remains from the advance expense fee which was 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.

One of the main reasons why the legislator preferred to introduce this new institution, the advance expense fee, is that the payment of the relevant amount prior to any phase of litigation would accelerate the litigation process. Compared to the old legislation where the relevant party paid the expenses separately, an advantage of this clause might be that it will make the litigation process faster and, hence, the delay in the judgment would be reduced noticeably. On the other hand, there exists an opinion that putting such a financial burden on the plaintiff hinders the right to trial and renders it possible only for the rich to resort to judicial remedies. Another opinion on the advance expense fee is that this clause prevents people from initiating a lawsuit which lacks legal grounds and makes them think twice, since the advance expense fee might be a significant amount, and therefore that this clause would help in reducing the courts' heavy work-load. Whether it really does or not is still vague, as the practice is very recent.

On a different note, as for the securities provided to the parties under Turkish legislation, Article 84 of New Procedural Law stipulates that security in an adequate amount should be provided to prevent any possible loss on the defendant's behalf, in cases which mainly include (i) a citizen of Turkey not residing in Turkey initiating a lawsuit, and (ii) the plaintiff having gone bankrupt before.

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 the Republic of Turkey regarding the matter, the relevant party will have to submit a security amount, the amount of which is at the court's discretion and which we have seen cases where such amount went up to as much as 10% of the amount in question. It should be noted that the relevant amount is at the court's discretion, thus it is subject to change.

Interim relief

A party, who wishes that a counter party cannot dispose of its property, may request from the court that an interim relief on the counter party's movable and immovable properties is granted.

The aforementioned securities are different from and in addition to the one which would be requested by the court as per Article 392 of the New Procedural Law, when one requests from the court that a preliminary injunction on a counter party's movable and immovable properties is granted. This security obligation applies to all regardless of the nationality, i.e., either Turkish or not. There have been cases where the amount to be requested by the court when a party requests from the court that a preliminary injunction on a counter party's movable and immovable properties is granted, added up to 30% of the amount in question. The relevant amount would be given back to the party, which initiates a lawsuit against the counter party, in whole, without any interest, after the decision of the court is finalised.

An additional protective measure available in respect of a counter party's assets would be the protection granted within the Execution and Bankruptcy Law (the "EBL"). In principle, there is no limitation to the transactions of any party prior to its bankruptcy, thus the transactions of any party shall be valid unless the conditions stipulated under EBL are fulfilled. Accordingly, one cannot assert that the transaction made prior to bankruptcy would be completely safe and sound from a legal point of view due to certain rules introduced by the EBL.

As per Article 278 of the EBL, in case a legal entity becomes subject to a bankruptcy, transactions which were conducted by the legal entity "without any consideration or in consideration of insignificant amounts" within 2 (two) years prior to such attachment and bankruptcy are deemed null and void. Any kinds of donations are deemed as transactions without consideration. The legal entity's transactions being null and void in the aforementioned way do not technically lead to nullity under substantive law (meaning that the transactions between the entity and the third parties remain valid), but entitles the creditors who could not collect their receivables to request the sale of the subject of the transactions (even if they remain the property of third parties) and collect his/her receivables therefrom.

In addition, as per Article 279 of the EBL, transactions of: (i) creation of a pledge over movable or a mortgage over immovable properties to secure an existing debt (where the pledgor had not previously committed to create such pledge or mortgage); (ii) conducting payment for undue debts; (iii) any payment made via any tool other than money; and (iv) annotations which are to be registered with the title deed to empower personal rights, which are exercised within 1 (one) year prior to the bankruptcy are deemed null and void (meaning and resulting in the way as explained here above) unless the third party transacting with the bankrupt entity proves that he/she was not aware of the financial condition of the bankrupt legal entity. The above mentioned challenges, if accepted by the relevant court, also entitle the creditor to request the sale of the subject of the transactions and collect its receivables therefrom.

Finally, according to Article 280 of the EBL, all transactions conducted by a legal entity whose capital is not sufficient to meet its debts for purposes of not compensating its creditors are deemed null and void (meaning and resulting in the way as explained here above), provided that the other parties of the transactions are aware of the economic situation of the legal entity or there is explicit evidence

which would require such third parties to be aware of the legal entity's situation. However, in order to enforce this provision, the legal entity must have been subject to a bankruptcy, which is initiated by a specific creditor claiming the nullity of the above mentioned transaction within 5 (five) years following the date of such transaction. In such case, the specific creditor requesting bankruptcy (such creditor must hold a certificate of insolvency, meaning that he/she could not collect its receivables) or the execution office itself may challenge the prior transactions of the legal entity. Although, according to the wording of the aforementioned article, the prior transactions of the legal entity are contested to be null and void, such challenge, indeed, if accepted by the relevant court, entitles the creditor to request the sale of the subject of the transactions and collect his/her receivables therefrom. Such an article cannot be enforced in case the other parties of the transactions are *bona fide* third parties. To sum up, in case a legal entity becomes subject to an attachment or bankruptcy, creditors who could not collect their receivables may claim the nullity of the transactions conducted by the legal entity to the detriment of its creditors within five (5) years prior to such transactions, provided that the other parties of the transactions are aware of the economic situation of the legal entity or there is explicit evidence which would require such third parties to be aware of the legal entity's situation. The determining factor in the above mentioned Article 280 is whether the transactions (could be any transaction) are conducted by the legal entity to the detriment of its creditors and the other parties are not *bona fide* or are obligated to be aware of the financial situation of the legal entity.

On a final note, it is noteworthy that, during any lawsuit based on Articles 278, 279 and 280 of the EBL governing this matter, such challenges may be dispelled by paying the receivables of the challenging creditor, as per Article 281 of the EBL.

International arbitration

Prior to the New Procedural Law, the Old Procedural Law did not include detailed provisions regarding the principles of arbitration, and as a result, the arbitration process was executed according to the principles of international law. With the New Procedural Law coming into force, it will be the applicable law on arbitrary disputes if they are subject to national law and have designated the Turkish courts as the authorised courts. As the new legislation 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 the arbitration process. Nevertheless, the major regulations are as follows:

First of all, Article 408 of the New Procedural Law clarifies the argument on immovable properties, whether the principles of arbitration are applicable regarding right *in rem*. According to the article, it is forbidden to bring right *in rem* disputes on immovable properties and transactions lacking the will of the parties before arbitral bodies. However, as New Procedural Law and International Private Law legislate a mandatory court for disputes arising from immovable property, this article goes no further than a repetition.

Furthermore, Article 414 draws attention to an important issue: 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 prosecution processes and Article 424 underlines the principle of freedom of contract in keeping mandatory rules reserved.

Moreover, another distinguished regulation is that the appeal process, which has been expressed in Article 439, 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 new 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

Turkey has no specific fully-fledged law governing mediation. This being said, the Draft Law on Mediation in Civil Disputes ("the Draft Law") is pending before the parliament. The Draft Law has stirred up a hot discussion among the public, to the further degree that the ones who are against the Draft Law claiming that mediation, as stipulated under the Draft Law, is indeed causing fights instead of mediating.

The Istanbul Bar Association, which is the most populated bar in Turkey, in a written declaration declared that they are totally against mediation as stipulated under the Draft Law. The highlights of the reasoning of the relevant declaration, as set out therein, are that mediation cannot be executed by persons who did not receive a law education, settlement which is stipulated under Article 35/A of the Attorney Law already fulfills the need for mediation, what is achieved through the Draft Law is the mere act of creating jobs for the unemployed, and although the judges and the prosecutors serve their duties independently and impartially, it is unclear under which independence and impartiality rules the mediators will serve.

In general, the criticisms with respect to mediation gather under a single roof, where it is claimed that mediation is a judicial activity and that some of the judicial powers are being transferred to individuals through mediation, that under the current circumstances mediation would be in violation of the Constitution of 1982 which governs that judicial powers shall be used by independent courts on behalf of the Turkish nation, and that this mediation process must be associated with the courts.

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