THE DISPUTE RESOLUTION REVIEW

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Editor
Damian Taylor

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Chapter 26

TURKEY

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I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Turkey is a civil law country. In this context, provisions of law are compiled in written form and codified. Court decisions are considered to be auxiliary sources of law.

The judicial branch consists of many courts and institutions whose duties and jurisdictions are regulated by law.

There are specialised courts entitled to settle disputes between certain parties or on a particular subject. Commercial courts, cadastral courts, labour courts, consumer courts, the specialised court for intellectual and industrial property rights, and family courts are examples of this types of court.

In addition to these, the Constitutional Court ensures compliance of all legal sources of Turkish law with the Constitution. The Constitutional Court also has some other duties, such as examining claims on violations of rights.

The European Convention on Human Rights has been in force in Turkey since 1954. If conditions for application are met, claims on violations of rights can be brought before the European Court of Human Rights as well.

As explained in more detail in the following sections, the main alternative dispute resolution methods under Turkish law are mediation and arbitration. Accordingly, instead of filing a lawsuit before the courts, parties may reach a settlement with the help of a third party appointed as mediator, or resort to arbitration.

The institution of mediation has gained more importance with the recent legislative changes that have made application to mediation mandatory for certain types of disputes before filing a lawsuit.

II THE YEAR IN REVIEW

i Legislative developments

Article 149 of the Code of Civil Procedure No. 6100 (CCP) was amended on 22 July 2020 to allow virtual hearings. Following this amendment, the court will allow participation in hearings by means of audio and video transmission (e-hearing) upon the request of one of the parties or *ex officio*. Pursuant to Article 149 of the CCP, the procedures and principles regarding the implementation of this Article will be determined in a separate regulation. Accordingly, the Regulation on Execution of Hearings by Transmission of Audio and Video

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in Civil Procedures entered into force on 30 June 2021. The request for e-hearing is made at least two business days before the hearing date with an application on the National Judiciary Informatics System (UYAP). The court may decline this request if the request is not duly made, the request is intended to abuse the right or delay the proceedings, or there are legal, factual or technical obstacles that will make it difficult to hold an e-hearing. The parties, their attorneys, witnesses and legal experts may be heard at the e-hearing. According to the regulation, it is possible to transmit documents through UYAP. As of 9 November 2021, there were 36,567 e-hearing applications to 1,400 different civil courts.[2]

Law No. 7343 dated 24 November 2021 Amending the Enforcement and Bankruptcy Law and Certain Laws has created significant changes in terms of the procedures for delivering a child to a parent who has been awarded custody in a family law case, such as a divorce. Before the amendments, this process was handled through enforcement offices, which are the entities responsible for enforcing private law judgments. This process was the focus of intense criticism. With the amendments, the articles of the Enforcement and Bankruptcy Law regarding the handing-over process of children have been removed, and this process is regulated under Child Protection Law No. 5395. Pursuant to Article 43/A of the Child Protection Law, decisions or injunctions issued by family courts regarding the handing over of a child or establishing a personal relationship with the child are carried out by the Directorates for Judicial Support and Victim Services established by the Ministry of Justice. In the case of an objection to the execution of decisions, the complaint will be addressed to the family court and not to the execution offices. Procedures within this scope are exempt from all fees. In addition, all expenses to be incurred for the execution of these procedures, except for attorneys' fees, are covered by the budget of the Ministry of Justice.

The Council of Judges and Prosecutors (Council) decided that some courts should specialise in cybercrimes and financial crimes.[3] The Council stated that cases arising from cybercrimes show unique characteristics, and that it is therefore necessary to establish new specialised courts to ensure a uniformity of practice. Consequently, cases related to the following will be decided by the aforementioned specialised courts:

a qualified theft;
b qualified fraud committed through the use of information systems or by acting as a public official or an employee of a bank, insurance or credit institution;
c access to information systems;
d blocking or disrupting the system, or destroying or changing data;
e improper use of debit or credit cards;
f use of prohibited devices or programs; and
g implementation of security precautions for legal entities who benefit from cybercrimes.

In accordance with the decision of the Council, new specialised courts are designated for cases arising from Law No. 6493 on the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions, as well as for cases related to tax crimes and expropriation.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) was ratified on 11 October 2021 and will enter into

2 https://edurusmabilgi.adalet.gov.tr/e-durusma-81-ilde-uygulanmaya-basladi_53517.

3 Decision of the Council of Judges and Prosecutors dated 25 November 2021 published in the Official Gazette dated 30 November 2021 and No. 31675.

force on 11 April 2022. The Singapore Convention regulates the enforceability of mediation agreements that resolve disputes of an international nature. The settlement agreements concluded in accordance with the Law on Mediation in Civil Disputes No. 6325 (Law on Mediation) are directly enforceable in Turkey. However, for the execution of settlement agreements incompatible with the Law on Mediation in Civil Disputes, recognition under the Singapore Convention is required to transform settlement agreements from a basic contract to a document functioning as a verdict. For settlement agreements to be enforceable under the Singapore Convention, they must be subject to mediation, international in character, commercial in nature and suitable for mediation. In a manner similar to the recognition and enforcement of foreign arbitral awards, Article 5 of the Singapore Convention also provides grounds (e.g., public policy, mediator's abuse of power) for refusal of enforcement of settlement agreements.

ii Dispute resolution developments in local courts

The Law on the Mandatory Use of Turkish in Commercial Enterprises No. 805 and dated 10 April 1926 (Law No. 805) provides obligations for the use of the Turkish language in commercial relations. Article 1 of Law No. 805 requires Turkish companies to use Turkish in all transactions, agreements, correspondences and books. According to Article 2, this requirement does not apply to agreements that will be performed abroad. In the past, there were debates on whether an arbitration agreement written in a foreign language would be invalid under Law No. 805. In a recent decision of the Istanbul Court of Appeal 12th Civil Chamber dated 11 February 2021,[4] the Court stated that Article 1 of Law No. 805 does not apply to a dispute if one of the parties to the arbitration agreement is a foreign company. Similarly, the Court of Cassation[5] ruled that if there is a foreign element pertaining to Article 2 of the International Arbitration Act No. 4686 (IAA), an arbitration agreement in a foreign language between two Turkish parties will not violate Law No. 805.

Recently, the Constitutional Court rendered an important decision[6] on the preliminary objection of arbitration and ownership rights. In this case, the plaintiff claimed that the preliminary objection to arbitration was rejected at the first hearing. However, the Court's decision on lack of jurisdiction was rendered seven years later when its claim was time-barred under English law. The plaintiff asserted that its right to seek justice, right to a fair trial and ownership rights had been violated. The Constitutional Court ruled that the plaintiff should have foreseen that the case could be dismissed due to the arbitration agreement. The Court also underlined that the plaintiff could have resorted to arbitration to prove that its claim was time-barred, but had decided not to do so. Furthermore, the Court noted that it had no duty to evaluate the law applicable to the dispute and whether the claim was time-barred under English law.

4 Decision of the Istanbul Court of Appeal 12th Civil Chamber dated 11 February 2021 No. 2021/205 E. 2021/185 K.

5 Decision of the Court of Cassation 15th Civil Chamber dated 2 October 2020 No. 2020/1714 E. 2020/2652 K.

6 Decision of the Constitutional Court dated 8 June 2021 No. 2018/5832 published in the Official Gazette dated 7 September 2021 No. 31591.

III COURT PROCEDURE

i Overview of court procedure

Turkey has adopted a three-tier judiciary system with the establishment of the courts of appeals in 2016: first instance courts, regional court of appeals and the final court of appeals.

Currently, the Regional Court of Appeals (Regional Court of Justice and Regional Administrative Court) operates as a court of appeals, while the Court of Cassation and the Council of State act as the final court of appeal.

Decisions subject to appeal are regulated by law. The right to appeal may not exist for a decision due to the type of the case, or due to the fact that the value of the claim is below the appeal threshold (which is redetermined each year based on the revaluation rate).

The principal statute governing private law proceedings is the CCP. The CCP contains rules governing proceedings before state courts and provides rules for domestic arbitration. As for criminal law proceedings, the Code of Criminal Procedure No. 5271 (Law No. 5271) is in force. The procedure regarding administrative cases is regulated by the Code of Administrative Procedure. There are also regulations on the execution of these laws.

ii Procedures and time frames

The civil litigation procedure is initiated by an application to the competent court. This application must include the relief sought by the plaintiff and the factual grounds on which the claims are based, as well as other elements required by law. While filing the lawsuit the plaintiff pays certain fees and expenses in advance. Meanwhile, some cases are subject to a fixed fee, while others require a proportional fee payment calculated based on the value of the claim.[7]

In general, the CCP stipulates a two-week period for submission of pleadings. However, in some cases longer or shorter periods may be foreseen: for example, shorter periods are foreseen for matters of enforcement and bankruptcy law.

Proceedings consist of several stages. These stages differ pursuant to the procedure applied to the case. Two basic judicial procedures are regulated under the CCP. The main judicial procedure is the written procedure. However, a simplified procedure is applied in some kinds of cases. A simplified procedure is generally adopted for cases that need to be concluded more quickly and that require a shorter and simpler examination. For example, pursuant to Article 4/2 of the Turkish Commercial Code No. 6102, commercial cases where the value does not exceed 500,000 hundred thousand Turkish lire are subjected to the simplified procedure.

The defendant may file a statement of defence (SoD) within two weeks from the notice of the statement of claim. In some cases, if requested by the defendant, the court may grant a one-time request for additional time. A defendant who has not submitted an SoD in due time is deemed to deny all the facts put forward by the plaintiff. The SoD should contain certain information specified by law, just like the statement of claim.

In cases where the written procedure is applied, the plaintiff may submit a statement of reply within two weeks from the notice of the SoD. The defendant can submit a statement of rejoinder within two weeks following the notice of the plaintiff's reply. Additional time can also be granted for these petitions.

7 Act of Fees numbered 492 and its annexes.

After the exchange of pleadings, the examination phase begins. In this phase, if there is a technical issue that requires examination, the file is conveyed to experts appointed by the court. Following the submission of the expert report, the parties may submit their objections. If the court deems it necessary, it may decide to obtain an additional report. Parties are also free to submit legal opinions or expert opinions.

As a rule, it is not mandatory to hold a hearing for every type of case: a court can render its decision in certain disputes just by examining the file.

Proceedings end with a judgment. Judgments must be served on the parties to gain effect.

It is rather difficult to make an exact estimation as to the length of proceedings. In 2018 a new practice was implemented with the aim of providing predictability as to the duration of proceedings. A goal was set for 87 per cent of civil lawsuits to be completed within one-and-a-half years, and for the remaining 13 per cent to be completed within two years. However, these estimates may vary depending on the circumstances of the concrete case.

There are interim measures to which the parties can resort, such as provisional injunctions, provisional attachments and discovery of evidence. The most frequently encountered among these is the provisional injunction. Pursuant to Article 389 of the CCP, a provisional injunction can be granted if it will become impossible, or at least significantly more difficult, to get relief due to a change that may occur, or if inconvenience or serious damage will arise due to delay. The requesting party must clearly state the grounds and type of provisional injunction and establish the merits of its case based on a plausible proof standard. If the request for provisional injunction is rejected the decision may be appealed. If the request is accepted, the implementation of this decision must be requested within one week. If the provisional injunction is requested and obtained before filing the lawsuit on the merits, the requesting party has to file the case on the merits within two weeks from the date on which the application of this decision is requested. In addition, in administrative jurisdiction, the execution of an administrative act can be suspended temporarily with the possibility of a stay of execution.

iii Class actions

In Turkey, class actions such as those that are available in the United States are not permissible. The most similar mechanism to class action is the group action. According to the CCP, group actions allow associations and other legal entities to file actions on their own behalf, to protect the interest of their members or the group their members represent. These actions may be initiated to determine the rights of those concerned, eliminate an unlawful situation or prevent the violation of the future rights of those concerned. Damages claims are not allowed. There are few group action cases in practice. Group actions are seen especially in consumer law, trade union law and environmental law disputes.

iv Representation in proceedings

As a principle, it is not mandatory that a party should be represented by a lawyer according to Turkish civil law. Everyone has the right to represent themselves in court proceedings. They can act as a plaintiff or a defendant in judicial and administrative courts, as a defendant or participant in criminal courts, or as a creditor-debtor in enforcement offices, and can represent themselves in the hearings. In this context, natural persons who do not have the

capacity to sue are represented by their legal representatives. For example, children are represented by their parents, while adults who lack full capacity (for reasons such as mental illness) are represented by their guardian.

According to Article 52 of the CCP it is also possible for legal entities to be represented by their authorised body in lawsuits.

v Service out of the jurisdiction

Apart from bilateral agreements, Turkey is a party to two significant conventions: the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965 (Hague Service Convention) and the Hague Convention on Civil Procedure of 1 March 1954 (Hague Civil Procedure Convention).

The service procedure accepted in the Hague Service Convention is service through the central authority. Pursuant to this Convention, all signatory states shall designate an authority in accordance with its laws. This provides a faster alternative to the traditional method of international service through diplomatic channels or consulates.

Article 10 of the Hague Service Convention stipulates a direct service method, which allows the recipient in the other country to be served by mail or courier without resorting to the central authority. However, since Turkey has made a reservation on this Article, this procedure will not be applied to recipients in Turkey.

On the other hand, pursuant to the Hague Civil Procedure Convention, a foreign court wishing to serve documents out of its jurisdiction must use diplomatic channels.

The rules for initiating proceedings under these two Conventions are the same.

If there is no bilateral or multilateral agreement between the requesting state and Turkey, the service of the process is carried out within the framework of the principle of reciprocity and international legal assistance rules.

If service is made on natural persons, it should be made to the intended recipient. In some cases, service to the persons residing in the same residence with the intended recipient or their household assistants in residence is also deemed to have been made to them.

In the case of legal entities, service should be made to the address of the authorised representative of the legal entity; if there is more than one representative, service should only be made to one of them. If the representative of the legal entity is not there at that time, the service should be made to one of the officers or employees in that place.

vi Enforcement of foreign judgments

A foreign judgment is recognised and enforced according to the specific bilateral or multilateral treaty between Turkey and the state in which the foreign judgment is rendered. In the absence of such treaty, the Private International and Procedural Law No. 5718 (PILA), regulating the general rules regarding the enforcement of foreign judgments in Turkey, shall be applied.

As a general rule, final judgments on civil claims are enforceable in Turkey, whereas only the personal or civil rights portions of the final judgments of criminal actions can be enforced.

A foreign judgment can be enforced under Article 54 of the PILA if the following conditions are met:

a there should be a contractual reciprocity, a legal provision in the laws of the state that provides for the enforcement of decisions of the Turkish courts or de facto reciprocity that allows the enforcement of judgments rendered by the Turkish courts;

b the foreign judgment shall not have been rendered on issues subject to the exclusive jurisdiction of the Turkish courts;
c the foreign judgment shall not be explicitly contrary to public policy; and
d the notification regarding the proceeding should have been duly made in accordance with the applicable law, and the right of defence of the party against whom the enforcement is sought must have been observed by the foreign court.

When the enforcement decision is granted by the Turkish court it becomes final, binding and executory.

vii Assistance to foreign courts

Turkey is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which was signed on 18 October 1970 (Hague Evidence Convention), which is the essential multilateral convention in judicial assistance. Turkey signed the Convention in 2000 and ratified it in 2004. This Convention basically authorises local courts in Turkey to gather evidence supporting ongoing or prospective international judicial actions before a court of another signatory state.

In cases where the Hague Evidence Convention and the Hague Civil Procedure Convention regulate the same legal issue, the provisions of the Hague Evidence Convention will prevail.

viii Access to court files

Pursuant to Article 161 of the CCP, parties or the intervening party (a third party who meets the requirements of a third-party intervention and whose request has been accepted by the court) may inspect the court files under the supervision of the court clerk. Other persons related to the case can also examine the file with the permission of the judge.

In addition, lawyers and legal interns may examine a court file even if they are not a party, under the supervision of the court clerk, in the absence of a confidentiality order.

On the other hand, making a copy of the file is subject to different provisions. The parties, the intervening party and their lawyers may make a copy of the file of a case to which they are a party.

Pursuant to Article 141/1 of the Constitution and Article 28/2 of the CCP, according to the open court principle, court hearings are open to everyone within the limits of feasibility (such as the capacity of the courtroom). Despite this principle, no photographs can be taken during the trial, and audio or video recordings are not allowed.

If public morals or public safety or a superior interest worthy of protection of the persons involved in the proceedings absolutely necessitate, the court may *ex officio* or upon request decide to close the hearing to the public.

The press can also watch public hearings, take notes and even sketch the proceedings without disturbing the order of the hearing and so long as they comply with the ban on recording. Hearings can be reported to the public objectively and accurately for news purposes.

ix Litigation funding

Litigation funding is not regulated under Turkish law and it is not common in disputes resolved before the courts. However, in terms of arbitration, litigation funding is a method that is frequently resorted to, especially for investment disputes.

Judicial assistance, on the other hand, is an important notion in Turkish law that enables economically distressed persons to seek their rights or to defend themselves before courts and enforcement offices. The persons who can benefit from judicial assistance, the conditions of benefiting and the procedures to be applied are determined in the CCP.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest in the legal profession are not as extensively regulated in Turkey as in other jurisdictions. The main provision that regulates the subject is Article 38/b of the Attorneys' Act No. 1136 (Attorneys' Act). According to this provision, attorneys must refuse to take on any work if they have represented or advised a party with opposing interests in the same work. However, the definition of the term 'same work' is rather vague and the wording of the provision leaves much room for interpretation. Evidently, an attorney may not represent a party who has conflicting interests with the opposing party that the attorney already represents in the same lawsuit or its appeal phases. However, based on the wording of the provision, it is not clear whether the attorney is allowed to take on any other work unrelated to the same work from another conflicting party. In practice, Turkish court precedents as well as the Turkish Bar Association's ethics committees interpret Article 38/b more broadly, such that the engagement of attorneys in work not exactly the same but related is also deemed to trigger a conflict of interest. Furthermore, Article 38/c of the Attorneys' Act states that a person who has previously been involved as a judge, prosecutor, expert witness, fact witness or civil servant in a proceeding cannot be engaged to act as an attorney at a later stage in that proceeding. Finally, as per Article 13 of the Attorneys' Act, attorneys cannot represent any party if they are relatives of a judge or prosecutor involved in the proceeding.

In terms of Chinese walls, there is no particular provision under Turkish law that regulates the principles and procedures of such. This does not mean they are not utilised. They are indeed permissible and, in fact, as the evolving practices among investment banks and merger and acquisition practitioners become more widespread, legal professionals tend to utilise Chinese walls more commonly. This is valid both for Chinese walls among legal firms themselves, or between the subordinates of a single firm and among numerous firms working on the same project. In this regard, Article 38 of the Attorneys' Act makes it clear that conflict of interest rules contained therein are equally applicable to partners as well as associates of a firm subordinate to them. Other than that, Chinese walls are often set up by contractual obligations for particular projects to better guarantee the security of the information flow where the laws do not explicitly do so.

ii Money laundering, proceeds of crime and funds related to terrorism

Under Turkish law, the provisions on money laundering are regulated in Law No. 5549 on the Prevention of Laundering Proceeds of Crime (Law No. 5549).

Law No. 5549 envisages certain responsibilities for the obliged parties in relation to the prevention of laundering proceeds of crime and, pursuant to the amendments introduced on 27 December 2020, self-employed lawyers are deemed to be obliged parties if they carry out the following activities:

a financial transactions regarding the purchase and sale of real estate;

b financial transactions regarding the establishment and removal of limited real rights;

c financial transactions regarding the establishment, merger, management, transfer and liquidation of companies, foundations and associations; and
d management of bank accounts, security accounts and any kind of accounts, and also the management of assets in such accounts.

Self-employed lawyers who meet these criteria are responsible for identifying their clients according to know your customer principles, reporting suspicious transactions and transactions that exceed the thresholds set by the Ministry of Treasury and Finance, and submitting information and documents requested by the Financial Crimes Investigation Board within the scope of Law No. 5549. In cases of breach of these responsibilities, administrative fines and imprisonment may be imposed on the obliged parties.

iii Data protection

In Turkey, protection rules for personal data held by private or public institutions are regulated under Law No. 6698 on Protection of Personal Data, and the secondary legislation on the data controllers' registry, the information and destruction obligation of data controllers and the procedure to be applied to data controllers. As a general rule, personal data cannot be processed without the explicit consent of the data subject. On the other hand, personal data may be processed without seeking the explicit consent of the data subject in cases where one of the following conditions (legal grounds) is met:

a It is expressly provided for by the laws.
b It is necessary for the protection of the life or physical integrity of the person him or herself, or of any other person who is unable to explain his or her consent due to a physical disability or whose consent is not deemed legally valid.
c Processing of personal data of the parties to a contract is necessary, provided that it is directly related to the establishment or performance of the contract.
d It is necessary for compliance with a legal obligation to which the data controller is subject.
e Personal data has been made public by the data subject him or herself.
f Data processing is necessary for the establishment, exercise or protection of any right.
g Processing of data is necessary for the legitimate interests pursued by the data controller, provided that this processing shall not violate the fundamental rights and freedoms of the data subject.

It should be noted that the processing of special categories of personal data (which are relating to race, religion, health, sexual life, criminal convictions, biometric and genetic data, etc.) is subject to different procedures and additional requirements.

The rules and obligations regulated under the data protection legislation do not apply if the personal data is processed by the judicial authorities or execution authorities in relation to investigations, prosecutions, trials or execution proceedings. Courts and debt enforcement offices, for instance, could be given as examples to this exemption.

Lawyers, on the other hand, are considered to be data controllers, and they must process personal data in accordance with the law. After all, lawyers have confidentiality obligations arising from the Attorneys' Act. Furthermore, lawyers are authorised to examine information and documents that may contain personal data without the need of data subjects' consent, since this authorisation is regulated by the law. They are also authorised to make copies of documents based on a power of attorney. On the other hand, as the enforcement of

law generally involves the constitution, exercise or defence of a legal claim or right, data processing in this respect will not require data subjects' consent since it will be realised based on one of the above-mentioned legal grounds (being necessary for the establishment, exercise or protection of any right).[8]

Pursuant to the data protection legislation, the transfer of personal data domestically is subject to the same procedures as data processing. In other words, if the above-mentioned legal grounds or explicit consent of the data subject exist, it is possible to transfer personal data in Turkey. However, cross-border data transfer may only be realised with the explicit consent of the data subject, or upon the existence of one of the above-mentioned legal grounds and authorisation of the Turkish Data Protection Board. On the other hand, if the country to which the data will be transferred is determined to have an adequate level of protection, then personal data can be transferred abroad without explicit consent upon the existence of one of the legal grounds mentioned above. The Data Protection Board is authorised to determine the countries in which there is an adequate level of data protection. However, no country has yet been designated by the Board as having adequate protection. Therefore, if the explicit consent of the data subject cannot be obtained, the only option for cross-border transfer is to sign a data transfer commitment that warrants an adequate level of protection and to obtain the approval of the Data Protection Board.

The general principles and rules set forth under Law No. 6698 on Protection of Personal Data and the secondary legislation, including Board decisions, should be considered throughout the transfer and processing of data even if the above-mentioned legal grounds exist. Within this context, personal data should be:

a processed lawfully and fairly;
b accurate and, where necessary, kept up to date;
c processed for specified, explicit and legitimate purposes;
d relevant, limited and proportionate to the purposes for which it is processed; and
e retained for the period of time determined by the relevant legislation or the period deemed necessary for the purpose of the processing.

More importantly, data controllers are obliged to take all technical and administrative measures to ensure that personal data is not processed unlawfully or accessed without authorisation, and is safeguarded.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Attorneys' Act explicitly regulates the confidentiality obligations of lawyers. Lawyers are prohibited from revealing the information they have acquired while performing their duties. A lawyers' capability to testify about such information depends on the consent of their client. However, even in such a case, the lawyer may refrain from testifying. The exercise of the right to refrain from testifying may not cause legal or criminal liability.

In this respect, the approach of the Competition Authority to the information obtained while investigating alleged violations is outstanding. Although the approach of the Competition Board (the decision-making body of the Authority) may vary occasionally, it

8 Personal Data Protection Authority, Personal Data Protection Guide with Examples No. 29 June 2019.

must be noted that the Board considers in-house lawyers to be company employees and does not grant attorney–client privilege to the correspondence between these in-house lawyers and other employees. In other words, while correspondence between a self-employed lawyer and a client made during the scope of representation benefits from the protection of attorney–client privilege, the correspondence between an in-house lawyer and the employees of the company where he or she works does not.

The admission requirements to act as a lawyer in Turkey are regulated by the Attorneys' Act. Accordingly, one must be a Turkish citizen and be registered with the Bar Association. Therefore, it is not possible for foreign nationals (who do not have Turkish citizenship) to practice law in Turkey. Pursuant to Article 44 of the Attorneys' Act, foreign attorney partnerships wishing to operate in Turkey can only provide consultancy services in foreign and international law matters.

ii Production of documents

Article 199 of the CCP specifies the scope of the term document to include any data such as written or printed text, promissory notes, drawings, plans, sketches, photographs, films, images or sound recordings, and data in electronic media and similar information carriers that are suitable for proving the facts of the dispute.

The fundamental concept of civil procedure under Turkish law is that each party must disclose the facts that support its claim and submit proof to support those facts. Pursuant to Article 219 of the CCP, parties are obliged to submit to the court all the documents in their possession that they or the other party rely on as evidence. In cases where only a copy of the document is submitted to the court, the court may request the original document to be submitted at its own discretion or following a request by one of the parties. In this circumstance, a party, third party or official authority in possession of the original document must submit the requested original to the court if requested. Electronic documents are submitted to the court in hard copy and in an electronically suitable form for examination when requested.

To decide on document production, the following conditions must be met:

a the court must be convinced that the document production request is necessary for the proof of the alleged issues and that this request is in accordance with the law; and

b the other party must either admit that the document is in his or her possession or remain silent on this issue, or the existence of the document must be derived from official documents or records or acknowledged in other documents.

If the court decides on the production of a document, the other party must produce such document within a period determined by the court. The court may draw negative inferences in favour of the party that sought the document production if the party fails to deliver the document within the time period or fails to establish a reasonable excuse for his or her incapacity to do so.

Documents that are difficult or inconvenient to submit to the court are examined on-site by the judge or an expert appointed by the judge.

Document production by third parties is also regulated under the CCP. If the court decides that a document in the possession of a third person or institution is necessary to prove the facts of the case, it orders the submission of this document.

Any person required to produce documents has to fulfil this obligation, and if such person cannot produce the document, an explanation along with its proof should be

submitted. If the court does not find the explanation sufficient, it can decide to call this person as a witness.

The court may decide on the submission of the commercial books of the parties in commercial cases at its discretion or upon the request of one of the parties. In accordance with Article 222/2 of the CCP, the commercial books will be accepted as evidence in commercial litigation in Turkey only if they are kept in a complete manner and following the procedure provided by the law. The opening and closing certifications should be complete and the records of the commercial books should match each other. Therefore, if the commercial books are not kept as per the law, they will not have any evidentiary value. Article 222/4 of the CCP clearly provides that commercial books that do not have opening and closing certifications, and the records of which do not match each other, can only constitute evidence to the detriment of their holder.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

This section highlights alternative dispute resolution mechanisms. As in many other countries, Turkey has tailored its laws to promote alternatives to court litigation to decrease the heavy workload of Turkish courts, as well as to adapt Turkish law to contemporary understandings, developments and principles in comparative dispute resolution law.

ii Arbitration

Arbitration is widely used in Turkey as a dispute resolution mechanism. Turkey's arbitration rules are based on arbitration-friendly legislation such as the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006 (UNCITRAL Model Law) and the Swiss Federal Statute on Private International Law of 1987.

There are two main laws that regulate arbitration in Turkey: the International Arbitration Act No. 4686 and the CCP.

Turkey is also party to significant conventions such as the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[9]

Applicable regulations

The IAA regulates the procedures and principles of international arbitration. The IAA is applicable in cases where a foreign element exists and the seat of arbitration is Turkey. The dispute is considered to have a foreign element:

a if the domicile or the workplace of the parties are in different countries or in a state different than the seat of arbitration or in a state different than the place of performance;

b if foreign capital is brought to Turkey; or

c in cases concerning international goods and capital transfers.

However, the parties or the arbitral tribunal may choose to apply the IAA even for disputes that do not have a foreign character as defined in the IAA.

9 The ICSID Convention was signed by Turkey on 24 June 1987 and entered into force on 2 April 1989.

Domestic arbitration is regulated by Articles 407–444 of the CCP. The provisions of the CCP are applicable to arbitrations seated in Turkey with no foreign element within the scope of Article 2 of the IAA.

Most preferred arbitral institutions

The two most popular national arbitral institutions in Turkey are the Istanbul Arbitration Centre (ISTAC) and the Istanbul Chamber of Commerce Arbitration Centre (ITOTAM).[10]

Both ISTAC and ITOTAM were established in 2014. Since then, with the increase in demand for arbitration in Turkey, parties have started to include arbitration agreements of these institutions in their contracts. As a result of this trend, the number of disputes before ISTAC and ITOTAM has increased heavily. Each institution's rules bear significant similarity to those of the other and to the Arbitration Rules of the International Chamber of Commerce (ICC).

ISTAC has adopted fast-track arbitration rules, emergency arbitration rules and mediation rules. The monetary threshold for the application of ISTAC fast-track rules is 300,000 Turkish lire. ITOTAM has also enacted emergency arbitration rules and arbitration rules for basic claims, which provide for a threshold of 500,000 Turkish lire.

In terms of international arbitral institutions, the ICC has an important position and considerable impact in Turkey. According to ICC Dispute Resolution 2020 Statistics,[11] there were 57 cases in which a Turkish party was involved. Turkey also ranks 12th globally and first in the Central and Eastern Europe region on the list of the most frequent nationalities among parties.

Rights of appeal

The only remedy against an arbitral award is an action to set aside as provided under Article 15 of the IAA and Article 439 of the CCP.

International arbitration

The parties can file an action to set aside within 30 days of the notification of the arbitral award. The competent court for the action to set aside is the court of appeals. The court of appeals cannot examine the decision on the merits; it can only examine whether the grounds for set aside have been met. Grounds that can be asserted to set aside are *numerus clausus* and are listed as follows under Article 15 of IAA:

a a party to the arbitration agreement is under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected the agreement or, if there is no such choice of law, under Turkish law,

10 There are other arbitral institutions in Turkey such as the Union of Chambers and Commodity Exchanges of Turkey (TOBB), the Energy Disputes Arbitration Centre (EDAC) and the Izmir Chamber of Commerce. The TOBB Arbitration Regulation has been established to resolve disputes between Turkish companies, between Turkish companies and foreign companies, and between foreign companies in the economic, commercial or industrial field through arbitration. The EDAC, headquartered in Ankara, initiated its activities as of 21 October 2020 with the aim of resolving disputes between companies regarding energy and infrastructure law.

11 For the ICC Dispute Resolution 2020 statistics see https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

b the appointment of the arbitrator or the composition of the arbitral tribunal is not in accordance with the procedure determined in the arbitration agreement or the procedure stipulated in the IAA;

c the decision is not rendered within the time limit;

d the arbitrator or the arbitral tribunal has unlawfully decided on its competence;

e the arbitrator or arbitral tribunal has decided on a matter falling outside of the scope of the arbitration agreement, or has not decided on all matters set forth in the claims of the parties, or has exceeded its authority;

f in terms of procedure, arbitration proceedings are not conducted in conformity with the parties' agreements or, in the absence of such agreement, the provisions of the IAA, and this situation has an effect on the substance of the award; or

g the principle of equality of the parties is not regarded.

The court will also examine *ex officio* the arbitrability of the disputes and public policy.

The arbitral award may be set aside fully or in part. The Court of Cassation, in a recent decision,[12] has decided that it is possible to set aside only a part of an arbitral award.

Domestic arbitration

Provisions of the CCP and the IAA on set aside are very similar. Although the grounds to set aside are the same, the effect of the action to set aside on the enforceability of awards differs. Pursuant to Article 439 of the CCP, filing an action to set aside does not prevent the execution of an arbitral award, whereas under the IAA, a set aside action will suspend an arbitral award's execution.

Certificate of execution

A difference between the CCP and the IAA is that there is no need for any other document for the execution of an arbitral award subject to the CCP. Such arbitral awards will have the same status as decisions rendered by local courts. On the other hand, for arbitral awards within the scope of the IAA, a certificate of execution should be obtained pursuant to Article 15/B of the IAA to execute the arbitral award.

For an arbitral award rendered pursuant to the IAA, there is no need for a separate recognition and enforcement process.[13] The court issues a certificate of execution if the court's decision regarding the dismissal of the action to set aside becomes final; if an action to set aside is not filed within 30 days; or if the parties have waived their right to object. The court examines *ex officio* the arbitrability of the dispute and public policy to issue a certificate of execution.

12 Decision of the Court of Cassation 15th Civil Chamber No. 2020/2230 E. 2021/148 K dated 22 January 2021.

13 H Ercüment Erdem, *Milletlerarası Ticaret Hukuku*, 2nd revised edition, Istanbul 2020, p. 656.

Recognition and enforcement of foreign arbitral awards

There are two main pieces of legislation regulating the recognition and enforcement of foreign arbitral awards under Turkish law: the New York Convention[14] and the PILA. Turkey has made a reservation to Article 1/3 of the New York Convention and thereby limited its application to foreign arbitral awards rendered in another contracting state and to commercial disputes.

The New York Convention takes precedence over PILA provisions. The PILA is applicable to cases where the New York Convention cannot be applied.

Foreign arbitral awards must undergo the process of recognition and enforcement in Turkey. Exceptions to this rule include ICSID and Multilateral Investment Guarantee Agency (MIGA) awards. According to Article 54 of the ICSID Convention and Article 4/j of the MIGA Convention Annex II, awards rendered pursuant to the Convention will be binding as if they are a final judgment of a Turkish court.

There are three main noteworthy issues in practice that parties should be aware of. The first issue is the interpretation of public policy as a ground for the refusal of recognition and enforcement. There is strong case law in this respect, which will guide parties as to Turkish courts' interpretation of public policy and which, in some instances, leads to a review on the merits.

The second issue is that disputes regarding rights *in rem* of immovable property located in Turkey and disputes on matters where the resolution is not subject to parties' will are not arbitrable under Turkish law. There are also matters deemed not arbitrable by the Turkish Court of Cassation, such as disputes arising from labour law, consumer law and the determination of the amount of lease agreements.[15]

Finally, according to Article 48/1 of the PILA, foreign natural or legal persons filing a lawsuit may face *cautio judicatum solvi* to provide security for the damages that may be caused by the lawsuit. However, if the foreign national is from a state where Turkish filing parties are exempt from *cautio judicatum solvi,* the court will grant the foreign national an exemption on the basis of reciprocity (Article 48/2 of PILA). As for the application fees, after a long discussion and contradictory interpretation of the relevant provisions by the courts, the Assembly of the Civil Chambers of the Court of Cassation has finally resolved that actions for recognition and enforcement of arbitral awards are subject to a fixed fee, which is a very modest sum.

Interim measures

Pursuant to Article 414 of the CCP and Article 6 of the IAA, the arbitral tribunal has the power to grant interim measures. However, there are several differences between these two provisions.

According to Article 6 of the IAA, the arbitral tribunal has the power to order interim measures except for those that must be exercised by the execution offices and other public authorities. Therefore, the arbitral tribunal cannot decide on precautionary attachments. In addition, the arbitral tribunal cannot issue an interim measure binding third parties.

14 Turkey's signed the New York Convention on 2 July 1992 and the Convention entered into force on 30 September 1992.

15 H Ercüment Erdem, *Milletlerarası Ticaret Hukuku*, 2nd revised edition, Istanbul 2020, p. 578.

Another important difference is that pursuant to Article 414 of the CCP, the arbitral tribunal may also amend or lift the interim measures granted by the courts, while this power is not foreseen under the IAA.

Recent developments and trends

The ITOTAM Arbitration Rules have been revised, and new rules entered into force as of 31 March 2021. The new amendments include revisions on issues such as joinder of additional parties, multiple contracts, consolidation and third-party funding. In addition, ITOTAM Mediation-Arbitration (MED-ARB) Rules entered into force on 11 March 2021.

Significant developments have taken place pertaining to the arbitration of corporate disputes. On 24 November 2021, the ITO (Istanbul Chamber of Commerce) shared a model arbitration clause to be included in the articles of association that it provides to its members. The model arbitration clause provides that all disputes between shareholders or between a company and its shareholders, or between members of the board and a company and its shareholders, including disputes arising from the articles of association and company resolutions, shall be settled by arbitration under the ITOTAM Arbitration Rules. According to the model arbitration clause, the seat of arbitration is Istanbul and the language of arbitration is Turkish.

In April 2020, the ISTAC Virtual Hearing Procedures and Principles were published. Accordingly, at the request of the parties or if the arbitral tribunal deems it appropriate, hearings can be conducted by videoconference or teleconference. The arbitral tribunal will ensure that the parties have the opportunity to attend the hearing and that the right to be heard (due process) is not violated.

Recently, the Court of Cassation rendered an important decision regarding the language of the arbitration clause. In principle, if the parties are of Turkish nationality, and the underlying agreement and arbitration agreement are related to a business in Turkey and signed within Turkey, the arbitration clause will be written in Turkish in accordance with Law No. 805. The Court of Cassation ruled that it was not contrary to Law No. 805 to write the arbitration clause in a language other than Turkish, even though the parties to the dispute were of Turkish nationality, as the dispute included foreign elements.[16]

iii Mediation

Mediation has also become widespread with the introduction of mandatory mediation for certain types of dispute. Turkish mediation legislation is mainly influenced by the UNCITRAL Model Law on International Commercial Conciliation of 2002. All of this legislation has, sometimes gradually and sometimes radically, increased the prevalence of these alternative dispute resolution mechanisms.

Mediation was introduced into Turkish law as a discretionary alternative dispute resolution mechanism by the Law on Mediation, which entered into force in June 2013.

Under the Law on Mediation Article 1/2, the subject matters suitable for mediation are defined as civil law disputes, including those with foreign elements, where the resolution

16 Decision of the Court of Cassation 15th Civil Chamber No. 2020/1714 E. 2020/2652 K dated 2 January 2020.

is subject to the parties' will. Parties may agree to apply to mediation before or during the lawsuit. Throughout the proceedings, the courts are also required to promote and propose mediation to the parties (CCP Article 137/1).[17]

According to a report by the Ministry of Justice Mediation Department, 741,595 discretionary cases were accepted by mediators between 2013 and 2021, with a 98 per cent success rate in reaching a settlement.[18]

To reduce the heavy workload of Turkish courts, mediation has become mandatory for certain lawsuits including labour law,[19] commercial law[20] and consumer law[21] disputes.

As per Article 18/5 of the Law on Mediation, if the parties reach an agreement as a result of the mediation process, such agreement becomes binding on the parties, meaning that the parties cannot resort to court for the issues resolved by the mediation agreement. In addition, pursuant to Article 18/4 of the Law on Mediation, a mediation agreement that has been signed by the parties and the mediator functions as a court verdict without the need of an affirmation by a judicial authority.

iv Other forms of alternative dispute resolution

Reconciliation, consumer arbitration committees and the insurance arbitration commission are other methods for alternative dispute resolution in Turkey.

According to Article 35 of the Attorneys' Act, attorneys may invite the parties to reconciliation before the commencement of a litigation or before the hearing of the lawsuit. This method, which requires the participation of lawyers, is applied in disputes in which the resolution is subject to parties' will.

Consumer arbitration committees are another alternative dispute resolution mechanism regulated by the Law on Consumer Protection No. 6502. These committees aim to provide efficient and accelerated resolution to disputes in which the costs and the time frame of normal consumer court adjudication are implausible for the consumer. Although the committees have 'arbitration' in their name, this mechanism cannot be categorised as arbitration since it is mandatory and not based on the parties' will. Pursuant to Article 66/3 of the Law on Consumer Protection and the Communiqué on Increasing the Monetary Limits in Article 6 of the Consumer Arbitration Committees Regulation, consumer disputes below 11,330 Turkish lire were brought before the consumer arbitration committees in 2021.

Article 30 of the Insurance Law No. 5684 provides the insurance arbitration commission as an alternative dispute resolution mechanism. This regulation mainly aims to resolve

17 Baki Kuru, *Medeni Usul Hukuku El Kitabı*, Ankara 2020, p. 1,111.

18 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/23112021085023ihtiyari%2020.11.2021.pdf.

19 According to Article 3 of the of the Law on Labour Courts No. 7036, mediation is regulated as a condition precedent to filing a claim before the court, and failure to resort to mediation is provided as a ground for refusal on procedural grounds. Between 2018 to 2021, a report by the Ministry of Justice Mediation Department indicated that 1,329,752 cases of labour disputes were admitted to mediation, and that 59 per cent of these disputes were resolved amicably. For the report, see https://adb.adalet.gov.tr/Resimler/SayfaDokuman/23112021085217i%C5%9F%20%2020.11.2021.pdf.

20 Law No. 7155 on Procedures of Initiation of Execution Proceedings Regarding the Receivables Arising from Subscription Agreements.

21 Law No. 7251 Amending the Code of Civil Procedure and Certain Laws. Mediation in consumer disputes demonstrated similar success to mediation in labour disputes, achieving 54 per cent of consumer disputes being resolved between 2020 and 2021: https://adb.adalet.gov.tr/Resimler/SayfaDokuman/23112021085226t%C3%BCketici%2020.11.2021.pdf.

disputes arising from insurance contracts as well as to adapt to the rapid progress of alternative dispute resolution in the world. The main advantage of the insurance arbitration commission is the four-month period foreseen for rendering an award and specialised arbitrators in the field of insurance law.[22] The arbitration commission system is mainly based on voluntary participation having arbitration characteristics. However, in compulsory insurances, the Law enables the insured to force an insurer to take part in an insurance arbitration commission procedure, irrespective of the insurer's membership of the insurance commission and their willingness to engage in arbitration.[23]

VII OUTLOOK AND CONCLUSIONS

In parallel with technological developments, Turkey has been using the electronic judicial system, which enables its users to make any kind of applications, submissions and transactions that can be made physically before the relevant judicial authorities to be made online. As the next step, the electronic notification system was put into effect in 2019. Taking a step forward, as of 2021, electronic hearings are allowed, enabling virtual hearings for the parties, their attorneys, witnesses, and legal experts. It can be said that the Turkish judicial system is keepsing up with technological developments.

Apart from that, technological developments have also revealed the need for new regulations. There have been significant developments regarding FinTech regulations in Turkey and new regulations are expected in the upcoming years. In particular, the Regulation on Remote Identity Verification of the banks, which allows branchless banking, and the amendments to the regulations on payments systems, were among the most remarkable developments seen this year. A specific regulation on cryptocurrencies and the relevant platforms is also on the Turkish Grand National Assembly's agenda. Given that the effects of the covid-19 outbreak are still ongoing, developments that focus on payment systems and activities are expected.

22 M Ç Bağatur, H Öge, *Sorularla Sigorta Tahkim*, Istanbul 2017, pp. 10–11.

23 ibid, p.13.

Appendix 1

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